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CALIFORNIA REPORTER

165 PACIFIC REPORTER

SECOND SERIES

27 Cal.2d 500

**RODRIGUEZ v. SUPERIOR COURT OF
CITY AND COUNTY OF SAN
FRANCISCO et al.**

S. F. 17206.

Supreme Court of California, in Bank.
Jan. 8, 1946.

1. Prohibition ⇨10(3)

Prohibition is an appropriate remedy to prevent the retrial of a defendant who has been in jeopardy.

2. Criminal law ⇨195(1)

The test for "double jeopardy" is identity of offenses, and not identity of occurrence from which they arise.

See Words and Phrases, Permanent Edition, for all other definitions of "Double Jeopardy".

3. Criminal law ⇨200(1)

A defendant, as respects double jeopardy, may be convicted of separate offenses arising out of the same transaction when each charge is separately stated, the offenses differ in their elements, and one is not included in the other.

4. Infants ⇨20

Facts insufficient to establish rape or attempted rape may justify a conviction of contributing to the delinquency of a minor. St.1937, p. 1033, § 702.

5. Criminal law ⇨200(7)

Where defendant was tried on an information containing a count charging statutory rape and a second count accusing him of contributing to the delinquency of a minor, and was acquitted of rape but jury disagreed on charge of contributing to the minor's delinquency, defendant was not in "jeopardy" as regards the second count, and his acquittal under first count was not a bar to his prosecution and conviction under second count, since the offenses are not the same. St.1937, p. 1033, § 702; Pen. Code, § 954.

See Words and Phrases, Permanent Edition, for all other definitions of "Jeopardy".

6. Criminal law ⇨553, 878(3)

A jury may reject part of a witness' testimony and accept part of it, and testimony accepted by jury may support a conviction of one offense, while another charge contained in same information may fail because jury has rejected evidence necessary to establish an essential element of the crime. Pen.Code, § 954.

Proceeding in prohibition by Nicholas Rodriguez against the Superior Court of the City and County of San Francisco and others, to restrain the City and County of San Francisco and Frank T. Deasy, Judge thereof, from retrying petitioner for the offense of contributing to the delinquency of a minor.

Writ denied.

Prior opinion 158 P.2d 954.

Morris Oppenheim, of San Francisco, for petitioner.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., of San Francisco, for respondent.

GIBSON, Chief Justice.

The object of this proceeding is to prevent the respondent court from retrying petitioner on a criminal charge of which he allegedly has been acquitted. Petitioner was tried on an information containing two counts, the first charging statutory rape, and the second accusing him of contributing to the delinquency of the minor involved in count one in violation of section 702 of the Welfare and Institutions Code, St.1937, p. 1033. He was found not guilty of rape and of the included offense of attempted rape. The jury disagreed on the

charge of violating section 702, and petitioner seeks to restrain the court from trying him again for this offense. He claims he has been once in jeopardy and that therefore the court is without jurisdiction to proceed against him.

[1] Prohibition is an appropriate remedy to prevent the retrial of a defendant who has been in jeopardy. *Jackson v. Superior Court*, 10 Cal.2d 350, 74 P.2d 243, 113 A.L.R. 1422.

[2, 3] In support of his claim of double jeopardy petitioner asserts that since both counts are based on the same occurrence or transaction, the offense defined in section 702 is necessarily included in the charge of rape or attempted rape and that an acquittal of the greater offenses is a bar to prosecution of the lesser offense. The test, however, is the identity of the offenses and not the identity of the occurrence from which they arise. A defendant may be convicted of separate offenses arising out of the same transaction when each charge is separately stated and the offenses differ in their elements and one is not included in the other. *People v. Kearney*, 20 Cal.2d 435, 126 P.2d 612; *People v. Hoyt*, 20 Cal.2d 306, 317, 125 P.2d 29; see, also, *People v. Craig*, 17 Cal.2d 453, 457-458, 110 P.2d 403; *People v. Coltrin*, 5 Cal.2d 649, 660, 55 P.2d 1161.

In *People v. Kearney*, 20 Cal.2d 435, 126 P.2d 612, the defendant was separately charged with rape and with a violation of section 288 of the Penal Code. Both charges were based on the same occurrence. Defendant contended that a dismissal of the rape charge operated to acquit him on the charge under section 288. We held, 20 Cal.2d page 438, 126 P.2d 614, that: "The two offenses are separate and distinct and made up of different elements. The rape count was dismissed because the evidence failed to show penetration. The child's testimony was uncertain on the point, and the medical testimony showed a lack of penetration. It does not follow, however, that defendant's conduct with the prosecutrix at the time was not of a lewd and lascivious character within the meaning of section 288, supra. The contention is answered by section 954 of the Penal

Code, which provides that where, as here, a defendant is charged with two or more different offenses connected together in their commission, 'A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.' See, also, *People v. Amick*, 20 Cal.2d 247, 125 P.2d 25; *People v. Stangler*, 18 Cal.2d 688, 695, 696, 117 P.2d 321."

[4, 5] While it is true that acts constituting statutory rape or attempted rape may also constitute a violation of section 702, since those acts by their very nature would contribute to the delinquency of the minor, the converse is not true. The facts may fail to establish rape or attempted rape yet justify a conviction under section 702. Consequently, petitioner's acquittal under the first count of the information is not a bar to his prosecution and conviction under the second count.

[6] Petitioner also claims that not only is the occurrence underlying the rape charge identical with that relied upon to support the accusation under section 702, but that the proof in support of the two charges is the same. He says that he would be guilty of rape if the things the prosecutrix testified to actually occurred, but that if her story is untrue he is not guilty of any offense. Petitioner argues that his acquittal of rape and of the included offense of attempted rape establishes the falsity of her testimony, and that he cannot be retried upon evidence which was addressed to the charge of which he stands acquitted. There is no merit in this contention. The jury may reject a portion of the testimony of a witness and accept a part of it. The testimony accepted by the jury may support a conviction of one offense, while another charge contained in the same information may fail because the jury has rejected evidence necessary to establish an essential element of the crime.

The alternative writ of prohibition is discharged and the application for a peremptory writ is denied.

SHENK, EDMONDS, CARTER,
TRAYNOR, SCHAUER, and SPENCE,
JJ., concurred.

27 Cal.2d 478

PEOPLE v. ADAMSON.
Cr. 4622.

Supreme Court of California, in Bank.
Jan. 4, 1946.

Rehearing Denied Jan. 31, 1946.

1. Burglary **↪**41(1)
Homicide **↪**253(1)

Evidence was sufficient to sustain conviction of first-degree murder and burglary. Pen.Code, § 189.

2. Criminal law **↪**417(1)

A witness may testify as to part of conversation, if that is all that he heard and it appears to be intelligible.

3. Burglary **↪**35
Homicide **↪**170

In prosecution for murder and burglary, testimony as to part of conversation in which defendant asked unidentified person whether he was interested in purchasing a diamond ring, was admissible as tending to identify defendant as perpetrator of crimes charged, in view of evidence that murderer's motive was theft of diamonds.

4. Criminal law **↪**382

To be admissible, evidence must tend to prove a material issue in light of human experience.

5. Criminal law **↪**404(4)

In prosecution for murder and burglary, women's stocking tops, found in defendant's room, were admissible as tending to identify defendant as person who removed stockings from murdered woman.

6. Criminal law **↪**338(1)

Evidence tending to throw light on fact in dispute may be admitted. Code Civ.Proc. § 1954.

7. Criminal law **↪**741(1)

The weight of evidence, tending to throw light on fact in dispute, is for jury to determine.

8. Constitutional law **↪**266

In prosecution for murder and burglary, admission in evidence of women's stocking tops, found in defendant's room, for purpose of identifying him as person who removed stockings from murdered woman, was not erroneous as depriving de-

fendant of fair trial and hence denying him due process of law by creating prejudice against him as a Negro by implication of a fetish or sexual degeneracy, in absence of either implication by prosecutor in oral argument to jury. U.S.C.A.Const. Amend. 14.

9. Criminal law **↪**404(1)

Demonstrative evidence, tending to prove material issue or clarify circumstances of crime charged, is admissible, despite its prejudicial tendency, except in rare cases of abuse.

10. Constitutional law **↪**24

The constitutional amendment, authorizing court and counsel to comment on defendant's failure to explain or deny any evidence or facts against him, controls previously adopted provision of amended section that no person shall be compelled to be witness against himself in criminal case. Const. art. 1, § 13.

11. Constitutional law **↪**206(1), 268
Criminal law **↪**12

State constitutional and statutory provisions, allowing comment on defendant's failure to deny or explain incriminating evidence by court and counsel and consideration of such failure by court or jury, do not violate due process of law and privileges and immunity clauses of Fourteenth Amendment. Pen.Code, § 1323; Const. art. 1, § 13; U.S.C.A.Const. Amend. 14

12. Criminal law **↪**317, 721(1), 787(1)

The constitutional provision that defendant's failure to explain or deny evidence against him may be commented on by court and counsel and considered by court or jury, whether defendant testifies or not, makes applicable to criminal cases, wherein defendant does not testify, established rule that party's failure to produce evidence within his power to produce does not affect in some indefinite manner ultimate issues raised by pleadings, but relates specifically to unproduced evidence by indicating that such evidence would be adverse to such party. Const. art. 1, § 13.

13. Criminal law **↪**559

All evidence must be weighed according to proof which one party had power to produce and other party had power to contradict. Code Civ.Proc. § 1963, subd. 5; § 2061, subd. 6.

14. Criminal law $\S$ 316

Defendant's failure to deny or explain evidence against him, when he has power to do so, may be considered by jury as tending to indicate truth of such evidence and greater probability of reasonable inferences unfavorable to defendant therefrom. Const. art. 1, $\S$ 13.

15. Criminal law $\S$ 317

Admission of evidence which defendant might explain or deny by his testimony renders his failure to testify significant as warranting inference that he would have given explanation, if he had any, or denied such evidence, if false, but no such inference may be drawn, where evidence shows that defendant has no knowledge of facts shown by evidence admitted against him. Code Civ.Proc. $\S$ 1963, subs. 5, 6; $\S$ 2061, subs. 6, 7; Const. art. 1, $\S$ 13.

16. Criminal law $\S$ 561(1)

The constitutional amendment, providing that defendant's failure to explain or deny evidence against him may be commented on by court and counsel and considered by court or jury, does not relieve prosecution of burden of establishing defendant's guilt beyond reasonable doubt by admissible evidence supporting each element of crime charged. Const. art. 1, $\S$ 13.

17. Criminal law $\S$ 317, 721(1)

Defendant's failure to testify cannot be regarded as confession of crime charged or properly characterized by prosecutor as tantamount to such confession.

18. Criminal law $\S$ 787(2)

The jury should have been instructed, not merely that court and counsel may comment on defendant's failure to explain or deny any evidence against him, but that such failure does not create presumption or warrant inference of guilt, but should be considered only in relation to evidence not explained or denied and that jury may consider defendant's failure to explain or deny incriminating evidence, which he could reasonably be expected to explain or deny, as tending to indicate truth of such evidence and greater probability of reasonable inferences unfavorable to defendant therefrom. Const. art. 1, $\S$ 13.

19. Criminal law $\S$ 1173(2)

The trial court's failure to instruct jury that defendant's failure to deny or explain evidence against him did not create presumption or warrant inference of guilt,

etc., was not prejudicial to defendant, in view of evidence showing that he could reasonably be expected to explain or deny all evidence presented. Const. art. 1, $\S$ 13.

20. Criminal law $\S$ 829(1, 9)

The trial court's refusal of defendant's proposed instructions as to presumption of innocence, burden on People to prove defendant's guilt beyond reasonable doubt, and defendant's right to elect not to take witness stand without raising inference or presumption of his guilt, was not error, in view of ample general instructions given on such presumption and burden.

21. Criminal law $\S$ 787(2)

Defendant's proposed instruction to jury that his failure to take witness stand raised no presumption or inference of his guilt was properly refused as misleading in failing to point out what consideration could be given such circumstance.

22. Criminal law $\S$ 809

The trial court may properly refuse to give jury a proposed instruction which is misleading because it only partially states law.

23. Criminal law $\S$ 787(1)

Defendant's proposed instruction that prosecutor's right to comment on defendant's failure to take witness stand did not relieve prosecution of burden of establishing defendant's guilt beyond reasonable doubt by competent and legal evidence should have been given. Const. art. 1, $\S$ 13.

24. Criminal law $\S$ 787(1)

Defendant, failing to testify, was entitled to specific instruction that his failure to deny or explain incriminating evidence did not impose on him burden of persuading jury of his innocence, though general instruction on burden of proof was given. Const. art. 1, $\S$ 13.

25. Criminal law $\S$ 317, 787(1)

Where no evidence capable of being explained or denied by defendant's testimony is presented in support of essential element of crime charged, defendant's failure to testify cannot alone support finding against him by jury on such element and he is entitled to instruction that such failure may not by itself support finding against him on essential element of crime. Const. art. 1, $\S$ 13.

26. Criminal law ⇨1173(2)

Refusal of defendant's proposed instruction that prosecutor's right to comment on defendant's failure to testify cannot be used to supply failure of proof by prosecution was not prejudicial to defendant, where ample evidence supporting each element of crimes charged was presented and evidence against defendant was so strong as to make it improbable that jury could have disbelieved all positive evidence supporting any essential elements of such crimes. Const. art. 1, § 13.

27. Constitutional law ⇨266

An authorized inference from proved fact need not be only plausible inference therefrom to be rational under due process clause of Federal Constitution, but is rational if proved fact is warning signal according to teachings of experience. U.S. C.A.Const. Amend. 14.

28. Constitutional law ⇨266

There is rational connection between defendant's failure to deny or explain incriminating evidence and inference of credibility and unfavorable tenor thereof, as required by due process clause of Federal Constitution, so as to authorize jury's consideration of such failure, in view of common experience that failure to explain or deny adverse evidence which defendant may reasonably be expected to explain or deny tends to show credibility of such evidence and renders more probable unfavorable tenor thereof. Code Civ.Prov. § 1963, subd. 5; §§ 2051, 2061, subd. 6; Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

29. Constitutional law ⇨70(1)

Any change in law, authorizing court and counsel to comment on, and court or jury to consider, defendant's failure to explain or deny evidence against him, must be made by Legislature, not courts. Pen. Code, § 1323; Code Civ.Proc. § 2051; Const. art. 1, § 13.

30. Criminal law ⇨1037(1)

Generally, district attorney's misconduct, as in frequently commenting, in oral argument, on defendant's failure to explain or deny evidence against him, cannot be urged on appeal from conviction, in absence of objection by defendant to such comments. Pen.Code, § 1323; Const. art. 1, § 13.

31. Criminal law ⇨1037(1)

The prosecutor's statement in oral argument to jury, after reviewing evidence, that defendant did not get on witness stand and say under oath that he was not guilty of crimes charged, was not ground for reversal of conviction, in absence of objection thereto by defendant, as jury was probably not misled thereby.

32. Criminal law ⇨566

Fingerprints are the strongest evidence of a person's identity.

Appeals from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Admiral Dewey Adamson was convicted of murder in the first degree and burglary in the first degree, and he appeals.

Affirmed.

Morris Lavine and Milton B. Safier, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Walter L. Bowers, Asst. Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant was charged with murder in count I of an information by the district attorney of Los Angeles County, and in counts II, III, IV and V, with four separate crimes of burglary. He pleaded not guilty and was tried before a jury on counts I and II. He was tried in a separate consolidated case on counts III, IV and V. He admitted two prior felony convictions and was adjudged an habitual criminal. The defendant did not testify and produced no witnesses. He was found guilty on count I of murder in the first degree, without recommendation, and guilty on count II of burglary in the first degree. This appeal is automatic from the judgment on count I. Pen.Code, § 1239. Defendant also appeals from the judgment on the burglary count and from an order denying his motion for new trial.

The body of Stella Blauvelt, a widow 64 years of age, was found on the floor of her Los Angeles apartment on July 25, 1944. The evidence indicated that she died on the afternoon of the preceding day. The body was found with the face upward covered with two bloodstained pillows. A lamp cord was wrapped tightly around the

neck three times and tied in a knot. The medical testimony was that death was caused by strangulation. Bruises on the face and hands indicated that the deceased had been severely beaten before her death.

[1] The defendant does not contend that the evidence does not justify a finding that murder in the first degree had been committed. Pen.Code, § 189. The sole contention of fact that he makes is that the evidence is not sufficient to identify him as the perpetrator. The strongest circumstance tending to so identify the defendant was the finding of six fingerprints, each identified by expert testimony as that of the defendant, spread over the surface of the inner door to the garbage compartment of the kitchen of the deceased's apartment. See Wigmore, Evidence, 3d Ed., 389. After the murder, this door was found unhinged, leaning against the kitchen sink. Counsel for defendant questioned witnesses as to the possibility of defendant's fingerprints being forged, but the record does not indicate that any evidence to that effect was uncovered. The theory of the prosecution was that the murderer gained his entrance through the garbage compartment, found the inner door thereof latched from the kitchen side, and forced the door from its hinges. It was established that defendant could have entered through the garbage compartment by having a man about his size do so. The fact that the key to the apartment could not be found after search and the testimony of a neighboring tenant as to sounds heard indicate that the murderer left the apartment through the door thereof and made his exit from the building down a rear stairway.

The tops of three women's stockings identified as having been taken from defendant's room were admitted in evidence. One of the stocking tops was found on a dresser, the other two in a drawer of the dresser among other articles of apparel. The stocking parts were not all of the same color. At the end of each part, away from what was formerly the top of the stocking, a knot or knots were tied. When the body of the deceased was found, it did not have on any shoes or stockings. There was evidence that on the day of the murder deceased had been wearing stockings. The lower part of a silk stocking with the top part torn off was found lying on the floor under the body. No part of the other stocking was found. There were other stockings in the apartment, some hanging

in the kitchen and some in drawers in a dressing alcove, but no other parts of stockings were found. None of the stocking tops from defendant's room matched with the bottom part of the stocking found under the body.

In reply to questions by the police, defendant denied that he resided or had ever been at the apartment house identified by testimony as his residence. At different times he gave two other addresses as his residence. When shown a picture of the murdered victim, he refused to look at it, stating that he did not like to look at dead people.

The theory of the prosecution was that the motive of the murder was burglary. Testimony revealed that the deceased was in the habit of wearing rings with large-sized diamonds and that she was wearing them on the day of the murder. The rings were not on the body and search has failed to uncover them. A witness, positively identifying the defendant, testified that at some time between the 10th and 14th of August, 1944, she overheard defendant ask an unidentified person whether he was interested in buying a diamond ring.

From the foregoing evidence a reasonable jury could conclude that beyond a reasonable doubt defendant committed the murder and burglary. See *People v. Ramirez*, 113 Cal.App. 204, 298 P. 60; 2 Wigmore, supra, 389. Testimony that the screws were still in the hinges of the door when it was found and that fragments of wood that appeared to have come from the screw holes were clinging to them, indicating a forced removal, served to discount the possibilities that at some previous date the door had been taken from the apartment for some unknown reason and at that time handled by the defendant, or that defendant had handled the door during some earlier visit to the deceased's apartment. Testimony to the effect that the garbage pail was not in its customary place when found after the murder further tended to substantiate the prosecution's theory as to time and mode of entrance.

[2,3] Defendant contends that error was committed in the admission of the testimony of part of a conversation in which he asked an unidentified person whether the latter was interested in purchasing a diamond ring. Conceding that this evidence, though hearsay, was admissible in so far as the hearsay rule is concerned as an admis-

sion (*People v. Ferdinand*, 194 Cal. 555, 568, 229 P. 341; *People v. Britton*, 6 Cal.2d 10, 13, 56 P.2d 491; *People v. Chan Chaun*, 41 Cal.App.2d 586, 593, 107 P.2d 455), defendant contends that it was irrelevant. The rule is well settled that a witness may testify to part of a conversation if that is all that he heard and it appears to be intelligible. *People v. Luis*, 158 Cal. 185, 194, 110 P. 580; *People v. Ramos*, 3 Cal. 2d 269, 272, 44 P.2d 301; *People v. Tarbox*, 115 Cal. 57, 64, 46 P. 896; *People v. Daniels*, 105 Cal. 262, 285, 38 P. 720; *People v. Montgomery*, 47 Cal.App.2d 1, 19, 117 P.2d 437. *People v. Rabalet*, 28 Cal. App.2d 480, 485, 82 P.2d 707, 709, is not contrary to this rule. The fragment of the sentence there held inadmissible, "242 to show," was held to create merely a suspicion of the meaning of the entire sentence. *People v. Jacquaino*, 63 Cal.App.2d 390, 393, 394, 146 P.2d 697. The part of the conversation here admitted, however, in view of the evidence indicating that the motive of the murderer was the theft of diamonds, tended to identify defendant as the perpetrator.

[4-7] To be admissible, evidence must tend to prove a material issue in the light of human experience. See 1 Wigmore, *supra*, 407. The stocking tops found in defendant's room were relevant to identify defendant because their presence on his dresser and in a drawer thereof among other articles of wearing apparel with a knot or knots tied in the end away from what was formerly the top of the stocking indicates that defendant had some use for women's stocking tops. This interest in women's stocking tops is a circumstance that tends to identify defendant as the person who removed the stockings from the victim and took away the top of one and the whole of the other. Although the presence of the stocking tops in defendant's room was not by itself sufficient to identify defendant as the criminal, it constituted a logical link in the chain of evidence. *People v. Graves*, 137 Cal.App. 1, 29 P.2d 807, 30 P.2d 508; *People v. Billings*, 34 Cal. App. 549, 553, 168 P. 396. Evidence that tends to throw light on a fact in dispute may be admitted. The weight to be given such evidence will be determined by the jury. *People v. Mooney*, 177 Cal. 642, 655, 171 P. 690; *People v. Graves*, *supra*; *People v. Billings*, *supra*; see 7 McKinney's Dig. 54. Codification of this rule as applied to demonstrative evidence is

found in section 1954 of the Code of Civil Procedure: "Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury. * * * The admission of such evidence must be regulated by the sound discretion of the court."

[8,9] It is contended that the admission of the stocking tops deprived defendant of a fair trial and therefore denied him due process of law. Defendant states that their admission could serve no purpose except to create prejudice against him as a Negro by the implication of a fetish or sexual degeneracy. No implication of either was made by the prosecutor in his brief treatment of the evidence in oral argument. Moreover, except in rare cases of abuse, demonstrative evidence that tends to prove a material issue or clarify the circumstances of the crime is admissible despite its prejudicial tendency. *People v. Antony*, 146 Cal. 124, 79 P. 858; *People v. Hawes*, 98 Cal. 648, 33 P. 791; *People v. Haydon*, 18 Cal.App. 543, 123 P. 1102, 1114; see *People v. Colvin*, 118 Cal. 349, 351, 50 P. 539; see *People v. Bolton*, 215 Cal. 12, 20, 8 P.2d 116; 8 Cal.Jur. 140 et seq.; *Ibid.* 76, § 177; 4 Wigmore, *supra*, 251, 254; 21 Mich.L.Rev. 835; 31 Yale L.J. 107.

[10] The prosecuting attorney commented repeatedly on the failure of the defendant to take the stand. By statute or by decision, the majority of jurisdictions prohibit such comment. See 8 Wigmore, *supra*, 412; 31 Mich.L.Rev. 40. In 1934, however, following studies made by the American Law Institute and the American Bar Association (9 Proc.Am.L.Inst. 202-218; 56 Reports A.B.A. 137-152), article I, section 13 of the California Constitution was amended to provide that "* * * in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. * * *" Similar provisions are found in section 1323 of the Penal Code. Article I, section 13 of the California Constitution also provides that "no person shall be * * * compelled in any criminal case, to be a witness against himself * * *." It is contended that this provision and the 1934 amendment are in-

consistent and that therefore both cannot be effective. Before the 1934 amendment, it was the rule in California that commenting on the defendant's failure to take the stand or advising the jury that it could draw inferences unfavorable to him on that account violated the privilege against self-incrimination. *People v. Tyler*, 36 Cal. 522. The 1934 amendment limited but did not abolish this privilege. A person still cannot be compelled in any criminal case "to be a witness against himself," but the privilege no longer extends so far as to prevent comment upon or consideration of his failure to explain or deny evidence against him. The practical effect of the 1934 amendment may be that many defendants who otherwise would not take the stand will feel compelled to do so to avoid the adverse effects of the comments and consideration authorized by the amendment. See 26 Yale L.J. 464, 466. Such a coercive effect, however, is sanctioned by the amendment, which, being later in time, controls provisions adopted earlier.

[11] It is contended that in so far as it limits the privilege against self-incrimination, the 1934 amendment to the Constitution and section 1323 of the Penal Code violate the due process clause of the Fourteenth Amendment to the United States Constitution. Although there has been much discussion as to the wisdom of allowing comment upon and consideration of a defendant's failure to deny or explain incriminating evidence (see 8 Wigmore, supra, 419; 31 Mich.L.Rev. 40; *Ibid.* 226; 22 Cornell L.Q. 392; 26 Yale L.J. 464; 9 Proc.Am.L.Inst. 202-281; 56 Reports of A.B.A. 137-152; 3 Jour. of Crim. Law and Criminology, 770; 13 *Ibid.* 292; 26 *Ibid.* 180), the freedom from federal constitutional limitations of state provisions allowing such comment and consideration was settled in *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97. See 31 Mich.L.Rev. 40, 45; *Ibid.* at 228; 22 Cornell L.Q. 392, 393; 8 Wigmore, supra, 414, § 2272, n. 2. In that case the defendant, who was convicted in the courts of New Jersey, had not testified in his own behalf. The trial court, in accordance with New Jersey decisions, commented on this fact. The court decided that such comment did not constitute a denial of due process, holding that the due process clause does not protect a person against self-incrimination. The fact that the comment in the *Twining* case

was by the court rather than the prosecutor is immaterial. *State v. Ferguson*, 226 Iowa 361, 283 N.W. 917; see 8 Wigmore, supra, 1943 Supp. 30. *Twining v. New Jersey* also held that the privilege against self-incrimination is not protected by the privileges and immunities clause of the Fourteenth Amendment.

[12-14] It is clear from the terms of the constitutional provision that the consideration and comment authorized relates, not to the defendant's failure to take the stand, but to "his failure to explain or to deny by his testimony any evidence or facts in the case against him" whether he testifies or not. The constitutional provision thus makes applicable to criminal cases in which the defendant does not testify, the established rule that the failure to produce evidence that is within the power of a party to produce does not affect in some indefinite manner the ultimate issues raised by the pleadings, but relates specifically to the unproduced evidence in question by indicating that this evidence would be adverse. *State v. Callahan*, 76 N.J.L. 426, 69 A. 957; *State v. Sgro*, 108 N.J.L. 528, 158 A. 491; *McDonald v. Smith*, 139 Mich. 211, 224, 102 N.W. 668; *Mooney v. Davis*, 75 Mich. 188, 193, 42 N.W. 802, 13 Am.St. Rep. 425; *Harrison v. Harrison*, 124 Iowa 525, 526, 100 N.W. 344; see Cal. Code Civ. Proc. §§ 1963(5), 2061(6), (7); 2 Wigmore, supra, 162; *Ibid.* 176, *Ibid.* 179. "All evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to contradict." *Mansfield, C. J.*, in *Blatch v. Archer*, Cowp. 66, see 2 Wigmore, supra, 162 et seq., and cases there cited. The Code of Civil Procedure codifies this rule by providing that the jury is to be instructed by the court on all proper occasions: "6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict" (Code Civ.Proc. § 2061(6); and that it is to be presumed "That evidence wilfully suppressed would be adverse if produced". *Ibid.* § 1963(5). The basis in common experience for this rule as applied to criminal cases has been set forth in *State v. Grebe*, 17 Kan. 458: "The instinct of self-preservation impels one in peril of the penitentiary to produce whatever testimony he may have to deliver him from such peril. Every man will do what he

can to shield himself from the disgrace of a conviction of crime, and the burden of punishment. We all know this. We all expect it. Whenever therefore a fact is shown which tends to prove crime upon a defendant, and any explanation of such fact is in the nature of the case peculiarly within his knowledge and reach, a failure to offer an explanation must tend to create a belief that none exists." Therefore the failure of the defendant to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable. Respondent cites *People v. Dukes*, 16 Cal.App.2d 105, 109, 110, 60 P.2d 197; *People v. Pianezzi*, 42 Cal.App.2d 265, 267-269, 108 P.2d 732 and *People v. Dozier*, 35 Cal.App.2d 49, 59, 60, 94 P.2d 598, as holding that failure to testify directly affects the ultimate issue of guilt by raising an "inference or presumption of guilt." The instruction refused in the *Dukes* case [16 Cal.App.2d 105, 109, 110, 60 P.2d 199] was in part to the effect that the members of the jury were "not to consider or permit [themselves] in anywise to be influenced by the fact that the defendant has not seen fit to offer himself as a witness before you." A similar instruction was refused in the *Pianezzi* case. The instruction refused in the *Dozier* case provided that failure to deny or explain testimony "should not create a prejudice or unfavorable inference in the minds of the jury; no inference can be drawn against the defendant from his failure to testify." [35 Cal.App.2d 49, 59, 60, 94 P.2d 603.] In these cases the court was clearly correct in holding that the instruction would destroy the effect of the 1934 amendment.

[15] The failure of the accused to testify becomes significant because of the presence of evidence that he might "explain or to deny by his testimony" (Art. I, § 13, Cal.Const.), for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it. *State v. Grebe*, supra; *Mooney v. Davis*, supra, 75 Mich. at page 193, 42 N.W. 802, 13 Am.St. Rep. 425; see Code Civ.Proc. §§ 1963(5), (6), 2061(6), (7). No such inference may be drawn, however, if it appears from the evidence that defendant has no knowledge

of the facts with respect to which evidence has been admitted against him, for it is not within his "power" (Code Civ.Proc. § 2061 (6) to explain or deny such evidence. *Ibid.* § 1963(5); *Parker v. State*, 61 N.J.L. 308, 39 A. 651; *Caminetti v. United States*, 242 U.S. 470, 494, 495, 37 S.Ct. 192, 61 L. Ed. 442, L.R.A.1917F, 502, Ann.Cas.1917B, 1168; *Blatch v. Archer*, supra; *R. v. Burdett*, 4 B. & Ald. 122 see *People v. Albertson*, 23 Cal.2d 550, 585, 145 P.2d 7.

[16] It was never intended, of course, that the 1934 constitutional amendment should relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt by admissible evidence supporting each element of the crime. *People v. Sawaya*, 46 Cal.App.2d 466, 471, 115 P.2d 1001; *State v. Callahan*, supra; see Bruce (One of the draftsmen of the American Bar Association resolution that preceded the adoption of the California provisions), *The Right to Comment on the Failure of the Defendant to Testify*, 31 Mich.L.Rev. 226, 229, 231; 2 Wigmore, supra, 179; 4 Cleveland Bar Journal 12; 3 Jour. of Crim. Law and Criminology 770, 774.

[17] Nor can the defendant's silence be regarded as a confession. In so far as *People v. Pianezzi*, 42 Cal.App.2d 265, 268, 108 P.2d 732, holds that the prosecutor may properly characterize the defendant's failure to testify as tantamount to a confession, it is disapproved.

[18] Of its own volition the trial court gave the following as the only instruction with respect to the right of the prosecution to comment on and of the jury to consider defendant's failure to explain or deny the evidence against him: "It is the right of court and counsel to comment on the failure of defendant to explain or deny any evidence against him * * *; yet the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of witnesses." In stating merely that court and counsel may comment on defendant's failure to explain or deny incriminating evidence, the instruction encompasses a rule of concern solely to the court. Respondent cites *People v. McKenna*, 11 Cal.2d 327, 336, 79 P.2d 1065, and *People v. Boggs*, 12 Cal.2d 27, 35, 82 P.2d 368, as upholding the instruction given. In the *McKenna* case, no comment was made on the failure of the defendant to testify, and it was held that an instruction in the general language of the Con-

stitution was not prejudicial. The Boggs case likewise rested merely on the ground that the instruction there given was not prejudicial. The jury, however, is concerned with the scope and nature of the consideration that it may give defendant's failure to explain or deny incriminating evidence, and in the present case should have been instructed that the defendant's failure to deny or explain evidence presented against him does not create a presumption or warrant an inference of guilt, but should be considered only in relation to evidence that he fails to explain or deny; and that if it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable.

[19] The failure to give such an instruction was not prejudicial, however. It appears from the evidence that defendant could reasonably be expected to explain or deny all evidence presented. Thus the jury could infer from the evidence concerning the fingerprints either that defendant handled the garbage compartment door in the perpetration of the burglary and murder or that they were placed there at some other time. The defendant could reasonably be expected to know whether or not he had handled the garbage door and if so, on what occasion. The evidence that he solicited some one to buy a diamond ring is susceptible of an inference either that he was attempting to sell the victim's ring or rings that had no connection with the crime. The defendant could reasonably be expected to know whether or not he had done such soliciting and, if so, with regard to what rings. His failure to explain or deny this evidence by his testimony could have been considered by the jury as indicating that the evidence was true and that the inferences unfavorable to the defendant were the more probable.

[20-22] The defendant contends that the court erred in refusing the following proposed instructions: "You are instructed that it is the policy of the law to zealously protect the innocent. In a criminal case the law clothes the defendant with a presumption of innocence and casts upon

the people the burden of proving guilt beyond a reasonable doubt. The defendant is not obliged to prove his innocence or offer any proof thereon, and if the defendant elects not to take the witness stand but to rest upon what he believes to be the weakness or insufficiency of the People's case, he has a right to so do and no inference or presumption of guilt arises from his failure to take the witness stand." "You are instructed that the burden of proof rests on the prosecution and the failure of the defendant to take the stand raises no presumption or inference of guilt." There was no error in the refusal to give these instructions. The court gave ample general instructions elsewhere on the presumption of innocence and burden of proof. The bare statement, moreover, that "the failure of the defendant to take the stand raises no presumption or inference of guilt," is deficient and misleading in that it fails to point out what consideration can be given the circumstance. The court may properly refuse to give a proposed instruction that is misleading because it only partially states the law.

[23,24] The following proposed instruction, however, should have been given: "You are instructed that the fact that the prosecutor has a right to comment on the failure of the defendant to take the stand does not relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt and by competent and legal evidence." Although a general instruction on burden of proof had been given, because of the likelihood of misconstruction of the weight and effect to be given the circumstance, the defendant was entitled to a specific instruction that failure to deny or explain incriminating evidence does not impose upon him the burden of persuading the jury of his innocence. In view, however, of the fact that the jury was instructed thoroughly on burden of proof generally, it is improbable that the verdict would have been different had the instruction been given.

[25,26] The following instruction was also proposed: "You are instructed that the right of the prosecution to comment on the failure of the defendant to take the stand cannot be used to supply a failure of proof by the prosecution." Since the circumstance of the defendant's failure to testify serves only to assist the jury in determining the credibility of and the inference

to be drawn from evidence that is capable of being but is not explained or denied by his testimony, where no such evidence is presented in support of an essential element of the crime, this circumstance clearly cannot alone support a finding on that element against the defendant. *People v. Sawaya*, supra; *State v. Callahan*, supra; see 2 *Wigmore*, supra, 179; 26 *Yale L.J.* 464, 469; 31 *Mich.L.Rev.* 226, 229, 231; 4 *Cleveland Bar Journal* 12; 3 *Jour. of Crim. Law and Criminology*, supra. Defendant was therefore entitled to an instruction that his failure to testify may not by itself support a finding against him on an essential element of the crime. The refusal to give the proposed instruction, however, was not prejudicial. Ample evidence supporting each element of the crime was presented. Moreover, the strength of the evidence against the defendant makes it improbable that the jury could have disbelieved all the positive evidence supporting any essential element of the crimes charged, thereby leaving defendant's failure to testify the sole circumstances in support of that element.

[27,28] Defendant contends that the rational connection between a fact proved and the fact presumed required by the due process clause of the Fourteenth Amendment (*People v. Scott*, 24 *Cal.2d* 774, 779, 151 *P.2d* 517, and cases there cited; *Tot v. United States*, 319 *U.S.* 463, 467, 63 *S.Ct.* 1241, 87 *L.Ed.* 1519) does not exist between the failure to deny or explain incriminating evidence and the inference of the credibility and unfavorable tenor thereof that these provisions permit the jury to draw. Defendant argues that reasons other than lack of power to explain favorably to himself or to deny such evidence, for example fear of disclosure to the jury of prior crimes through impeachment (*Code Civ.Proc.* § 2051; see 3 *Wigmore*, supra, 538; *Ibid.* 380) or fear of creating a bad impression by being a "poor witness," may prompt a defendant not to take the stand. In view of the even poorer impression normally created by not taking the stand (*State v. Grebe*, supra; see *Bruce*, 31 *Mich.L.Rev.* 226, 229, 231; 8 *Wigmore*, supra, 410; *Ibid.* 424; 3 *Jour. of Crim. Law and Criminology*, supra), fear of creating a bad impression because of being a "poor witness" is not an impressive explanation of a defendant's silence. See 22 *Cornell L.Q.* 392, 395 et seq.; 13 *Jour. of Crim. Law and Criminology*, 292, 293.

It is true that defendants convicted of prior crimes often do not take the stand because of fear that upon cross-examination their criminal record will be given to the jury. See *Code Civ.Proc.* § 2051; 22 *Cornell L.Q.*, supra; 9 *Proc.Am.L.Inst.* 202, 204, 207; 56 *Reports of A.B.A.* 137, 142, 144; 13 *Jour. of Crim. Laws and Criminology*, 292, 295. Clearly, however, the inference authorized need not be the only plausible one that can be drawn from the proved fact, to be rational under the due process clause. The inference is rational if the proved fact is a warning signal according to the teachings of experience. *People v. Scott*, 24 *Cal.2d* 774, 780, 151 *P.2d* 517; *Morrison v. California*, 291 *U.S.* 82, 90, 54 *S.Ct.* 281, 78 *L.Ed.* 664. It is common experience that the failure to explain or deny adverse evidence that a defendant may reasonably be expected to explain or deny tends to show the credibility of such evidence and renders more probable the unfavorable tenor thereof. *Code Civ.Proc.* §§ 1963(5), 2061(6); *State v. Grebe*, supra; see 2 *Wigmore*, supra, 164 et seq.; 31 *Mich.L.Rev.* 226, 229.

[29] There has been much criticism of the present state of the law, which places a defendant who has been convicted of prior crimes in the dilemma of having to choose between not taking the stand to explain or deny the evidence against him thereby risking unfavorable inferences, and taking the stand and having his prior crimes disclosed to the jury on cross-examination. See 22 *Cornell L.Q.* 392, 395; 31 *Mich.L.Rev.* 40; 9 *Proc. Am.L.Inst.*, supra; 56 *Reports of A.B.A.*, supra. In the present case defendant admitted two prior felony convictions for which he served terms of imprisonment in the Missouri state prison. The fact of the commission of these crimes was not offered or introduced into evidence and would have been inadmissible under the general rule with respect to prior crimes. *People v. Albertson*, 23 *Cal.2d* 550, 576, 145 *P.2d* 7, and authorities there cited. Had defendant taken the stand, however, the commission of these crimes could have been revealed to the jury on cross-examination to impeach his testimony. *Code Civ.Proc.* § 2051; *People v. Braun*, 14 *Cal.2d* 1, 92 *P.2d* 402; see 28 *Cal.L.Rev.* 222; 3 *Wigmore*, supra, 380. Since fear of this result is a plausible explanation of his failure to take the stand to deny or explain evidence against him (see 22 *Cornell L.Q.* 392; 13

Jour. of Crim. Law and Criminology, 292, 295; 9 Proc.Am.L.Inst., supra; 56 Reports of A.B.A. supra), the inference of the credibility and unfavorable tenor of such evidence that arises from this failure is definitely weakened by this rule of impeachment. This weakness, however, could not be revealed to the jury by counsel or court without prejudicing the defendant through the revelation of past crimes. Court and prosecutor are left no alternative but to comment on defendant's failure to deny or explain evidence against him as though the sole reason for his silence was that he had no favorable explanation. Any change in the law in this respect, however, must be made by the Legislature.

[30] The prosecutor commented seven times in oral argument on defendant's silence. Defendant did not object below to these comments. In the absence of such objection it is the general rule that misconduct of the district attorney cannot be urged on appeal. *People v. King*, 13 Cal. 2d 521, 527, 90 P.2d 291; *People v. Boggs*, 12 Cal.2d 27, 40, 82 P.2d 368; *People v. Hight*, 37 Cal.App.2d 498, 501, 99 P.2d 657.

[31, 32] Moreover, in the majority of instances these comments were properly limited to specific parts of the evidence that defendant could reasonably be expected to explain or deny. The prosecutor approached the borderline of permissible comment, however, when he closed his oral argument as follows: "In conclusion, I am going to just make this one statement to you: Counsel asked you to find this defendant not guilty. But does the defendant get on the stand and say, under oath, 'I am not guilty?' Not one word from him, and not one word from a single witness. I leave the case in your hands." This statement could be construed as a declaration that the jury should infer guilt solely from defendant's silence, and if defendant had objected thereto, he would have been entitled to have the jury advised that his silence could not be given such construction. It is improbable, however, that the jury was misled. The prosecutor's statement followed his review of the evidence and could be construed in connection therewith as a conclusion that although the evidence established guilt, the defendant failed to explain or deny it. A major part of the testimony and of the prosecutor's oral argument concerned the presence of six

of defendant's fingerprints on the garbage compartment door. Fingerprints are the strongest evidence of identity of a person and under the circumstances of the present case they were alone sufficient to identify the defendant as the criminal. *People v. Ramirez*, 113 Cal.App. 204, 298 P. 60.

The judgments and the order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.



27 Cal.2d 496

In re JINGLES.

Cr. 4686.

Supreme Court of California, *in Bank*.

Jan. 4, 1946.

1. Criminal law ☞641(1)

Although the constitutional right of an accused to be represented by counsel should be jealously guarded, it is a right which may be waived. Const. art. 1, § 13.

2. Criminal law ☞304(1)

Court will judicially notice that the right of an accused to counsel is very commonly waived in prosecutions for misdemeanors in justices' and police courts. Const. art. 1, § 13.

3. Criminal law ☞251

Evidence established that defendant was fully instructed as to his rights prior to plea of guilty to misdemeanor charge in police court, and that he had made no request for assistance of counsel, and therefore waived that right. Gen.Laws 1943, Act 1970, § 5; Const. art. 1, §§ 7, 13.

4. Criminal law ☞641(1)

Where an accused is fully instructed concerning his rights and thereafter, with full knowledge of those rights, waives his right to be represented by counsel, the mere fact that he may not previously have been familiar with those rights or with court procedure, is not determinative. Const. art. 1, § 7.

5. Criminal law ⇨251

Where defendant, convicted of a misdemeanor in police court, had been informed of his constitutional right, made no request for the assistance of counsel and was a man of average intelligence, he had "competently, intelligently, and completely" waived the assistance of counsel. Const. art. 1, § 7.

6. Criminal law ⇨641(1)

Waiver by accused of right to assistance of counsel need not be expressed but may be implied. Const. art. 1, § 7.

7. Criminal law ⇨251

Where defendant had been fully advised concerning his right to be represented by counsel, an implied waiver of that right resulted from his act of voluntarily entering his plea of guilty without having the aid of counsel and without requesting such aid. Const. art. 1, § 7.

8. Jury ⇨29(4)

After defendant had entered a valid plea of guilty, no question of the right to trial by jury or of the manner of waiving such right remained. Const. art. 1, § 7.

9. Indictment and information ⇨71

Complaint charging violation of a statute in that defendant had in his possession a revolver, a deadly weapon, capable of being concealed on his person, was sufficient to give defendant notice of the offense of which he was accused. Pen.Code, § 952; Gen.Laws 1943, Act 1970, § 5.

10. Indictment and information ⇨111(1)

Complaint charging violation of statute in that accused had "in his possession a revolver, a deadly weapon, capable of being concealed on his person", was sufficient without negating the exceptions specified in statute. Gen.Laws 1943, Act 1970, § 5.

11. Habeas corpus ⇨92(1)

In habeas corpus proceeding the scope of inquiry into sufficiency of indictment is limited, and if there is attempted to be stated an offense of the kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense will not be examined.

Edward D. Mabson, of San Francisco, for petitioner.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Petitioner, who is in the custody of the sheriff of Contra Costa County, seeks his release on habeas corpus.

Petitioner was charged in the Police Court of the City of Richmond with a misdemeanor to wit: a violation of section 5 of the Dangerous Weapons' Control Law of 1923, Stats.1923, p. 695, Deering's Gen. Laws 1943, Act 1970, in that on or about August 15, 1945, in the city of Richmond, he had in his possession a revolver, a deadly weapon, capable of being concealed on his person. Upon his plea of guilty, entered on August 16, 1945, the imposition of sentence was suspended and he was placed on probation for a period of one year upon the condition, among others, that he serve six months in the county jail.

The writ was issued by this court upon the filing of a petition in which petitioner alleged: (1) that he "was not represented by, nor did he have the assistance of, counsel, nor did he competently, intelligently, completely, or at all, waive the assistance of counsel on his said trial, nor was he given the opportunity of obtaining the aid and assistance of counsel" (Art. I, § 13, Constitution of the State of California); (2) that a trial by jury was not waived in open court "by defendant and his counsel" (Art. I, § 7, Constitution of the State of California); (3) that the court pronounced judgment forthwith and in less than six hours after the plea of guilty was entered contrary to the provisions of section 1449 of the Penal Code; and (4) that petitioner was convicted and is now confined "for the commission of an act which is not a crime."

A return was filed herein which included a certified copy of the entries in the "Criminal Docket of the Police Court of the City of Richmond" relating to the proceedings on the above-mentioned charge against petitioner. The pertinent portions of these entries read: "Arraigned and instructed. Plea—Guilty. Defendant requested that judgment be pronounced forthwith." Upon the return day, petitioner and Judge Leo G. Marcollo, who presided in the police court, testified regarding the proceedings there. While there was some conflict in the testimony, we are satisfied that prior to

Proceeding in habeas corpus by Thomas James Jingles to secure release from custody.

Writ discharged.

petitioner's entry of his plea of guilty, he was fully instructed as to his right to be represented by counsel and as to his right to enter a plea of not guilty and to be tried by a jury.

[1,2] Petitioner's precise claim under his first point is not entirely clear as his several allegations with respect to that point are made in the disjunctive and the authorities cited by petitioner deal only with the general right of the accused to the aid of counsel. There can be no doubt that petitioner had the right to be represented by counsel for the constitutional guarantee extends to criminal prosecutions "in any court whatever." Art. I, § 13, Constitution of the State of California. And while the right of an accused person to be represented by counsel should be jealously guarded, petitioner concedes that it is a right which may be waived. *Ex parte Connor*, 16 Cal. 2d 701, 108 P.2d 10. In this connection, we may state that it is a matter of common knowledge that it is a right which is very commonly waived in prosecutions for misdemeanors in justices' and police courts. If, therefore, under the facts as determined from the evidence, there was a valid waiver by petitioner of his right to be represented by counsel, it is of no moment that he "was not represented by, nor did he have the assistance of, counsel."

[3-5] As above indicated, we are satisfied that petitioner was fully instructed as to his rights and we are further satisfied that petitioner made no request at any time for an "opportunity of obtaining the aid and assistance of counsel." The question involved in petitioner's first point is therefore narrowed to his allegations that he did not "competently, intelligently, completely, or at all, waive the assistance of counsel." With respect to these allegations, petitioner states in his brief that he was "unfamiliar with court procedure and the legal rights of persons charged with crime." He testified to that effect on the return day, but if an accused person is fully instructed concerning his rights and thereafter, and with full knowledge of those rights, waives his right to be represented by counsel, the mere fact that he may not previously have been familiar with those rights or with court procedure is not determinative. Petitioner's testimony demonstrated that he is a man of average intelligence and that he was as capable as the average person of "competently, intelligently, and completely"

waiving his right to be represented by counsel. There remains only the question of whether petitioner waived that right "at all."

[6-7] Under the facts as determined by this court, we are of the opinion that petitioner impliedly waived his right to counsel. It is true that there was no express waiver, but the authorities clearly indicate that an implied waiver is sufficient. *Cundiff v. Nicholson*, 4 Cir., 107 F.2d 162; *McDonald v. Hudspeth*, 10 Cir., 108 F.2d 943; *Franzen v. Johnston*, 9 Cir., 111 F.2d 817. Having been fully advised concerning his right to be represented by counsel, petitioner's implied waiver of that right resulted from his act of voluntarily entering his plea of guilty, without having the aid of counsel and without requesting the aid of counsel, after being thus fully advised.

[8] Petitioner's second point appears to be that as he was not represented by counsel, there could be no valid waiver of a trial by jury by "defendant and his counsel." Art. I, § 7, Constitution of the State of California. It is a sufficient answer to this point to state that after petitioner entered a valid plea of guilty, no question of the right to trial by jury or of the manner of waiving such right remained. *People v. Hough*, 26 Cal.2d 618, 160 P.2d 549.

Petitioner's third point was apparently abandoned upon the oral argument as the testimony showed without conflict that petitioner waived time for pronouncing judgment.

[9-11] Petitioner's fourth point is entirely without merit. The complaint was clearly sufficient "to give the accused notice of the offense of which he is accused" (Pen.Code, § 952) and it was not necessary for the complaint to negative the exceptions specified in the statute. In *re Lord*, 199 Cal. 773, 250 P. 714; *Ex parte Hornef*, 154 Cal. 355, 97 P. 891. Furthermore, as was said in *In re Leach*, 215 Cal. 536, 12 P.2d 3, 7, in quoting with approval from 13 California Jurisprudence at page 232: "The scope of inquiry upon habeas corpus into the sufficiency of an indictment or information is limited, for, although the petitioner may be discharged if the pleading totally fails to charge an offense known to the law, if there is attempted to be stated an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are suf-

ficient to constitute an offense of that kind will not be examined into." See, also, *In re Wilson*, 196 Cal. 515, 238 P. 359; *In re Kavanaugh*, 180 Cal. 181, 180 P. 533.

The writ is discharged and the petitioner is remanded to custody.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



27 Cal.2d 457

MOXLEY v. TITLE INS. & TRUST CO. et al.
L. A. 18982.

Supreme Court of California, in Bank.
Jan. 4, 1946.

Rehearing Denied Jan. 31, 1946.

1. Appeal and error ⇐854(3)

If demurrer to complaint is well taken as to any of grounds stated therein, order sustaining demurrer must be affirmed.

2. Trusts ⇐61(1)

Where discretion as to amount of income to be devoted to needs of beneficiary is vested in trustee, or where effect of trust is to direct accumulations of the income until a fixed time, trust cannot be terminated by the court during the period fixed by the trustor, even where all the beneficiaries are sui juris and consent thereto.

3. Property ⇐7

Within the limits of the law, every man may do as he pleases with his own property.

4. Trusts ⇐112

Ordinarily, the function of the court with reference to active trusts is not to remake the trust instrument, or to reduce or increase the size of gifts made therein, or to accord the beneficiary more advantage than the donor directed that he should enjoy, but rather the function is to ascertain what the donor directed that the donee should receive and to secure to him the enjoyment of that interest.

5. Trusts ⇐112

In determining the nature, extent, and object of a trust, the Supreme Court must look to the trust instrument. Civ.Code, § 2253.

6. Wills ⇐680

In construing testamentary trust, the expressed wishes of the testatrix must be followed.

7. Trusts ⇐61(1)

The absence of spendthrift features in testamentary trust giving trustees absolute discretion in their application of net income to use of testatrix' daughter, and directing the trustees to transfer entire corpus and all its accumulations to daughter on reaching age 35, would not authorize judicial termination of trust prior to daughter's reaching age 35, since the testatrix may have had good reason for desiring that corpus should not go to daughter before age 35.

8. Trusts ⇐177

Trustees having the power to exercise discretion will not be interfered with so long as they are acting bona fide, and the exercise of their discretion will not be controlled in violation of wishes of testator creating the trust.

9. Trusts ⇐61(1)

The death of father who was designated, along with trust company, as trustee in testamentary trust giving trustees absolute discretion in their application of net income to use of testatrix' daughter and directing them to transfer entire corpus and all its accumulations to daughter on reaching age 35, would not warrant judicial termination of trust prior to daughter reaching age of 35.

10. Evidence ⇐65

A testatrix designating her husband and a trust company as trustees could be presumed to have had knowledge of the general law of trusts that, on the death, renunciation, or discharge of one of several cotrustees, the trust survives to the others. Civ.Code, § 2288.

11. Trusts ⇐61(1)

A court of equity has power to terminate a dry, simple, or passive trust before the time fixed for the termination thereof by the trust instrument.

12. Trusts ⇐61(1)

Courts should respect admittedly valid and reasonable terms of a trust instrument creating an active trust, and should not assume the power to terminate such trust prior to the time expressly fixed by the trust instrument for such termination.

13. Trusts ⇨61(1)

A testamentary trust giving trustees absolute discretion in their application of net income to use of testatrix' daughter, and directing them to transfer entire corpus and all its accumulations to daughter on reaching age 35, was an "active trust" for a definite duration, with large powers and duties committed to trustees, and was not subject to judicial termination prior to daughter's reaching age 35.

See Words and Phrases Permanent Edition, for all other definitions of "Active Trust".

14. Trusts ⇨58

An active trust will be judicially modified only in exceptional situations in order to carry out rather than to defeat the primary purpose of trustor as expressed in trust instrument.

15. Trusts ⇨58

A testamentary trust giving trustees absolute discretion in their application of net income to use of testatrix' daughter who was sole beneficiary and without issue and directing them to transfer entire corpus and all its accumulations to daughter on reaching age 35, would not be judicially modified before daughter reached age 35 by giving her some of the corpus to permit her to build a house, in absence of showing of such necessitous circumstances as would warrant disregarding plain provisions of trust.

TRAYNOR, J., GIBSON, C. J., and CARTER, J., dissenting.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Peggy Ann Moxley against the Title Insurance & Trust Company, a corporation, and others, to terminate a testamentary trust. From a judgment of dismissal after sustaining demurrers to complaint without leave to amend, the plaintiff appeals.

Affirmed.

Prior opinion 154 P.2d 417.

Ben C. Cohen, of Los Angeles, for appellant.

Mathes & Sheppard and Gordon F. Hampton, all of Los Angeles, amici curiae on behalf of appellant.

Alfred Wright, Harold F. Collins, Gordon Hall, Jr., and Martin Gendel, all of Los Angeles, for respondents.

SPENCE, Justice.

By this action plaintiff sought to terminate a testamentary trust prior to the time expressly provided for such termination. General and special demurrers to plaintiff's amended complaint were sustained without leave to amend, a judgment of dismissal was entered, and plaintiff appeals therefrom.

In her amended complaint plaintiff sets forth the establishment and operation of the trust as follows: The trust was created by the will of plaintiff's mother, Mabelle E. Kent, which will was executed on September 19, 1932. Under the terms of the trust the Title Insurance and Trust Company and Sidney R. Kent were named as trustees, with the direction that "the entire net income of said trust estate shall be held and accumulated by said trustees and reinvested by them for the beneficiaries thereof hereinafter named; provided, that any part of said net income may be paid, applied and expended by said trustees in their absolute discretion for support, care and education of" plaintiff. It was also provided that when plaintiff should reach the age of 35 years, the trust estate and all accumulations thereof should be transferred and delivered to her, whereupon the trustees were to be discharged from the trust; that if plaintiff should die before reaching the age of 35 years, the trust estate and accumulations should be transferred and delivered to any child or children of plaintiff; but in the event plaintiff should die without issue before reaching the age of 35 years, said trust estate should be transferred to any beneficiary designated by the deed or testamentary disposition of plaintiff, and in the absence of such appointment, to certain other named beneficiaries.

Mabelle E. Kent, the trustor, died on October 14, 1932, and on March 16, 1934, the trust estate was distributed to the trustees, who entered upon their duties and continued to act as joint trustees until the death of Sidney R. Kent, plaintiff's father, on March 19, 1942. Since then the corporate trustee has acted alone.

It is next alleged that plaintiff has no living issue, and that she has conveyed all her interest in the trust to her husband

"to take effect in the event that plaintiff herein should die without issue surviving her before reaching the age of" 35 years. Named as defendants in this action to terminate the trust are the corporate trustee, Title Insurance and Trust Company; plaintiff's husband, E. D. Moxley; "contingent remaindermen under said trust"; and R. E. Allen, appointed on petition of plaintiff as "guardian ad litem for any child or children now unborn but who may be living at the time of the death of plaintiff herein should said plaintiff die before she reaches the age of 35 years."

It is further alleged in the amended complaint that "notwithstanding the provisions of the trust that the plaintiff should receive the entire trust estate, together with the accumulations thereof, upon reaching the age of 35, it was contemplated by plaintiff's mother at the time of the creation of said trust that should the occasion arise or circumstances exist warranting the earlier termination of said trust for the purpose of relieving plaintiff from any undue hardship or unexpected contingency, the trust could be earlier terminated"; that such "circumstances exist" in that when the will creating the trust was executed, plaintiff was a schoolgirl 15 years of age, living with her mother, and not capable of looking after her financial affairs; that it was contemplated by the trustor, plaintiff's mother, that if she should die before plaintiff should attain the age of 35 years, plaintiff would live with her father, Sidney R. Kent, who would provide for her independently of the trust, and therefore it would be unnecessary for plaintiff to receive the corpus of the trust prior to her attainment of the designated age; that the trustor believed that plaintiff's father, then living, would participate in the management of the trust, but by reason of his death, this is no longer possible; that the income from the trust is negligible and wholly inadequate to support plaintiff in a manner consistent with her station in life; that plaintiff's income apart from the trust is similarly insufficient; that by reason of her father's death, plaintiff is unable to have comforts and necessities and to buy a home as she could if her father were alive; that plaintiff is now 26 years of age, happily married and living with her husband, capable of managing the estate left in trust by her mother, and is desirous of purchasing a home; that "the conditions aforesaid have arisen since the creation of the

trust * * * and said situation was not contemplated by plaintiff's mother and therefore no provision was made for the same."

It is further alleged that the primary purpose of the trust was to protect plaintiff during her minority in providing for her support, education and maintenance; that such purpose has been accomplished; that the interests of the remaindermen are secondary to those of plaintiff; that the trust is not a spendthrift trust nor made irrevocable by its terms "making it incapable of termination before the full period prescribed for its duration."

It is further alleged that plaintiff's father by will created a trust and gave plaintiff a testamentary power of appointment of the trust estate; that plaintiff for "valuable consideration, did irrevocably * * * appoint as beneficiaries any child or children which might be born to the plaintiff who might be living when she reached the age of 35 years and that * * * by virtue of such irrevocable * * * appointment under the Last Will and Testament of the plaintiff * * * the issue of plaintiff's body, if any there be, should she die before reaching the age of 35 will not be prejudiced * * * and for said reason there is not nor can there be any hostility of interest between plaintiff and such defendant contingent remaindermen." According to the amended complaint the securities in the trust created by plaintiff's mother have a value of about \$37,500, while the value of plaintiff's interest in the trust created by her father is alleged to be "in excess of the sum of one-half million dollars."

[1] Both the corporate trustee and the guardian ad litem for the contingent remaindermen demurred to the amended complaint upon the following grounds: (1) Failure to state facts sufficient to constitute a cause of action; (2) lack of jurisdiction of the court; and (3) defect of parties defendant in that unborn contingent remaindermen were not and could not be represented in the action. The order of the court sustaining the demurrers is general in its terms and does not indicate the grounds upon which the court acted. In such situation the law is settled that "If the demurrer is well taken as to any of the grounds stated therein, then the order of the court sustaining the demurrer must be affirmed by the reviewing court." *Haddad v. McDowell*, 213 Cal. 690, 691, 692, 3 P. 2d 550, 551, and authorities there cited.

Plaintiff's pleading here is vulnerable to defendants' first point of objection above enumerated, and the other grounds of demurrer need not therefore be considered. *Hays v. Temple*, 23 Cal.App.2d 690, 696, 73 P.2d 1248.

[2-4] In *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, at pages 179, 180, 187 P. 425, 426, the rule is stated as follows: "Where discretion as to the amount of the income to be devoted to the needs of the beneficiary is vested in the trustee (*Estate of Hemphill*, 180 Pa. 95, 36 A. 409; *In re Stewart's Estate*, 253 Pa. 277, 98 A. 569, Ann.Cas.1918E, 1216), or where the effect of the trust is to direct accumulations of the income until a fixed time (*Claflin v. Claflin*, 149 Mass. 19, 20 N. E. 454, 3 L.R.A. 370, 14 Am.St.Rep. 393; *Shelton v. King*, 229 U.S. 90, 33 S.Ct. 686, 57 L.Ed. 1086, [see, also, *Rose's U.S. Notes*]), the trust cannot be terminated by the court during the period fixed by the trustor, even where all the beneficiaries are sui juris and consent thereto." This is the rule in a majority of American jurisdictions with respect to active trust (annotation, 123 A.L.R. 1427) and has its foundation in the well-established principle that, within the limits of the law, every man may do as he pleases with his own property. *Estate of Easterday*, 45 Cal.App.2d 598, 604, 114 P.2d 669. Ordinarily, the function of the court with reference to active trusts is not to remake the trust instrument, reduce or increase the size of the gifts made therein or accord the beneficiary more advantage than the donor directed that he should enjoy, but rather to ascertain what the donor directed that the donee should receive and to secure to him the enjoyment of that interest. 4 Bogert, *Trusts and Trustees*, p. 2936; *Claflin v. Claflin*, 149 Mass. 19, 20 N.E. 454, 3 L.R.A. 370, 14 Am.St.Rep. 393.

[5,6] It is axiomatic that we must look to the instrument creating the trust to determine the nature, extent and object of said trust. Civ.Code, § 2253; Restatement, *Trusts*, § 4; *Ringrose v. Gleadall*, 17 Cal. App. 664, 667, 121 P. 407. From plaintiff's pleading of the terms of the trust created by her mother's will, it is clear that the testatrix intended to establish an active and subsisting trust for a definite duration, with large powers and duties committed to the trustees. Thus, under the testamentary plan the trustees are expressly invested with "absolute discretion" in their applica-

tion of the net income to the use of plaintiff until she reaches the age of 35 years, at which time they are directed to transfer "all of said trust estate and all accumulations thereof" to plaintiff and "thereupon be fully discharged." Such plain arrangement for the trustees to retain complete control of the corpus and "absolute discretion" with respect to the income of the trust estate for the stated period would manifestly be violated by a judicial termination of the trust prior to the expiration of such stated period. The expressed wishes of the testatrix must be followed. *Estate of Yates*, 170 Cal. 254, 257, 149 P. 555.

[7] That the trust lacks spendthrift features would not authorize its termination prior to the time specified, for the testatrix may have had good reason for desiring that the corpus of the trust should not go to plaintiff until she should attain the specified age. *Estate of Easterday*, 45 Cal. App.2d 598, 607, 114 P.2d 669. "The fact that because of the particular wording of a valid trust the legatee himself may impair its efficacy is not a justification for equity so to do." *Estate of Yates*, 170 Cal. 254, 257, 149 P. 555, 557. In connection with such situation and the authorities applicable thereto, it is said in 4 Bogert, *Trusts and Trustees*, at pages 2938-2939: "* * * it can be maintained with some force that the destruction of trusts by court action is anti-social in that it encourages donees to spend and waste in an age where there is an all too clear tendency to extravagance and neglect of the future. The settlor has said that the cestui shall enjoy the gift over a period of years. Shall the court be a party to a violation of that intent and thus encourage the possible squandering of the bounty? Even though the cestui will be able to squander through the device of sale at a sacrifice, should not the court do what it can to discourage wastage, by refusing the decree of termination, in the hope that the cestui will not think of alienation, or will find it too costly to use, or will be unable to find a buyer for his interest?"

[8] Except under circumstances not shown here, courts cannot substitute their judgment for that of the trustor. In dealing with this question in a similar case, the Supreme Court of the United States said: "Upon what principle, then, is a court of equity to control the trustee by compelling a premature payment? It is a settled principle that trustees having the

power to exercise discretion will not be interfered with so long as they are acting bona fide. To do so would be to substitute the discretion of the court for that of the trustee. Upon the same and even stronger grounds a court of equity will not undertake to control them in violation of the wishes of the testator. To do that would be to substitute the will of the chancellor for that of the testator." *Shelton v. King*, 229 U.S. 90, 94, 95, 33 S.Ct. 686, 687, 57 L. Ed. 1086.

[9, 10] Plaintiff makes the sweeping allegation that "notwithstanding the provisions of the trust," the testatrix contemplated that "for the purpose of relieving plaintiff from any undue hardship or unexpected contingency, the trust could be earlier terminated." Then follow averments purporting to substantiate plaintiff's two theories for equitable relief: (1) Change of circumstances not anticipated by the testatrix; and (2) accomplishment of the objects of the trust. Such claims, imputing to the testatrix purposes inconsistent among themselves and different from the purpose plainly appearing from the terms of the will creating the trust, add nothing to plaintiff's cause of action. Manifestly, they cannot supply a basis for materially changing the testamentary plan which denied to plaintiff the management of the corpus until she should reach the age of 35 years. In her specific allegation as to the "contemplated" indispensability of her father to serve as trustee and in her claim that his death, after she attained her majority and was capable of handling her own affairs, would sustain the present termination of the trust, plaintiff ignores the import of the provisions of her mother's will emphasizing the testatrix' intention that the trust should not so fail, by fixing a definite period for its duration and by making a corporate trustee, as well as plaintiff's father, responsible for its administration. Presumably the testatrix in so providing had knowledge of the general law of trusts in this state and elsewhere that "On the death, renunciation, or discharge of one of several co-trustees the trust survives to the others." Civ.Code, § 2288; 2 Scott on Trusts, 1939 Ed., § 195, pp. 1057-1060. These circumstances demonstrate the pertinency here of the statement made in the case of *Shelton v. King*, 229 U.S. 90, at page 101, 33 S.Ct. 686, 57 L.Ed. 1086: "In the case at bar nothing has happened since the will which was not anticipated

by the testatrix." In substance, plaintiff's pleading of "changed conditions" amounts to no more than the pleading of mere considerations of convenience to herself as ground for frustration of the testamentary design for administration of the trust, and she cannot prevail. As was aptly said in *Shelton v. King*, supra, 229 U.S. at page 101, 33 S.Ct. at page 690, 57 L.Ed. 1086: "There is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid."

[11] The cases in this jurisdiction cited by plaintiff in support of her alleged cause of action possess distinctive features which render them of no avail here. That a court of equity has the power to terminate a dry, simple or passive trust before the time fixed for the termination thereof by the trust instrument cannot be disputed. Thus, in *Eakle v. Ingram*, 142 Cal. 15, 75 P. 566, 100 Am.St.Rep. 99; and *Moor v. Vawter*, 84 Cal.App. 678, 258 P. 622, dissolution of passive trusts before the stated time was decreed upon application of the beneficiaries. Cf. 123 A.L.R. 1442, 1443. The *Eakle* case, 142 Cal. at page 17, 75 P. 566, 100 Am.St.Rep. 99 expressly declared the defendant to have no "standing in court to dispute [plaintiffs'] application [because] he was a mere bare trustee." (Italics added.) In the *Moor* case the provision in the trust instrument for the accumulation of income beyond the age of minority of the petitioning beneficiaries was held void under authority of section 724 of the Civil Code (amended in 1929 to allow such accumulation); and with such active duty of the trustee eliminated from consideration the principle governing the termination of a dry trust was applied as the basis for according the beneficiaries the relief sought in the light of those facts. *Moor v. Vawter*, 84 Cal.App. 678, 684, 258 P. 622. In *Gray v. Union Trust Co.*, 171 Cal. 637, at pages 640, 641, 154 P. 306, 308, the court observed that the plaintiff's application for relief did not concern "a dry, naked trust, since active duties are imposed upon the trustee during the life of the plaintiff [in making investments and reinvestments as in its discretion may seem necessary and proper], and a no less active duty upon her death in causing to be determined, should she fail to nominate, those entitled to take the property." The language in that case is directed to the point that remaindermen

were created by the trust instrument and they were not before the court, so that a decree of dissolution was improperly entered. But there is nothing in the Gray case which is contrary to the limitations stated in the Fletcher case, *supra*, and it is only in connection with "a dry [and] naked trust" that the Gray case is cited in *Moor v. Vawter*, *supra*, as authority for the trial court's exercise of its discretion in determining whether or not to enter a decree for termination as there sought.

Whittingham v. California Trust Co., 214 Cal. 128, 4 P.2d 142, and *Bennett v. Nashville Trust Co.*, 127 Tenn. 126, 153 S. W. 840, 46 L.R.A.N.S., 43, Ann.Cas.1914A, 1045, illustrate a limited class of cases in which the court, under certain circumstances, may *modify* the terms of the trust, increase or reduce the trustee's powers, and direct advances of income or principal to the beneficiaries. Thus, in the *Whittingham* case, plaintiff, by reason of a drastic change in her condition of health following the time of the creation of the trust, was in an admittedly necessitous condition and she based her application for relief upon that ground. The trustees were invested with the power of "management and control of the trust estate," [214 Cal. 128, 4 P.2d 143] but it does not appear from the opinion exactly what the duties were. Declaring plaintiff to be "the only person beneficially interested" in a certain fraction of the income and principal of the trust estate, the court deemed it proper upon equitable grounds that one-third of plaintiff's portion be distributed to her; but the trust itself was not terminated. In the *Bennett* case plaintiff, a minor beneficiary, alleged that it was necessary in order to complete her education that she be granted permission to use currently the *income* from certain money left in trust for her under the testator's direction that it "be held * * * with all accumulations" by the executor until she should attain the age of 25. Analyzing at pages 841, 842 of 153 S.W. the application as "one which relates merely to the better or more judicious mode of managing and controlling the subject-matter of the trust in order that the design and wishes of the donor may be more completely accomplished [rather than] to divest the trustee of title to the property which is the subject-matter of the trust and vest such title in direct opposition to the will of the donor," the

court concluded that plaintiff should have the advancement of income sought; but again the trust was not terminated.

Akin in character insofar as *modification*, rather than termination, of a trust is concerned is the case of *Adams v. Cook*, 15 Cal.2d 352, 353, 101 P.2d 484. There certain real property was conveyed in trust to be sold at a price fixed in the trust instrument. Active duties relating to the management of the trust property were conferred upon the trustee. The beneficiaries applied for equitable relief in the administration of this property following the discovery of oil thereon, a circumstance which markedly affected its value and which was not contemplated at the time of the creation of the trust. In such situation it was there aptly said 15 Cal.2d at page 361, 101 P.2d at page 489: "* * * where the primary purpose of the trust would not be accomplished by a strict adherence to the terms of the declaration of trust and * * * when it is made to appear in a court of equity, as was shown in the present case, that the benefits and advantages which the trustors desired to confer upon the beneficiaries would not accrue to them by 'a slavish adherence to the terms of the trust,' the court may *modify* the terms of the trust to accomplish the real intent and purpose of the trustors." (Italics added.)

[12, 13] It thus appears that plaintiff's contention that the complaint states a cause of action for the termination of the active trust in question finds no support in any case heretofore decided in this jurisdiction and finds no support in the decisions representing the great weight of authority in this country. On the other hand, both reason and the great weight of authority indicate that courts should respect the admittedly valid and reasonable terms of a trust instrument creating an active trust and should not assume the power to terminate an active trust prior to the time expressly fixed by the trust instrument for such termination. That the trust under consideration is an active trust rather than a so-called dry, simple or passive trust, cannot be disputed and we therefore conclude that the trial court properly determined that plaintiff's complaint fails to state a cause of action for its termination.

While plaintiff's argument is confined to her claim that she is entitled to termination rather than to modification of the trust, certain authorities cited by plaintiff

deal with modification and it may be assumed that if plaintiff's complaint states a cause of action for modification, the demurrer thereto should not have been sustained. We are satisfied, however, that plaintiff's complaint fails to state a cause of action for either termination or modification of the trust.

[14, 15] It is only under peculiar circumstances such as those exemplified in *Adams v. Cook*, 15 Cal.2d 352, 101 P.2d 484, that a court has the power to modify an active trust. See, also, *Whittingham v. California Trust Co.*, 214 Cal. 128, 4 P.2d 142; *Bennett v. Nashville Trust Co.*, 127 Tenn. 126, 153 S.W. 840, 46 L.R.A., N.S., 43, Ann.Cas.1914A 1045. In the cited cases, the courts were dealing with exceptional situations in which modification was decreed in order to carry out, rather than to defeat, the primary purpose of the trustor as expressed in the trust instrument. Plaintiff's allegations in the present case have been heretofore considered and we find no such peculiar circumstances alleged here. Plaintiff does not allege facts showing anything in the nature of an emergency or any peculiar circumstances which were not reasonably within the contemplation of the testatrix when she expressly directed that the corpus of the trust should be withheld from plaintiff until plaintiff should attain the age of 35 years. Plaintiff alleges that she desires to purchase a home but her allegations regarding the insufficiency of her income for that purpose fail to show such necessitous circumstances as would warrant a court in disregarding the plain provisions of the trust. And while we do not believe that a trust should be modified merely upon a showing of the beneficiary's desire to purchase a home and a showing of the insufficiency of the beneficiary's income to make such purchase or to support herself in the manner to which she has been accustomed, it is significant to note that plaintiff makes no allegation that her husband, to whom she alleges she is happily married and to whom she may look for support, has not sufficient income to purchase said home and to support her in such manner. Plaintiff's allegations fall far short of presenting a situation such as is disclosed in any of the cited cases dealing with modification of active trusts and, in our opinion, such allegations are wholly insufficient to justify such modification.

The judgment is affirmed.

SHENK, EDMONDS, and SCHAUER, JJ., concurred.

TRAYNOR, Justice (dissenting).

I dissent. The English courts hold that the sole beneficiary of a trust beyond the age of minority can demand that the fund be conveyed to him and the trust terminated, even though the trust instrument provides that the enjoyment of the fund by the beneficiary shall be postponed until he has reached a certain age. "The principle * * * has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age—unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one." *Gosling v. Gosling*, Johns. 265, 272; *In re Couturier*, 1907, 1 Ch.D. 470, 473; *Saunders v. Vautier*, 4 Beav. 115; see 3 Pomeroy, *Equity Jurisprudence*, 5th ed., § 991(b). This doctrine has not been adopted in the United States. See cases collected in *In re Hamburger*, 185 Wis. 270, 201 N.W. 267, 37 A.L.R. 1420, 1423, *Hills v. Travelers Bank & Trust Co.*, 125 Conn. 640, 7 A.2d 652, 123 A.L.R. 1427. In the leading case of *Clafin v. Clafin*, 149 Mass. 19, 20 N.E. 454, 3 L.R.A. 370, 14 Am.St.Rep. 393, the court refused to follow the English authorities and held that a provision in a trust charging the trustee with the accumulation of income until the sole beneficiary reached an age beyond that of 21 years was binding on the beneficiary. See *Estate of Yates*, 170 Cal. 254, 256, 149 P. 555. The *Clafin* case, however, did not determine whether the trust would have been terminable upon equitable grounds, had the petitioner shown such grounds and not relied solely on the alleged invalidity of the provision restraining his enjoyment of the property. See *Sears v. Choate*, 146 Mass. 395, 15 N.E. 786, 4 Am.St.Rep. 320. In many American jurisdictions, the rule of the *Clafin* case has been extended to cover not only a suit to terminate a trust as a matter of course but also a suit based on equitable grounds. See *Hills v. Travelers Bank & Trust Co.*, 125 Conn. 640, 7 A.2d 652, 123 A.L.R. 1427; 3 Scott, *Trusts*, § 337.3; 4 Bogert, *Trusts*, 1002.

In this state, however, it has been recognized that a court of equity has inherent power to terminate a trust before the end of the period specified in the trust instrument. The beneficiaries of a trust other than a spendthrift trust may secure its termination if all the beneficiaries are sui juris and all agree upon its termination, and if a court of equity concludes that the best interests of the beneficiaries will be served thereby. *Whittingham v. California Trust Co.*, 214 Cal. 128, 135, 4 P.2d 142; *Gray v. Union Trust Co.*, 171 Cal. 637, 641, 154 P. 306; *Eakle v. Ingram*, 142 Cal. 15, 75 P. 566, 100 Am.St.Rep. 99; *Moor v. Vawter*, 84 Cal.App. 678, 682, 258 P. 622; see, also, *Bennett v. Nashville Trust Co.*, 127 Tenn. 126, 153 S.W. 840, 46 L.R.A., N.S., 43, Ann.Cas.1914A, 1045, and cases there collected. The California cases allowing the termination of a trust in the interest of the beneficiaries are not limited to dry trusts, nor do they make the power of the court to terminate the trust dependent upon the existence of an emergency or upon changed conditions obviating the purposes of the trust that were unforeseeable by the settlor. Thus, in *Moor v. Vawter*, supra, the trust instrument provided for the accumulation of income, and it was not alleged that there were unforeseeable developments after the testator's death. The court stated 84 Cal.App. at page 684, 258 P. at page 624: "It may not be denied that, generally speaking, the rule obtains as announced in the case of *Gray v. Union Trust Co.*, 171 Cal. 637, 641, 154 P. 306, to the effect that the termination of a trust is discretionary with the trial court. See, also, *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 180, 187 P. 425. But such a pronouncement goes no further than does the ordinary principle regarding the general subject of judicial discretion. * * * In the instant case it was stipulated that the beneficiaries were in all respects competent, not spendthrifts, and that all of them joined in the request that the trust be terminated. No reason of any sort based upon facts or equitable considerations was interposed by the trustees which might in any manner militate against the right of the beneficiaries of the trust in the premises." In *Gray v. Union Trust Co.*, 171 Cal., supra, at page 641, 154 P. at page 308, this court declared: "It is only when all the parties in interest are before a court, when each is sui juris, and all join in the application, that a court of equity ever ter-

minates a valid trust. And even when all these circumstances exist, equity does not do so by force of the application, but only when a decree so doing is meet and proper. When such circumstances exist power is in the court of equity to terminate the trust, but with that power is not necessarily imposed the duty so to do. It is still discretionary." The opinion of Justice Henshaw in the *Gray* case cites for the foregoing rule *Estate of Yates*, 170 Cal. 254, 149 P. 555, in which the opinion was prepared by the same justice. *Estate of Yates*, supra, must therefore be understood as interpreted in the *Gray* case.

Defendant relies on *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 179, 180, 187 P. 425, for the proposition that this state follows the rule that if the trust instrument directs the accumulation of the income until the beneficiary has reached a certain age, the trust cannot be terminated by the court before that time, "even where all the beneficiaries are sui juris and consent thereto." The passage in the *Fletcher* case to that effect, however, was only a dictum in that case. The *Fletcher* case involved a trust instrument that provided, not for accumulation of income, but merely for the administration of the trust property and the distribution of income by the trustee. It was held that the trust would have been terminable but for the contingent interest of unborn issue. This court declared in that case that "The only discretion vested in the trustee" under the trust instrument in question was "as to the nature and character of the investments to be made" and that such discretion of the trustee does not "take the trust out of the general rule," which the court stated 182 Cal. at page 179, 187 P. at page 426: "Where the beneficiaries of the trust are all sui juris, and seek the termination of a trust, a court of equity may terminate the same even if the period for such termination fixed by the instrument creating the trust has not yet arrived." The court recognized that under this rule the "termination of the trust is, however, discretionary with the court. *Gray v. Union Trust Co.*, 171 Cal. 637, 154 P. 306." 182 Cal. 177, 180, 187 P. 425, 426. The dictum in the *Fletcher* case had no bearing on trusts in this state for the accumulation of income after a beneficiary had reached majority, for under sections 723 and 724 of the Civil Code, not amended until 1929 (Stats.1929, p. 276), a trust instrument could not validly provide for the

accumulation of income after the beneficiary had reached majority.

New York and other states by statute read a spendthrift clause into any trust whose income is designed for an individual beneficiary. See 4 Bogert, Trusts, 2932, 2933; 1 Scott, Trusts, 750; Griswold, Spendthrift Trusts, 194. Courts in these states refusing to terminate such a trust before the time fixed in the trust instrument simply confirm the rule that spendthrift trusts are not terminable by court decree. In this state a trust is not a spendthrift trust if the trust instrument does not provide that the beneficiary's interest shall be unassignable and not subject to the claims of his creditors. Civ.Code, § 867; *Fatjo v. Swasey*, 111 Cal. 628, 637, 44 P. 225; *Blackburn v. Webb*, 133 Cal. 420, 422, 65 P. 952; see *Griswold, Spendthrift Trusts*, 129; 25 Cal.Jur. 324. By declaring not terminable a trust like the present one, which contains no spendthrift clause, the court would prevent a beneficiary from using the trust funds for urgent needs or highly desirable purposes. It would not, however, prevent him from selling his equitable interest in the trust, and since a purchaser of that interest could not obtain the trust property before the end of the period specified in the trust instrument, it is not likely that he would pay a price commensurate with the present value of that interest. As has been aptly said: "Property sold in presenti, but not to be delivered for many years, must be sold at a sacrifice, and when the seller is a person of the character for whom such restraints are supposed to be useful, the chances are that it will be sold at a very great sacrifice. In fact, the law, by sanctioning such restraints, is exposing inexperienced youth to those 'catching bargains' against which the old-fashioned equity always strove to protect it." *Gray, Restraints on Alienation*, 2d ed. § 124(n); see, also, *Sears v. Choate*, 146 Mass. 395, 398, 15 N.E. 786, 4 Am.St. Rep. 320; *Scott, Control of Property by the Dead*, 65 U. of Penn.L.Rev. 527, 632, 648-650. It is absurd to refuse termination in such a situation for fear of frustrating the trustor's intent, when the net result of the refusal is to continue the trust for the sole benefit of the trustee. 46 Yale L.J. 1005, 1011. Moreover, the assets of the trust may be distributed to the beneficiary and the trust terminated by an agreement between the beneficiary and the trustee se-

curing the latter's full discharge. See 4 Bogert, Trusts, 2938. To preclude the same result by court decree is to "penalize cestuis who are overconscientious and seek the instruction of the court, or who have a trustee who is anxious to get the commissions from the trust and hence will not consent to termination." Bogert, *ibid.*

When exercising its discretion as to whether a trust should be terminated, a court weighs the importance and urgency of the interests calling for the termination of the trust and determines whether or not the character of the trust property is such that, in view of the circumstances of the case, its administration by the trustee is called for. It considers whether the trust would otherwise end within a short time; whether the termination of the trust would defeat a particular purpose of the trust, such as withholding the administration of the trust property from the husband of a woman beneficiary (see *In re Cornil's Estate*, 167 Iowa 196, 149 N.W. 65; L.R.A. 1915E, 762; 43 Yale L.J. 410); whether the beneficiaries have sufficient experience to manage the trust property (see *Eagle v. Ingram*, 142 Cal. 15, 16, 75 P. 566, 100 Am. St.Rep. 99; *Moor v. Vawter*, 84 Cal.App. 678, 684, 258 P. 622); whether they are free from propensities that would endanger a reasonable management of the trust property (see *Estate of Easterday*, 45 Cal. App.2d 598, 603, 604, 607, 114 P.2d 669); whether the circumstances that give rise to their interest in terminating the trust were probably anticipated by the trustor (*Fletcher v. Los Angeles Trust & Sav. Bank*, *supra*, 182 Cal. at page 180, 187 P. 425; *Whittingham v. California Trust Co.*, 214 Cal. 128, 4 P.2d 142; see *Adams v. Cook*, 15 Cal.2d 352, 101 P.2d 484); and whether the trust was intended primarily for the purpose of accumulating the income or for the administration of the trust property. *Fletcher v. Los Angeles Trust & Sav. Bank*, *supra*; see, also, *Woestman v. Union Trust & Sav. Bank*, 50 Cal.App. 604, 607, 195 P. 944.

There is no hard and fast rule preventing the termination of a trust if it is not proved that the settlor did not anticipate events subsequent to the creation of the trust. The principal purpose of a trust is to benefit the beneficiaries, and presumably a court will better serve the intentions of the settlor by weighing the actual interests of the beneficiary of a trust in its termi-

nation against the benefits intended by its continuance than by insisting that adequate proof be offered that the present circumstances could not be or were not anticipated by the settlor. "The majority American position to the effect that non-spendthrift trusts are indestructible as long as they are active and have a purpose to be performed has the appearance of strength, in that it stresses respect for the intent of the settlor, harmony with the spendthrift trust doctrine, and refusal by the courts to make wills and deeds; but it seems in fact an impractical rule which brings about an adherence to theory but no practical individual or social benefit." 4 Bogert, Trusts, 2940.

Nor is there any hard and fast rule that a trust providing for the accumulation of income cannot be terminated by a court. Although such a trust may now be valid (Civ.Code, §§ 723, 724) it does not follow that it cannot be terminated. The settlor intends by such a trust to secure the beneficiary's well-being in the future, but it might be shown to the satisfaction of the court that the present needs of the beneficiary outweigh his interest in future security. Moreover, in the present case the settlor did not provide for an obligatory accumulation of income, for the will provides that in the discretion of the trustees the income may be accumulated or paid to the beneficiaries. (No power was given to invade the corpus.) The will does not reveal whether this provision was made to empower the trustees to use only part of the income for the current requirements of the beneficiary, or to have the income accumulated while plaintiff was very young for distribution to her when she was older and her needs were greater, or whether it was made to avoid controversies and possible litigation as to what is income and what is corpus. If a provision in a will giving the trustee discretion to accumulate income precluded a court from determining that the corpus of the trust should be conveyed to the beneficiary and the trust terminated, the court would be bound to a rule of thumb regardless of the reasons for giving such discretion to the trustee. Whether the income can be accumulated or must be currently distributed affords no ground for deciding the entirely unconnected question whether the corpus of the trust can be distributed to the beneficiaries before the time stated.

The majority opinion holds that the trust in the present case could be terminated if it were a dry trust but that since it is an active trust it must continue until plaintiff has reached the age of thirty-five. It has long been recognized in California, however, that active trusts can be terminated on equitable grounds before the expiration of the period fixed in the trust instruments. This court has defined a dry or passive trust as follows: "The term 'dry trust' refers to a trust wherein the trustees would have no actual responsibilities as such and no active duties to perform." Estate of Shaw, 198 Cal. 352, 363, 246 P. 48. According to the Restatement of Trusts, "A trust is not active unless the trustee has by the terms of the trust affirmative duties to perform. If his sole duties are negative, that is not to interfere with the beneficiary in his enjoyment of the property, the trust is passive." Restatement, Trusts, § 69, Comment (a). In *Eagle v. Ingram*, 142 Cal. 15, 75 P. 566, 100 Am.St.Rep. 99, the trustee was to hold certain real property and "to pay the rents, issues, and profits thereof" to named beneficiaries. Since the beneficiaries were entitled only to net income during the trust period, the duty of managing the property, as well as that of paying the income to the beneficiaries, was imposed on the trustee. The court used the term "bare trustee" in that case, not to indicate that the trust was a dry one, but as is evident from the context (142 Cal. at page 17, 75 P. 566, 100 Am.St.Rep. 99), to emphasize that a trustee with an interest only in his compensation cannot object to the termination of the trust as can a person interested as a beneficiary in the trust property. In *Moor v. Vawter*, 84 Cal. App. 678, 258 P. 622, "the testator left all his property in trust" to be administered by the trustee for the benefit of the widow of the testator during her life, and, if she died within ten years after the testator's death, for the benefit of the sons of the testator until the expiration of such ten-year period. The trust was terminated during the ten-year period. The invalidity of the provision for the accumulation of income under the law at that time did not affect the active character of the trust but only the nature of the duties to be performed by the trustee. It is undisputed that management of the trust property and distribution of the net income thereof are duties of the trustee of an active trust and that the ac-

tive character of a trust does not depend on the trustee's duty to accumulate the trust income. In *Whittingham v. California Trust Co.*, 214 Cal. 128, 4 P.2d 142, the trust was terminated as to one-third of the share of one of the beneficiaries. The trustees were charged with the management and control of the trust estate, the corpus of which consisted of a large number of mortgages, trust deeds, and mortgage guaranty certificates.

It is clear not only that the foregoing cases involved active trusts, but, as is evident from the quotation in *Eagle v. Ingram*, supra, from *Underhill on Trusts and Trustees*, and the original context of the quotation, that the court had no doubt that active trusts could be terminated upon equitable grounds before the expiration of the period fixed in the trust instruments.

The majority opinion regards the *Whittingham* case as illustrative of a limited class of cases "in which the court, under certain circumstances, may *modify* the terms of the trust, increase or reduce the trustee's powers, and direct advances of income or principal to the beneficiaries." There is no essential difference, however, between a modification of a trust by reducing the period provided for its existence and other modifications of important provisions. The court in the *Whittingham* case made no differentiation between the partial termination of a trust and its complete termination. On the contrary, relying on *Moor v. Vawter*, supra, and *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 187 P. 425, it based its decision on the court's power to terminate trusts on equitable grounds.

Plaintiff has adduced equitable grounds for the termination of the trust, which are sufficient in my opinion to allow her to go to trial. The facts are simple. A mother who lived separately from her husband, a successful businessman, made a testamentary trust to provide for the future security of her fifteen-year-old daughter, then living with her. There was then the possibility that this trust would be the only source of the daughter's future security. The father's wealth was subject to the contingencies of his business: he might remarry and in his will provide for others than his daughter. Had this situation remained unchanged, the continuation of the trust might well have served the best interests of the daughter. The father, how-

ever, has died leaving property to plaintiff under a trust that makes it unnecessary for her to depend entirely on her mother's trust for future security, and her present income is insufficient to purchase and maintain a home on the scale to which she has been accustomed.

Defendant contends that even if the trust could be terminated if plaintiff were the sole beneficiary, the termination is precluded by the contingent interest of her unborn issue, who would be entitled to the trust property should plaintiff die and leave issue surviving before reaching the age of thirty-five. Plaintiff, who was 26 years old when her first amended complaint was filed in December, 1943, is without issue. She has exercised her right under the will to determine who shall be entitled to the trust fund should she die without issue before reaching the age of thirty-five years. In order to secure her unborn issue, should this trust be terminated and should she then have issue and die before reaching the age of 35 years, plaintiff has exercised in favor of her unborn issue a power of appointment given her as beneficiary of the trust created by the will of her father. Plaintiff has alleged that the value of the benefits that her issue would enjoy under this power of appointment greatly exceed the value of their interest in the present trust, and that therefore her issue would be adequately protected against any loss that might result from the termination of the trust.

A court of equity may frame its decree to suit the exigencies of the case. *Wills v. Porter*, 132 Cal. 516, 521, 64 P. 896; *California etc. Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 P. 593; *Thackrah v. Haas*, 119 U.S. 499, 502, 7 S.Ct. 311, 30 L.Ed. 486; see 10 Cal.Jur. 559; *McClintock, Equity*, 42, 255. It may make the termination of a trust conditional upon the furnishing of a fair equivalent for the contingent interests therein. In *re Colgan*, 1881, 19 Ch.D. 305: see 2 Scott, Trusts, 853. Its power in this respect is comparable to other powers affecting contingent interests. Thus a court, by approving a compromise, may diminish the contingent interest of unborn issue in a trust. *Loring v. Hildreth*, 170 Mass. 328, 49 N.E. 652; 40 L.R.A. 127, 64 Am.St.Rep. 301; *Fisher v. Fisher*, 253 N.Y. 260, 170 N.E. 912, 69 A.L.R. 918; *Copeland v. Wheelwright*, 230 Mass. 131, 119 N.E. 667; see *Mabry v. Scott*, 51

Cal.App.2d 245, 257, 124 P.2d 659. It may allow, on grounds of necessity or "high expediency," the sale of trust property in the absence of a power of sale in the trust instrument, despite a contingent interest of unborn or unascertained persons. *Mayall v. Mayall*, 63 Minn. 511, 514, 65 N.W. 942; *Beliveau v. Beliveau*, 217 Minn. 235, 14 N.W.2d 360. Courts have even approved the destruction of the contingent interest when it is "so remote, and its actual enjoyment so improbable that its retention would appear to be nothing more substantial than a film of mist."

It cannot be held that the unborn issue were not represented or that the trial court was precluded from terminating the trust because the guardian ad litem demurred to plaintiff's action. A guardian ad litem may be appointed under the inherent powers of a court of equity to safeguard the interest of unborn issue in a trust. *Mabry v. Scott*, 51 Cal.App.2d 245, 256, 124 P.2d 659, and cases there cited. He is not free to give or withhold arbitrarily or capriciously his consent to the termination of the trust; he must act reasonably in protecting the interests that he represents. At all times he is under the control and subject to the orders of the court (see, *In re Jaeger*, 218 Wis. 1, 259 N.W. 842, 99 A.L.R. 747), for "The court is, in effect, the guardian—the person named as guardian ad litem being but the agent to whom the court, in appointing him (thus exercising the power of the sovereign State as *parens patriae*) has delegated the execution of the trust." *Cole v. Superior Court*, 63 Cal. 86, 89, 49 Am.Rep. 78. The guardian ad litem in the present case opposed plaintiff's application to terminate the trust on the grounds that the contingent remaindermen were indispensable parties and that a trust cannot be terminated if there are persons yet unborn who have a contingent interest in the trust. He might not have done so had he been properly instructed. In any event, the final determination as to whether or not the contingent interest of the unborn issue would be adequately protected rests with the court.

Since the allegations of plaintiff's complaint set forth a *prima facie* case, the demurrer should not have been sustained.

GIBSON, C. J., and CARTER, J., concurred.

MIZE et al. v. DAVY et al.
Civ. 3178.

District Court of Appeal, Fourth District,
California.
Jan. 18, 1946.

1. Automobiles ⇨245(90)

Evidence that plaintiffs' automobile completed a right-hand turn at intersection and, while on its own proper side of street, collided head on with defendants' taxicab, which was being operated on wrong side of street, was not sufficient to establish that collision was caused solely by negligence of driver of plaintiff automobile. *Vehicle Code*, § 525, St.1943, p. 2173.

2. Automobiles ⇨245(60, 79)

Where automobile, after completing right turn at intersection, collided head-on with defendants' taxicab, which was on wrong side of street, questions of proximate cause and of contributory negligence of driver of automobile were for jury. *Vehicle Code*, § 525, St.1943, p. 2173.

3. Automobiles ⇨245(79)

Where street, onto which plaintiffs' automobile had just turned when struck head on by defendants' taxicab, was not equipped with curb, and grass and weeds grew out to edge of traveled portion of street, whether driver of automobile violated code section requiring automobile to be driven as close by as practical to right-hand curb or edge of roadway was for jury. *Vehicle Code*, § 525, St.1943, p. 2173.

4. Damages ⇨130(1)

\$2,500 to young man for internal injuries sustained in automobile accident was not excessive, where special damages amounted to approximately \$1,000.

5. Appeal and error ⇨1060(1)

Circumstances justifying a suspicion that counsel for plaintiff was attempting to indirectly get the matter of insurance before jury were not sufficiently prejudicial to justify a reversal, particularly where evidence on controlling questions of negligence was not so evenly balanced as to indicate probability of a different result had misconduct in question not occurred.

6. Appeal and error ⇨978(2)

On issue of misconduct of counsel, District Court of Appeal will give considerable weight to decision of trial court on motion for new trial.

7. Trial ⇨133(6)

Where it did not clearly appear that verdict was affected by alleged attempt to bring question of insurance before jury or that amount allowed suggested prejudice as a result thereof, alleged misconduct was sufficiently cured by striking out improper statements and by admonitions and instructions of court.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Oscar Mize, and by Freeman Mason, Jack Mize, Richard Mize, and Odell Mize, by and through their guardian ad litem, Oscar Mize, against A. W. Davy individually, A. W. Davy doing business as Yellow Cab Company, and others, to recover for injuries sustained by minor plaintiffs in a collision between automobile in which they were riding and a taxicab. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Hoge, Pelton & Gunther, of San Francisco, Mack, Werdel & Bianco, of Bakersfield, and Alden Ames, of San Francisco, for appellants.

Dorris & Fleharty, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action for damages arising from the collision of an Oldsmobile with a taxicab owned by the defendant Davy and driven by the defendant Jeske. The Oldsmobile was owned by the plaintiff Mize and was driven by the plaintiff Mason, who was about 18 years old. The other minor plaintiffs were passengers in that car.

The accident happened near the junction of Tulare Street and Bernard Street in the City of Bakersfield. Bernard Street runs east and west and Tulare Street comes into it from the north but ends there. At the time in question the Oldsmobile, which had been proceeding south on Tulare Street, turned to the west on Bernard Street and collided with the taxicab at a point some 25 or 30 feet west of the westerly line of Tulare Street. The taxicab was proceeding

east on Bernard Street and at the time of the accident was well over on the north or wrong side of the street.

A jury's verdict awarded \$300 to Oscar Mize for damage to his automobile, \$2500 to Mason, \$100 to Richard Mize, \$100 to Jack Mize and nothing to Odell Mize. Judgment was entered accordingly and the defendants have appealed.

[1] Although it is admitted that the driver of the taxicab was negligent in being on the wrong side of the street, it is argued that the sole cause of the accident was the negligence of Mason, the driver of the other car, and that, in any event, it conclusively appears that he was guilty of contributory negligence. That the driver of the taxicab was guilty of negligence appears beyond question. It appears from the testimony of three witnesses that as the Oldsmobile approached Bernard Street Mason slowed down to five or ten miles an hour, looked both ways, changed to second gear, and turned west on Bernard Street well to the north of the center line of that street. These witnesses testified that just after this turn was made and when they had proceeded about 25 feet on Bernard Street the taxicab suddenly came from behind a Ford car, which was approaching from the west on Bernard Street and which was then almost opposite the Oldsmobile, and that the taxicab thus suddenly appeared in front of the Oldsmobile, causing the head-on collision which occurred. The driver of the taxicab, while admitting that he was on the wrong side of the street, testified that he passed another car some 300 feet west of the point of collision and that he had not yet returned to his own side of the street when the accident happened. While there is some conflict as to how long the taxicab had been driven on the wrong side of the street there is none on the fact that it was on the wrong side of the street, and there is nothing to support the contention that the sole cause of the accident was negligence on the part of the driver of the Oldsmobile.

[2, 3] It cannot be held, as a matter of law, that the driver of the Oldsmobile was guilty of contributory negligence. In support of this contention the appellants rely on certain evidence that there were skid marks coming around the turn from the north and leading up to where the Oldsmobile stopped, and that there were certain marks in the gravel which indicated that the car making these skid marks had also skidded sideways

while making the turn. Two officers expressed the opinion that these skid marks were made by the Oldsmobile and that from observing the skid marks they would estimate that the car making them was going 30 or 35 miles an hour when it came around the corner. It is argued from this that negligence on the part of the driver of the Oldsmobile conclusively appears. Aside from the weakness of this testimony as to excessive speed in making the turn, there was positive and un rebutted evidence, based upon a comparison of the tread of the tires of the Oldsmobile with tread marks appearing in the skid marks, to the effect that these skid marks were not made by the Oldsmobile. There was also the evidence of three witnesses that this car was driven around this corner at a slow rate of speed and without getting very near the center line of Bernard Street. The matter of proximate cause also presented a question of fact for the jury. It is also argued that contributory negligence appears in that at the time of the accident the Oldsmobile was six or eight feet north of the center line of Bernard Street, it being argued that its driver was violating section 525 of the Vehicle Code, St.1943, p. 2173, in that he was not then driving as close as practicable to the right-hand curb or edge of the roadway. There is evidence that there was no curb on the north side of Bernard Street and that grass and weeds grew out to the edge of the traveled portion of the street. The driver of the Oldsmobile had proceeded but a few feet after making the turn. Aside from other considerations, it cannot be held as a matter of law that he was violating this statute. *Mathers v. County of Riverside*, 22 Cal.2d 781, 141 P.2d 419. On the record before us, the entire question of contributory negligence was one of fact for the jury and not one of law.

[4] The appellants further contend that the verdict of \$2500 in favor of Mason is excessive. In support of their contention that Mason was not seriously hurt they rely on a portion of the testimony given by some of the doctors who treated him, and on the testimony of one of the officers that immediately after the accident Mason told him that he was not hurt and that he seemed more concerned about one of the smaller boys who was unconscious.

There is evidence of special damages suffered by this respondent amounting to approximately \$1000, including loss of wages, doctor bills and hospital bills. He was 18

years old, was married and had previously been strong and healthy. It appears that the steering wheel was badly bent from contact with his body. He was treated that day at the Kern General Hospital, and was then suffering pain in his stomach, back and over his body. He was allowed to go home and three days later was taken to another hospital where he remained for nine days. The doctor who first examined him found evidence of internal bleeding, either in his stomach or in his higher intestines. There is evidence of considerable pain and sleeplessness. He was treated by a doctor several times a week for seven weeks. He was unable to work for three months and he was still suffering pain and some disability at the time of the trial, which was six months after the accident. His doctor testified that he had developed a duodenal ulcer as a result of the injuries he received in this accident; that this might or might not heal in time and with proper care and diet; that it would require diet and care; and that the sort of diet required would interfere with a man working at physical labor, as this respondent was, since such a person could not eat as much as he needed to keep up his strength. The evidence, although conflicting, is ample to support the amount in question, and it cannot be held that it is so excessive as to indicate that it was the result of passion or prejudice on the part of the jury.

Finally, it is contended that counsel for the respondents, by repeated reference to the subject of insurance companies, was guilty of misconduct which was sufficiently prejudicial to require a reversal. Four instances are cited as supporting this charge: 1. In his opening statement counsel for the respondents, after describing the accident said: "and after the accident, while he was still there, Mr. Murray, from the Adjustment Bureau—" Counsel for the appellants then interrupted, objecting "to any reference to Mr. Murray or any insurance company." He also assigned the matter as prejudicial error and made a motion for a mistrial. The court denied the motion for mistrial but instructed counsel for the respondents to omit such references from his statement. Counsel then stated that "There was a person there" and that this person took Mason and one of the other boys to the Habberfelde Building and kept them there about two hours and fifteen minutes. This was cited as prejudicial error and another motion made for a mis-

trial. The court denied this motion but instructed counsel to leave these matters out saying "The conversations they had in the meantime has nothing to do with it." 2. During his testimony respondent Mason was asked by his counsel where he went after the accident and how he got there. An objection was made and sustained unless the witness wanted to testify that they took him to a hospital. The witness then said that he went to a hospital that evening "but before I went to the hospital—" The court interrupted saying "That answers it." Counsel for the respondents then asked: "You went to the hospital, what time?" The witness replied: "After they turned me loose." Counsel for the appellants moved to strike the answer, assigned it as misconduct, and asked that the jury be admonished to disregard it. The court struck out the answer but did not admonish the jury at that time. 3. While the respondent Oscar Mize was on the stand he stated in response to a question that he first saw his son two and one-half hours after the accident. He was asked "Where was he then" and replied: "Well, he was in the Yellow Cab Insurance Company car. They had brought him back from—" Counsel for appellants assigned this as misconduct on the part of the attorney for the respondents and as prejudicial error, and moved for a mistrial. The court denied the motion for a mistrial, admonished the jury not to regard anything that had been said regarding an insurance company, stated "There is no insurance company in this case," and then said that he did not think that counsel anticipated this answer. Counsel for respondents then replied: "No I didn't, Your Honor." 4. In his argument to the jury counsel for respondents said: "Now, in insurance cases that doctor is paid by the State—" Counsel for the appellants interrupted assigning "Counsel's repeated reference to insurance doctors as prejudicial error and misconduct" and moved for a new trial. The court instructed the jury to disregard any statement about insurance and counsel for the respondents then said: "I am just illustrating a class of cases, not this case."

In the first instance, counsel for respondents mentioned someone from an adjustment bureau and counsel for the appellants first mentioned an insurance company. It was then stated that someone had taken the two boys to the Haberfelde Building and kept them there over two hours. The court instructed counsel for respondents to

omit these matters, stating that any conversations during this time had nothing to do with the case. In the second instance, the respondent Mason volunteered the statement that he went to the hospital "after they turned me loose." The judge struck out the statement saying that the witness "probably doesn't know any better." In the third instance the respondent Oscar Mize improperly stated that he saw his son in an insurance company car. It does not certainly appear that this was designed by respondent's counsel and the court immediately admonished the jury not to regard anything that had been said regarding an insurance company, adding that there was no insurance company in this case. In the fourth instance a reference was made to insurance doctors in industrial accident cases, by way of illustration, and the court again instructed the jury to disregard any statements about insurance. In his final instructions the court instructed the jury not to consider remarks made by counsel as evidence, to disregard any evidence which had been stricken, and to decide the case solely on evidence which had been admitted by the court. Another instruction read as follows: "The question of insurance has been mentioned in this case. I instruct you that this is a case between the plaintiff on one hand, and the defendants on the other. No insurance company is a party to or interested in this action."

It is hard to understand why counsel will persist in jeopardizing good cases in this way. If counsel alone could be punished the answer would be easy.

[5-7] While counsel's conduct in this regard is not to be commended and while it justifies a suspicion that he was attempting to indirectly get the matter of insurance before the jury, it cannot be here held, under established law, sufficiently prejudicial to justify a reversal. The evidence on the controlling questions of negligence was not so evenly balanced as to indicate the probability of a different result had the misconduct in question not occurred. *Baker v. Rodriguez*, 41 Cal.App.2d 58, 105 P.2d 1018, and cases there cited. The matter was presented on a motion for a new trial and the court's decision thereon is entitled to considerable weight here. *Mullanix v. Basich*, 67 Cal.App.2d 675, 155 P.2d 130. It does not clearly appear that this verdict, in whole or in part, was affected by this matter or that the amount allowed suggests prejudice as a result thereof. *Shriver*

v. Silva, 65 Cal.App.2d 753, 151 P.2d 528. It cannot be held that such misconduct as here appears was not sufficiently cured by the striking out of certain evidence and by the admonitions and instructions of the court. *Nagamatsu v. Roher*, 10 Cal.App.2d 752, 53 P.2d 174.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



72 Cal.App.2d 602

PEOPLE v. MILLER.

Cr. No. 3921.

District Court of Appeal, Second District,
Division 3, California.

Jan. 18, 1946.

1. Assault and battery ☞69

The owner of property is justified in using force or a deadly weapon to eject a trespasser only when it is manifest to one, as a reasonable person, that injury is contemplated, but owner is then entitled to use only such force as is reasonably necessary to repel attack or to protect property.

2. Assault and battery ☞92

Evidence was sufficient to sustain conviction for assault with caustic chemicals on ground defendant used excessive force in ejecting intruders. Pen.Code, § 244.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Evelyn Miller was convicted on two counts charging her with committing an assault with caustic chemicals, and she appeals.

Affirmed.

Crispus A. Wright, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

DESMOND, Presiding Justice.

Defendant, in a jury-waived trial, was found guilty upon two counts charging her with committing an assault with caustic chemicals, as defined in section 244, Penal Code, upon two soldiers who called at her house at about 2 o'clock a. m. on December 13, 1944. She appeals from both judgments on the ground of insufficiency of the evidence to support the convictions. We shall, therefore, summarize the evidence which, in our opinion, amply supports the convictions.

It appears without dispute that the two soldiers, under the influence of liquor, traveled in a taxicab from downtown Los Angeles to the home of the defendant in the southerly part of the city. They went onto the porch of the appellant's house, rang the doorbell and knocked upon the door. After a few minutes a woman's voice, coming from the inside of the house, said: "Go away or I will shoot you. * * *" One of the soldiers, in his testimony, identified the voice as belonging to the defendant and testified that instead of going away they continued to knock upon the door for several minutes, rang the bell, but denied having kicked the door. They stated that they turned the knob of the door but did not try to force it open. The taxi-driver testified that he saw the soldiers enter the porch and heard them knock vigorously, one of them saying, "in a pleading, persuading tone of voice, 'That is all right, Honey, we have got lots of money, and you can take both of us. Come on, Baby, let us in. We were here and drank beer before.'"

According to the appellant, after her door bell rang she looked out and saw the soldiers staggering around and recognized them as two men who had been there three days previously. She turned on the porch light and asked what they wanted and they said they wanted to see "Maxie" or "Maisie." She informed them that no one by that name lived there, told them to go away, and then turned off the light. The soldiers, however, remained upon the porch, ringing the doorbell, pounding upon the door and, finally, according to appellant, one of them said: "Let's go in; she is in there by herself, and we have been here too long, and nobody has seen us and nobody will know we are going in." One of the soldiers, according to appellant, then said: "If you shoot us, you will hang before sun up." She further testified that when one of the soldiers kicked the lock, she went into the bathroom

where she found a wash basin containing water, soap powder and Purex, as well as a can containing lye. She testified: "I happened to think about this lye, and I took it out and the little can of lye was about three-fourths full and I only put about one-fourth in the pan of water, and then I went to the door." By this time, appellant continued, the noise had stopped and she thought the soldiers had gone, but when she turned on the porch lights someone exclaimed, "'She is there, and we are going to get in'"; that she immediately opened the door, hurled the solution at the soldiers, quickly closed the door and turned off the light. After the soldiers ran out to the street calling "Taxi," appellant returned to bed.

The taxi driver testified that he saw "something like a flash" on the porch and saw one of the soldiers staggering down the steps; that the other soldier then grabbed him by the arm, brought him toward the cab and shouted, "'Cabby, get a doctor, or get us to the hospital.'" Upon being asked about the condition of the soldier who was grabbed by the arm and led toward the cab, he said, "He was screaming at the top of his voice, as though he was insane, and was hollering, 'What is the matter with you? Can't you drive this car? Why don't you get going?'" The taxi driver testified that he stopped at a hotel displaying a neon sign and that it was the first place that looked as though it were open; that he and his two passengers went upstairs and in the men's lavatory; that the soldiers undertook to wash their faces; that one of them "had a very slick look and his lips were puffed up and all swollen looking." From the hotel they then went to the Georgia Street Receiving Hospital where the taxi-driver saw one of the soldiers placed upon the table and, upon his eyelids being rolled back, saw that the "eyeballs were black or a kind of slate color." He also noticed that the other soldier had a burned spot on his neck.

Two police officers, who were in the receiving hospital when the soldiers were admitted, were directed to investigate their case. One of them, being called to the witness stand, testified that: "The faces of both of them were burned. They were flushed and pitted with black marks from the solution that was on their faces. Q. What did you notice particularly as to——'s [naming one of the soldiers] condition? A. His eyes were closed, and while the doctor was treating them, I took

hold of the eyelid and raised it so I could see the right eyeball, and at that time it resembled a hardboiled egg with the shell taken off. It was completely white and seared. * * * The other eye was damaged slightly on the extreme left side. * * * The lids were swollen and red. * * * His mouth was swollen and there were spots that were all black where he had received severe burns." The two officers then went out to the house where the soldiers had been refused admittance. According to one of these officers, the defendant stated that she had tried to get the soldiers to go away; that they would not go; that she went and got this solution, fixed it up, brought it to the door and threw it at them to get rid of them. The appellant, upon being asked by the officer whether she knew that the solution would harm the parties, answered, "'Sure, that is what I wanted to do.'" He stated also that "We asked her why she took such severe measures when she had ample help in the house. There were seven other people besides herself." Among these, according to the officers, were two colored men, each of whom they found in bed with a woman. The appellant, however, said, "she did not want to bother anybody else." Upon being taken to the police station, the defendant made and signed a written statement, which is reproduced in the record and from which it appears that she threw the caustic solution upon the soldiers, saying, "I was afraid; I didn't know what they were going to do. So that was the only way I knew how to get them out quick, I was afraid." She stated that two men were in her house at the time. Being asked why she did not call them to her assistance, she replied, "Because they were using such nasty language. I figured in that case a woman could handle it better than a man. Usually civilian men and soldiers don't get along, particularly when they are of a different color." Upon being asked whether she knew that the caustic solution would probably produce serious injuries, she answered, "No, it never had hurt me. I use it practically every day, getting grease off the floor and so on," and further stated that she used the lye because "I knew that would make them leave. Because it gives them the itch and they would scratch and would look for something. I knew they would go away." She also stated that she had seen one of the soldiers about three days prior to December 13th, at which time he and an-

other soldier had come to her home at about 5:30 in the morning and that on that occasion "I bluffed them away. I told them I was going to shoot them and one said 'let's go' and the other he said he didn't know whether he ought to go or not, that must have been the tall one as this one (pointing * * *) came off the steps and started around towards the front."

The soldier just indicated was called in rebuttal and testified that he had been at appellant's house on three occasions. The first of these was on the morning of December 2nd, when he was alone, and observed a woman named "May" in the company of a sailor. As to the two other occasions, he testified as follows:

"Q. Did you at any time go to a back window and try to get in or pull the screen off of the window three days before that time? A. On the morning of the 9th, Sunday morning, I and another fellow * * * went out there and I went out there because I remembered the place. I did not do anything at first. We went out there and knocked on the door and nobody answered. We asked for Maisie and did not get any answer. Somebody told us to get away or they would shoot us, so I said, 'Let's go,' and this other fellow that was with me, he was very tall, as she described him, and then we went away.

"Q. Did either of you go to the back? A. Yes, he wanted to go around to the back, and I went with him and knocked on the screen door, but we did not tear it off.

"Q. Did either of you attempt to pull it off? A. No.

"Q. Did you on the morning of December the 13th kick or hit the lock or the door and try to open it or not? A. We turned the knob, but we did not try to force it.

"Q. Did you at any time make any statement that you aimed to get in whether they liked it or not? A. Not that I recall."

[1] The People concede that the soldiers who went upon appellant's porch on December 13th were trespassers and that they were given notice to get off the premises; they also concede that the owner of property has the right to use necessary force to prevent a forcible trespass, but contend that in this case it was not necessary for appellant, in order to rid her premises of the presence of the soldiers, to resort to the force which she employed. They

rely upon the principle stated in the recent case of *People v. Corlett*, 1944, 67 Cal.App. 2d 33, at page 51, 153 P.2d 595, 603, namely: "that the owner of property is justified in using force or a deadly weapon to eject a trespasser only *when it is manifest to one, as a reasonable person*, that injury to the property is contemplated, and that the owner is then entitled to use only such force as is *reasonably necessary* to justify the attack or to protect the property." See, also, *People v. Teixeira*, 1899, 123 Cal. 297, 55 P. 988, where the court, speaking of the defendant, said, 123 Cal. page 299, 55 P. page 989: "In law he was only entitled to use that amount of force necessary for the protection of his property." In *People v. Hubbard*, 1923, 64 Cal.App. 27, 220 P. 315, this appears, 64 Cal.App. page 35, 220 P. page 319: "The person who is acting in defense of his habitation must first use moderate means before resorting to extreme measures. But he may resist force with force, increasing it in the ratio of the intruder's resistance, without measuring it in golden scales; and whether he has used excessive force or not is a question for the jury. 'The question of the amount of force justified in repelling an assault *or maintaining the possession of property* (italics ours) is one peculiarly within the province of the jury.' *Fawkes v. Reynolds*, 190 Cal. 204, 211 P. 449."

[2] In the instant case there was no jury and, the trial judge was called upon to determine whether excessive force was used by the appellant. He knew that when the soldiers asked to be admitted there were at least seven persons, other than appellant, in her house, two of them being men, and that their presence would have been some guarantee of appellant's safety even if entry had been effected. He was in a position, from the evidence before him, to determine what kind of an establishment appellant maintained and to conclude that she was not so much afraid of any injury to herself or her property as she was anxious to get rid of her callers who were unwelcome at that particular time. It is apparent that they were making nuisances of themselves, but we cannot say that the trier of the facts erred when he concluded that the appellant used excessive force when she opened the door of her house and threw the caustic liquid in the faces of the soldiers.

The judgments are affirmed.

SHINN and WOOD, JJ., concur.

72 Cal.App.2d 629

ROLANDO v. EVERETT et al.

(Miller, Intervenor).

Civ. 7176.

Sac. 5732.

District Court of Appeal, Third District,
California.

Jan. 22, 1946.

1. Acknowledgment § 6(1), 29

Certificate of acknowledgment of chattel mortgage executed by a partnership in the general form provided by statute for certificates of acknowledgment unless otherwise provided, was not substantially in the form provided by statute for certificate of acknowledgment of an instrument executed by a partnership and hence chattel mortgage was not entitled to recordation and, though recorded, it did not constitute notice to attaching creditors. Civ.Code, §§ 1161, 1189, 1190a.

2. Acknowledgment § 6(1)

Where chattel mortgage executed by partnership, though recorded, lacked valid certificate of acknowledgment by partnership, judgment creditor purchasing chattels included in mortgage at execution sale on judgment against partnership based on indebtedness owing judgment creditor before mortgage was executed, became owner of such chattels unencumbered by lien of mortgage, regardless of whether judgment creditor had actual notice of mortgage and even though mortgagee in action to foreclose mortgage had caused a keeper to be placed in charge of mortgaged chattels before execution sale. Civ.Code, §§ 1161, 1190a, 2957, 2973.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Joseph Rolando, doing business under the firm name and style of Rolando Lumber Company, against Lyle B. Everett and another, individually and as copartners doing business under the firm name of Everett McEachern Lumber Company, to foreclose a chattel mortgage, wherein Edward Miller intervened, claiming some of the chattels included in the mortgage by virtue of purchase thereof at an execution sale on a judgment in action against the Everett McEachern Lumber Company. Plaintiff was given judgment

for balance due on his note and the property included in chattel mortgage, other than that sold to intervener was ordered sold to satisfy mortgage debt, and plaintiff appeals.

Judgment affirmed.

Hill & Hill, of Eureka, for appellant.

E. S. Mitchell, of Eureka, and Thelen, Marrin, Johnson & Bridges, of San Francisco, for respondents.

ADAMS, Presiding Justice.

On January 16, 1943, plaintiff Rolando lent \$5,000 to Everett McEachern Lumber Co., a copartnership consisting of Lyle B. Everett and J. L. McEachern. A promissory note evidencing the indebtedness was executed and delivered to plaintiff. Thereafter and on August 2, 1943, a chattel mortgage on certain described equipment belonging to the copartnership was executed. It recited that it was "By Lyle B. Everett and J. L. McEachern, copartners by occupation Lumbermen, mortgagors, to Rolando Lumber Company, by occupation Lumber dealers, mortgagee." It was signed "J. L. McEachern For Everett-McEachern Lumber Co. A Copartnership," and bore a certificate of acknowledgment which read: "On this 2nd day of August in the year of our Lord one thousand nine hundred and forty-three, before me, Lewis H. De Castle, a Notary Public * * * personally appeared J. L. McEachern known to me to be the person described in and whose name is subscribed to the within instrument and acknowledged to me that he executed the same." Said mortgage was recorded on September 1, 1943.

On January 26, 1944, plaintiff brought this action to foreclose the aforesaid chattel mortgage, only \$1,000 having been paid upon the note. A keeper was placed in charge of the property mortgaged. Defendants defaulted, but Edward Miller, with permission of the court, filed a complaint in intervention seeking to quiet title to certain of the chattels which had been included in the chattel mortgage, alleging that he had become the owner of same about March 27, 1944, by virtue of an execution sale on a judgment in an action against the Everett McEachern Lumber Company brought by him in Mendocino County. Miller also filed an answer to plaintiff's complaint, admitting the execution of the chattel mortgage, but denying

that it was made in good faith without intent to defraud creditors. Plaintiff filed an answer to the complaint in intervention denying the allegations of the same. After trial of the issues, by the court sitting without a jury, findings were made and filed in which the execution of the mortgage was recited, but it was found that it did not bear the acknowledgment required by Section 1190a of the Civil Code of the State of California. It was further found that Miller had purchased at execution sale the articles claimed by him and that he, "by reason of such Execution Sale and by reason of the fact that no legal partnership acknowledgment has been had on said Chattel Mortgage, became the owner of said property so purchased under said Execution Sale." Plaintiff was given judgment for the balance due on his note, and the property included in the chattel mortgage, other than that sold to intervenor, was ordered sold to satisfy the mortgage debt.

Plaintiff has appealed from said judgment, contending first that the certificate of acknowledgment of the mortgage was sufficient.

Section 1190a of the Civil Code provides that the certificate of acknowledgment of an instrument executed by a partnership "must be substantially" in the following form:

"On this — day of —, in the year —, before me (here insert the name and quality of the officer), personally appeared —, known to me (or proved to me on the oath of —) to be one of the partners of the partnership that executed the within instrument, and acknowledged to me that such partnership executed the same."

It is apparent that the certificate appended to the mortgage is in the general form provided for in Section 1189 of the Civil Code, which section provides:

"The certificate of acknowledgment, *unless it is otherwise in this article provided*, must be substantially in the following form:

"'State of —, county of —, ss. On this — day of —, in the year —, before me (here insert name and quality of the officer), personally appeared —, known to me (or proved to me on the oath of —) to be the person whose name is subscribed to the within instrument, and acknowledged that he (she or they) executed the same.'" (Italics ours.)

[1] While appellant concedes, as he must, that the certificate upon which he relies is not in the form provided in Section 1190a, he contends that it is "substantially" the same and that even assuming that the certificate was defective the mortgage was recorded and such recordation was sufficient to give respondent notice. But it is obvious from the language used in Section 1189, and the fact that a different form of certificate of acknowledgment by a partnership is prescribed, that it cannot be said that the one form is substantially the same as the other. Appellant cites cases in which forms of certificates of acknowledgment used were held to comply substantially with statutory requirements, and cases which hold that a certificate is to be sustained wherever it can be done by a fair and reasonable interpretation of the statute. But in none of the cases cited by him was it held that the substitution of one statutory form of certificate for another constitutes substantial compliance. It was said in *Kahriman v. Jones*, 203 Cal. 254, 255, 263 P. 537, that the provisions of the Civil Code relating to chattel mortgages should be strictly construed. If the use of the form prescribed in Section 1189 were to be held to be substantial compliance with the form prescribed by Section 1190a, then the latter section would be rendered entirely superfluous. Also see *Wolf v. Fogarty*, 6 Cal. 224, 65 Am.Dec. 509, *Kelsey v. Dunlap*, 7 Cal. 160, and *Malloye v. Coubrough*, 96 Cal. 649, 31 P. 622, in which certificates of acknowledgment were held insufficient to admit instruments to record or to operate as notice to third parties.

Appellant further argues that respondent had actual notice before he purchased at the execution sale; that as under Section 2973 of the Civil Code a defective mortgage of personal property, though not made in conformity with statutory requirements, is nevertheless valid between the parties and persons who before parting with value have actual notice thereof, the mortgage was valid as to respondent; and, finally that since he had caused a keeper to be placed in charge of the property before its seizure under the execution on Miller's judgment, he had taken the mortgaged property into his possession, and, in effect, transformed his invalid mortgage into a valid one giving him priority over Miller as an attaching creditor.

Respondent's reply to these arguments is that he did not have actual notice until

the foreclosure proceeding was commenced; that the certificate of acknowledgment being defective the mortgage was not entitled to recordation, Civ.Code, Sec. 1161, and even though recorded was ineffective as to him; and that, as he extended credit to the partnership before and subsequent to the execution and the recording of the mortgage it is, as to him, entirely void regardless of whether he had actual notice of it prior to this proceeding, citing *Old Settlers Investment Co. v. White*, 158 Cal. 236, 240, 110 P. 922.

The evidence amply supports the contention that the copartnership was indebted to respondent at the time the mortgage was executed and that such indebtedness was still unpaid when plaintiff began this action. It was for such indebtedness that respondent secured the judgment in Mendocino County upon which execution was issued and the sale to him was made. Whether or not he knew of the existence of the said mortgage before he purchased at the execution sale is not clear from the evidence. The pleading presents no specific issue as to whether intervenor had knowledge of the existence of the mortgage, or if he had, when he acquired such knowledge; and no finding regarding knowledge was made or requested.

[2] In support of his contention that, regardless of notice, the chattel mortgage was invalid as to him by reason of the defective certificate of acknowledgment, respondent cites *Cardenas v. Miller*, 108 Cal. 250, 39 P. 783, 41 P. 472, 49 Am.St.Rep. 84; *Bishop v. McKillican*, 124 Cal. 321, 57 P. 76, 71 Am.St.Rep. 68, *Noyes v. Bank of Italy*, 206 Cal. 266, 274 P. 68, and *Bank of America v. Sampsell*, 9 Cir., 114 F.2d 211. In the *Cardenas* case, 1895, a chattel mortgage upon a growing crop of barley was executed March 11, 1892, by one Drennan in favor of Cardenas. It was not recorded until June 28, 1892. At the time of its execution Drennan was indebted to Miller on a promissory note. Miller sued thereon and caused an attachment to be levied upon Drennan's interest in the crop on June 23, 1892 (prior to the recordation) and a keeper was placed in charge of the crop by the sheriff. At that time Miller had actual notice of the mortgage, though it was not yet recorded. Plaintiff Cardenas, claiming the right so to do under his mortgage, harvested and sacked the barley. Miller thereafter took possession of it.

The question was, did the lien of the attachment have priority over that of the mortgagee when the lien claimant had actual notice of the mortgage. The court said that Section 2957 of the Civil Code makes a clear distinction between creditors and subsequent mortgagees—that as to creditors the unrecorded mortgage was void without qualification, and as to them the question of actual notice was wholly immaterial; and that, since the attachment antedated the recordation of the mortgage, the mortgagee was not protected as against the attaching creditor. No defect in the mortgage was there relied upon, but since in the case before us the certificate of acknowledgment was so defective that the mortgage was not entitled to recordation, Civil Code, Sec. 1161, the situations in the two cases are the same.

In *Bishop v. McKillican*, 1899, *supra*, a mortgage covering both real and personal property was recorded as a real estate mortgage; but it contained no affidavit and was not recorded as a chattel mortgage as required by the Civil Code. A creditor of the mortgagor afterwards brought suit against said mortgagor and caused an attachment to issue under which the sheriff (McKillican) seized some of the personal property included in the mortgage. In an action to foreclose the mortgage Bishop was named receiver for the mortgagor with authority to continue its business. In an action to test the sheriff's right of possession the court held that under Section 2957 of the Civil Code the mortgage was void as to the attaching creditor as far as the personal property was concerned; and judgment for the sheriff was affirmed.

In *Noyes v. Bank of Italy*, 1929, *supra*, defendant bank, in 1921 and 1922, lent one Petrich a large sum of money, of which about \$8,000 remained unpaid on March 23, 1923. On that date Petrich gave the bank a promissory note for the unpaid balance and a chattel mortgage covering personal property. The mortgage was filed for record on March 26, 1923, but was defective in that it lacked a certificate of acknowledgment. On July 28, 1923, the bank, assuming to act under the terms of the mortgage, took possession of the property and caused same to be sold as pledged property on August 28, 1923, at which time it bought it for \$3,000, there being no other substantial bids. On August 10, 1923, an involuntary petition in bankruptcy had been

filed against Petrich. He was adjudged a bankrupt on October 22d, and plaintiff Noyes was appointed trustee of his estate. Noyes thereupon demanded of the bank possession of the personal property in question, and being refused, brought this action. At the trial admission of the mortgage in evidence was refused, and the question before the Supreme Court was the validity of this ruling in view of Section 2957 of the Civil Code, the respondent claiming that the mortgage was void as to creditors. The court sustained this contention, saying, 206 Cal. at pages 268, 269, 274 P. at page 69: "We think the position of the plaintiff is well taken. Section 2957 of the Civil Code provides: 'A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless: * * * 2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property.' It is a conceded fact in this case that said chattel mortgage was not acknowledged as required by the Code section, and was void to the extent therein provided. As applied to the facts in the present case, the said mortgage under the plain intent of the statute was 'void as against creditors of the mortgagor,' Petrich, and must be so declared unless some one of the considerations urged by the defendant would require a contrary conclusion."

However in that case it was insisted by appellant that none of the creditors of Petrich were in a position to attack the mortgage, it not being shown that any of them were creditors who had acquired a lien upon the mortgaged property by virtue of some legal proceeding or who had come armed with some process authorizing seizure of the property; and that a mere creditor at large could not attack the mortgage. The court said, 206 Cal. at pages 269, 270, 274 P. at page 70:

"* * * It is urged that the case of *Loosemore v. Baker*, 175 Cal. 420, 166 P. 26, citing *Ruggles v. Cannedy*, 127 Cal. 290, 53 P. 911, 59 P. 827, 46 L.R.A. 371, is directly in point and is controlling here. We think a sufficient answer to the contention lies in the fact that whatever the status of the creditors may be in this case, the Bankruptcy Act has supplied the deficiency which the defendant claims to have existed and has vested the trustee in bankruptcy with all the rights, remedies, and powers of

a judgment creditor holding an execution duly returned unsatisfied.

* * * * *

"Even if it be assumed that a mortgage void as to creditors pursuant to the plain terms of the statute could be transformed into a valid mortgage by the mortgagee's seizing the mortgaged property or by otherwise taking possession of the same with the consent of the mortgagor and thus shut out general creditors or creditors not possessing a lien or armed with process, yet we are satisfied that it was the intention of the Bankruptcy Act to safeguard the rights of such general creditors by giving the trustee the status of a lien creditor and also to prevent the mortgagee from defeating the rights of the creditors of the bankrupt by contending that such creditors were general creditors only. * * * In other words, the trustee was intended to be placed in the position of a lien creditor who would, but for the bankruptcy proceeding, be entitled to attack the alleged void mortgage and to enable him to protect the interests of general creditors against invalid liens, unlawful transfers, etc."

In *Bank of America v. Sampsell*, 1940, supra, the bank made a loan taking as security a chattel mortgage on 11 automobiles. The mortgage was not filed with the Department of Motor Vehicles and the mortgagee registered as owner of the cars, as required by Section 195 of the Vehicle Code, St.1935, p. 118, until January 26, 1939, on which date the bank obtained possession of and sold 10 of the automobiles. On February 1, 1939, the mortgagor was adjudicated a bankrupt and thereafter Sampsell, trustee in bankruptcy, secured an order for the bank to show cause why the mortgage should not be declared invalid. After a hearing an order issued adjudging the mortgage to be void and authorizing the trustee to sell the cars free of any lien. The question on appeal was whether the failure to comply with Section 195 of the Vehicle Code rendered the mortgage invalid as against the trustee as the representative of creditors who became such prior to compliance with the section. The court held that it did, saying that "in California, a creditor may attack his debtor's mortgage even though he is unable to perfect a lien until after the mortgage has been recorded *or the mortgaged property has passed into the hands of the mortgagee*," [114 F.2d 213] citing *Ruggles v. Cannedy*, 127 Cal. 290, 53 P. 911, 59 P.

827, 46 L.R.A. 371, *Noyes v. Bank of Italy*, supra, *Chelhar v. Acme Garage*, 18 Cal. App.2d Supp. 775, 61 P.2d 1232.

In support of his contention that since he had caused a keeper to be placed in charge of the mortgaged property prior to its seizure and sale under Miller's execution he had obtained priority over Miller, appellant relies upon *Adlard v. Rodgers*, 105 Cal. 327, 38 P. 889, 890. In that case a mortgage, though recorded, was not acknowledged, proved or certified as required by Section 2957 of the Civil Code, and the court said it was void as against attaching creditors "unless plaintiff [assignee of the mortgagee] had reduced the property to possession." The evidence showed that plaintiff had been given possession of the key to the premises where the property was stored, had locked the door and posted thereon a notice that he was in possession of the property therein contained. The following day, defendant, as constable, attached the property in an action by a creditor of the mortgagor. The court said, 105 Cal. at page 334, 38 P. at page 891, that, "Plaintiff's mortgage was valid, as between himself and the mortgagors. It provided for possession by the former upon nonpayment. Default was made, and he took possession. As against attaching creditors, such possession was valid."

Respondent, however, contends that the *Adlard* case is overruled by *Ruggles v. Cannedy*, supra, and *Loosemore v. Baker*, supra. In the former case apparently no mention was made of *Adlard v. Rodgers* by either court or counsel. However, in *Loosemore v. Baker* the mortgagee of personal property was in possession thereof with the consent of the owner under a chattel mortgage which was never recorded. The mortgagor became indebted to another party subsequent to the giving of the mortgage, and after the mortgagee had taken possession this creditor attached the chattels in the possession of the mortgagee. The court said, 175 Cal. at page 422, 166 P. at page 27: "The judgment giving priority to the lien of the attachment under these facts comes strictly within the decisions of this court in *Ruggles v. Cannedy*, 127 Cal. 291, 53 P. 911, 59 P. 827, 46 L.R.A. 371, and *Alferitz v. Scott*, 130 Cal. 474, 62 P. 735. If it is thought that anything to the contrary to these decisions is held in *Adlard v. Rodgers*, 105 Cal. 327, 38 P. 889, it must be considered as superseded by the later decision of the court in

bank above cited. *Lemon v. Wolff*, 121 Cal. 272, 53 P. 801, also relied on by appellant, contains nothing bearing upon this case. It declares the sound and familiar principle that even a chattel mortgage void for lack of recordation or void for defective verification and acknowledgment may still be good between the parties, and that a mere creditor at large is not in a position to attack it, it being said that: 'Only a creditor who has acquired a lien upon the mortgaged property by virtue of some legal proceeding, or who is armed with some process authorizing seizure of the property, can question the compliance with these formalities.' In this case the creditor had acquired a lien and was armed with process."

In *Chelhar v. Acme Garage*, supra, Beyer, the mortgagee of an automobile, had taken possession of same under a chattel mortgage that had not been deposited with the Motor Vehicle Department as prescribed by the Vehicle Code. *Chelhar* obtained a judgment against the mortgagor and caused an execution to issue, and the car was seized from the mortgagee. The latter filed a third-party claim, and after a hearing the trial court held title to be in the said mortgagee. On appeal to the Appellate Department of the Superior Court this order was reversed. In the opinion written by the very able Judge Walter Perry Johnson, he said that there was conflict in the decisions as to the right of priority of a judgment creditor of a mortgagor who levies execution after the mortgagee, under an unrecorded mortgage, and has taken possession of the mortgaged property; that while it had been held in *Adlard v. Rodgers* that in such case the mortgagee in possession had priority, that that case had been overruled in effect by *Loosemore v. Baker*, supra. He cited *Ransom & Randolph Co. v. Moore*, 272 Mich. 31, 261 N.W. 128, in which the *Loosemore* case was followed; also *Stephens v. Perrine*, 143 N.Y. 476, 39 N.E. 11, and *Wilkinson, Gaddis & Co. v. Bohlen*, 88 N.J.L. 680, 97 A. 279; and the conclusion was that the chattel mortgage was invalid as against the creditor, and that Beyer's possession before sale did not enlarge or perfect his asserted lien or add to his title as against an execution creditor. Also see *In re Steffens*, 31 F.2d 660, 662, 63 A.L.R. 589 (citing *Stephens v. Perrine*, supra); *Timmer v. Talbot*, D.C., 19 F.Supp. 687, 689 (affirmed in *Lemmen v. Timmer*, 6 Cir.,

89 F.2d 1011); In re Shay's Estate, 157 Misc. 615, 285 N.Y.S. 379, 381, and Col-lateral Finance Co. v. Braud, 298 Ill.App. 130, 18 N.E.2d 392, 395, 396, citing Ruggles v. Kennedy and Chelhar v. Acme Garage, supra.

In view of the foregoing decisions the judgment of the trial court should be and it is hereby affirmed.

PEEK and THOMPSON, JJ., concur.



PARKER et al. v. SHELL OIL CO.*
Civ. 12963.

District Court of Appeal, First District,
Division 2, California.

January 22, 1946.

Hearing Granted March 21, 1946.

1. Limitation of actions ⇨178

The identity of amounts sued for in two counts of complaint does not in itself establish that the two causes of action are identical as respects bar of statute of limitations.

2. Limitation of actions ⇨29(2)

Trial ⇨365(3)

Where first count of complaint stated a cause of action for rent, second count stated a cause of action upon an open, mutual, and current account which jury determined in answer to a special interrogatory was not based solely upon rent item, but plaintiffs failed to sustain their burden of pointing out specifically what other items were included and evidence indicated that second count actually was for rent sought in first count and recovery under first count was barred by limitations, recovery under second count was also barred. Code Civ.Proc. § 337, subd. 2.

3. Appeal and error ⇨1097(1)

Statement of District Court of Appeal on former appeal became the law of the case and was binding upon a subsequent appeal, particularly where statement could not be classed as obiter dictum in light of reference to issue as major contention of one of the litigants.

* Subsequent opinion 175 P.2d 838.

4. Evidence ⇨417(1)

Where plaintiff alleged a cause of action upon an open, mutual, and current account, court properly excluded reference to written lease between the parties by which plaintiff sought to explain items of account on ground that such procedure would constitute more than an explanation and would actually lead to addition by parol evidence of an item not appearing in records upon which plaintiffs base their claim of an open account.

5. Account, action on ⇨6(5)

A recovery will not be permitted where an open account is alleged if the right of action is based upon an express contract which does not constitute an item of the account.

6. Limitation of actions ⇨29(2)

A party cannot extend a period of limitation by purporting to rely on a book account and then, by process of calculation based thereon, seek to establish an amount due under the terms of an agreement that bears no relation to book account when direct enforcement of agreement is barred by limitations. Code Civ.Proc. § 337, subd. 2.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Ben Parker and Della Parker against Shell Oil Company to recover rent for a gasoline service station and to recover a balance due on an open, mutual, and current account. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Bernal & Bernal and Edward E. Craig, all of Berkeley, for appellants.

McCutchen, Thomas, Matthew, Griffiths & Greene, of San Francisco, and Sherrill Halbert, of Modesto, for respondent.

NOURSE, Presiding Justice.

On January 15, 1932, the parties to this action entered into a lease whereby the defendant company leased a gasoline service station from plaintiffs. Under the terms of the instrument defendant promised to pay plaintiffs as rental a sum equal to one cent per gallon of gasoline delivered to and sold from the premises. As part of the same transaction a lease and consignment contract was executed whereby defendant sublet the leased premises to plaintiffs and appointed them its agent to sell

gasoline. Plaintiffs did not keep regular books but retained certain receipts, invoices and statements as a record of their transactions with the oil company. In March, 1933, plaintiffs acquired another parcel of property nearby, a gasoline pump was installed and by oral agreement the terms of the original lease were made to apply to this service station.

On June 7, 1940, plaintiffs commenced this action to recover certain sums of money. The second amended complaint alleged in the first cause of action that \$3,259.02 was due and owing to plaintiffs as the unpaid balance of the monthly rental from January 15, 1932, to August 1, 1936. In the second cause of action plaintiffs alleged that the defendant was indebted to them on a balance due upon an open, mutual and current account in the amount of \$3,259.02. The trial resulted in a stipulated judgment in favor of plaintiffs for \$168.35 when the trial judge held himself bound by the prior order of a motion judge and refused to admit evidence of the alleged open, mutual and current account in support of the second cause of action. On appeal, *Parker v. Shell Oil Company*, 55 Cal.App.2d 48, 130 P.2d 158, the judgment was reversed on the ground that the trial judge erred in holding himself bound by the void order of the motion judge.

On retrial plaintiffs filed their third amended complaint, again setting forth two causes of action. The first count was for the recovery of \$3,259.02 rent alleged to be due on the service station lease as modified by the oral agreement of March, 1933. The second count was for the recovery of \$3,259.02 alleged to be due as a balance on an open, mutual and current account. A trial was had on the issue of the statute of limitations at which time plaintiffs offered a valise containing the receipts, invoices and statements upon which they based their claim of an open, mutual and current account. The court directed a verdict for the defendant on the first cause of action as to all rent accruing prior to the last three months of the lease. On the second count the court submitted to the jury the question as to whether this cause of action was based solely upon the rent due under the lease pleaded in the first cause of action. The jury answered the interrogatory in the negative. The court then entered a judgment notwithstanding the verdict for defendant on the first cause of action, upholding defendant's contention that the

cause of action was barred in its entirety by the two year statute of limitations applicable to oral contracts.

Thereafter a trial was had on the issues raised by the second count of the third amended complaint and the answer. Both parties were allowed to make plaintiffs' valise of receipts available to their accountants who prepared statements for the court. The summary of plaintiffs' accountant took into consideration the lease which called for one cent per gallon rental and this item of rent was included in the statement. The defendant's accountant did not consider the item of rent and showed a balance in favor of the oil company. The court refused to accept the procedure adopted by plaintiffs' accountant on the theory that the contents of the valise, considered as an open, mutual and current account, did not contain the items of rent. Judgment was entered in favor of defendant.

Plaintiffs' appeal is devoted solely to the portion of the judgment relative to the second cause of action. They argue that the court erred in its refusal to consider the item of rent as a part of the open, current and mutual account and that the lease may be used for the purpose of explaining the items of the account.

[1, 2] The second cause of action stated in the third amended complaint alleged that \$3,259.02 was due as the balance of an open, mutual and current account. Appellants contend that they are not suing merely for the rent due under the service station lease in this cause of action but that the item of rental is only one of several items which is included in the account. It is true, as stated in the former appeal in this action, that the identity of amounts sued for in the two counts does not in itself establish that the two causes of action are identical. It is also true that in an early stage of the trial the jury, in answer to a special interrogatory, found that the second cause of action was not based solely upon the rent due under the lease. Although appellants argue this matter in general terms they have failed to sustain their burden of pointing out specifically what other items are included. The evidence presented at the trial on the general issues raised by the second count and the answer thereto is wholly to the contrary. Plaintiff, Della Parker, the sole witness produced by the plaintiffs at this trial, testified without contradiction that the only

item which remained unpaid and for which she was suing was the item of rent, all other items having been settled between the parties. This evidence, standing unimpeached, establishes as a fact that the claim under the second cause of action, although couched in terms of an open, mutual and current account, is for the rent allegedly due under the lease pleaded in the first count.

In view of this evidence and the change of the record the statement of the court on the former appeal, *Parker v. Shell Oil Company*, supra, 55 Cal.App.2d at page 55, 130 P.2d at page 162 becomes of prime import. The court said:

"The major contention of respondent is, that, even if the order of the motion judge was void, no prejudice to appellants occurred because the offered documents, as a matter of law, would not constitute an open, mutual, and current account. This contention is predicated on the argument that the account pleaded in the second count is based on the lease pleaded in the first, and that the law will not permit a person, where his claim on express contract is barred by the statute of limitations, to evade the statute by the device of pleading that claim as an open account. That is undoubtedly the law. *Tillson v. Peters*, 41 Cal.App.2d 671, 107 P.2d 434; *Cleveland v. Inter-City Parcel Service*, 22 Cal.App.2d 574, 72 P.2d 179; *Lee v. De Forest*, 22 Cal.App.2d 351, 71 P.2d 285; *Stewart v. Claudius*, 19 Cal.App.2d 349, 65 P.2d 933; *People v. California S. Deposit, etc., Co.*, 41 Cal.App. 727, 183 P. 289. If the proffered evidence should show that appellants' second cause of action is for the rent due under the lease pleaded in the first, these cases would be authority for the proposition that no open account, as required by section 337, subdivision 2, of the Code of Civil Procedure, existed."

[3] This statement of the court in the former appeal is binding upon us in this subsequent appeal and is the law of the case. *Dewey v. Gray*, 2 Cal. 374; *Pillsbury v. Superior Court*, 8 Cal.2d 469, 472, 66 P. 2d 149; *Gore v. Bingham*, 20 Cal.2d 118, 121, 124 P.2d 17; *De Hart v. Allen*, Cal., 161 P.2d 453. It cannot be said that this statement in the opinion is obiter dictum. 2 Cal.Jur. 959. The reviewing court refers to the issue as "the major contention of respondent." The effect of the ruling is a direction to the trial court on the new trial to admit the proffered evidence and,

if it found that the second cause of action was for the rent due under the lease pleaded in the first cause, the rule of the decision cited should be applied.

[4-6] Appellants' contention that they are entitled to refer to the written lease in order to explain the items of their alleged open, mutual and current account is without foundation. It is apparent that such procedure would constitute more than an explanation but would actually lead to the addition by parol evidence of an item not appearing in the records upon which they base their claim of an open account. It is settled law that a recovery will not be permitted where an open account is alleged if the right of action is based upon an express contract which does not constitute an item of the account. *Hopkins v. Orcutt*, 51 Cal. 537, 538; *Lee v. De Forest*, 22 Cal.App.2d 351, 359, 71 P.2d 285. The statement of the law in *Cleveland v. Inter-City Parcel Service*, 22 Cal.App.2d 574, 72 P.2d 179, is pertinent to the situation presented by the instant appeal. The court said in 22 Cal. App.2d at page 580, 72 P.2d at page 182:

"Plaintiff cannot thus extend the period of limitation by purporting to rely upon a book account, and then, by a process of calculation based thereon, seek to establish an amount due under the terms of an oral agreement that bears no relation to the books, and when the enforcement of said oral agreement under the law is barred by the statute of limitations. As has been hitherto declared, 'The distinction, as a matter of pleading, between a book account and an ordinary contract debt not founded on a writing, is only important when * * * the statute of limitations is involved and where the question arises whether suit may be commenced within four years, or must be begun within two years after the cause of action has accrued.' *Hansen v. Burford*, 212 Cal. 100, at page 107, 297 P. 908, 911, citing *Wright v. Loaiza*, 177 Cal. 605, 171 P. 311, 312. It has been held that recovery cannot be had for items not contained in a book account. *Egan v. Bishop*, 8 Cal.App.2d 119, at page 126, 47 P.2d 500."

The trial court's exclusion of the item of rent from the alleged open, mutual and current account was in accord with this recognized principle of law.

The judgment is affirmed.

GOODELL and DOOLING, JJ., concur.

**BRANDENBURG v. PACIFIC GAS &
ELECTRIC CO. et al. ***

Civ. 7193.

**District Court of Appeal, Third District,
California.**

Jan. 15, 1946.

Rehearing Denied Feb. 14, 1946.

Hearing Granted March 14, 1946.

1. Judgment ⇨199(3)

Where there was ample evidence to support implied finding that defendant was negligent and that plaintiff was not contributorily negligent, trial court erred in granting defendant's motion for judgment in its favor notwithstanding the verdict. Code Civ.Proc. § 629.

2. Judgment ⇨199(3)

A motion for judgment notwithstanding the verdict should be granted only when it appears from a full and fair consideration of whole evidence viewed in light most favorable to party securing verdict that there is no substantial evidence to support verdict. Code Civ.Proc. § 629.

3. Judgment ⇨199(3)

Motion for judgment notwithstanding the verdict, like a motion for nonsuit, must be denied if there is any evidence or reasonable inferences to be drawn therefrom in support of verdict. Code Civ.Proc. § 629.

4. Carriers ⇨280(3)

The duty devolving upon a street railway toward its passengers requires it to exercise utmost care and diligence for their safe carriage and a reasonable degree of skill to provide everything reasonably necessary for that purpose. Civ.Code, § 2100.

5. Carriers ⇨303(7)

Where rear end of street car projected some two feet into marked safety zone as car made left turn and was thereby dangerous to passengers in zone, street railway was not relieved of negligence in failing to call passengers' attention to dangerous and misleading marking of zone merely because zone was marked and maintained by city. Civ.Code, § 2100; Vehicle Code, § 88, St. 1935, p. 99.

6. Carriers ⇨320(25)

Whether motorman of street car, which was about to make a left turn, was negligent in failing to warn passengers

alighting in safety zone of danger of protruding rear end of car as car made turn or in failing to see that passengers were safely beyond space car would occupy as it made turn before he proceeded to move car around curve was for jury. Civ.Code, § 2100; Vehicle Code, § 88, St.1935, p. 99.

7. Carriers ⇨303(1)

Duty of a street railway toward its passengers does not necessarily cease immediately upon their alighting from a car. Civ.Code, § 2100.

8. Carriers ⇨328(1), 333(1)

The rule that passengers who board or alight from cars which stop on a curve of track are ordinarily bound to anticipate that end of car will protrude beyond outside curve of track as car moves around curve does not apply where car stops before it reaches curve opposite a misleadingly marked safety zone and passenger who alights expects car to continue on straight track. Civ.Code, § 2100; Vehicle Code, § 88, St.1935, p. 99.

9. Carriers ⇨347(9)

Where passenger alighted from street car believing that street car intended to continue in a straight course and did not know that safety zone had been erroneously marked to indicate that it was ordinarily safe for passengers alighting from car to remain within outline thereof, whether passenger was guilty of contributory negligence when struck by rear end of car as it made a left turn was for jury. Civ.Code, § 2100; Vehicle Code, § 88, St. 1935, p. 99.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by George Brandenburg against Pacific Gas & Electric Company and another to recover for injuries sustained when plaintiff was struck by the rear end of defendants' street car as street car was turning a corner. Judgment for defendants notwithstanding the verdict for plaintiff, and plaintiff appeals.

Reversed with directions to render judgment for plaintiff in accordance with verdict.

Brandenburger & White, of Sacramento, for appellant.

Thos. J. Straub and F. H. Pearson, both of San Francisco, and Jay L. Henry, of Sacramento, for respondent.

THOMPSON, Justice.

The plaintiff secured a verdict for damages in the sum of \$2,500 for personal injuries sustained by him as a result of being struck by the rear end of a street car which, as it turned to the left upon an intersecting street, overlapped a safety zone upon which he stood after alighting from the car.

The trial court granted a judgment in favor of the defendant notwithstanding the verdict under Section 629 of the Code of Civil Procedure, on the theory that there was no evidence of defendant's negligence, and upon the contrary, that plaintiff was guilty of contributory negligence.

The plaintiff, who was employed as a painter with the Southern Pacific Company, had resided for only a few months southeasterly of the vicinity where the accident occurred, and he was not familiar with the operations of street cars on the track in question. The defendant owned a city street car system and operated street cars on and along 28th street and elsewhere in the City of Sacramento. There was but one man, a motorman, employed on the car in question. A track extends northerly from southeast Sacramento, where the plaintiff lived, along 28th street past P street, where the accident occurred, to the down-town district. There is also a turn in the 28th street track at P street which proceeds westerly. At the corner of 28th and P streets, there was, adjacent to the track on 28th street, a safety zone which was forty-four feet in length and four feet in width outlined on the pavement by broad white stripes, and marked at the corners with white buttons. There was an intervening space of about eight feet between the easterly line of the safety zone and the east curbing of the street. Between the edge of the zone next to the track and the street car, when it was traveling straight north along 28th street, there was a space of about six inches. When the car turned westerly at P street, the rear end overlapped the safety zone a distance of about two feet, extending approximately to the center of the zone. Mr. Colwell, the motorman, was aware of that fact. The plaintiff had no such knowledge.

About 8 o'clock on the evening of June 11, 1943, the plaintiff and his family con-

sisting of his wife and three small children, boarded the street car traveling northerly along 28th street to go to the Lutheran Church, situated one block westerly of 28th street. Since the plaintiff supposed the car was going to continue northerly, and not knowing it would turn westerly, he signalled the motorman to stop at P street. The car stopped opposite the safety zone, and the plaintiff and his family alighted from the front door of the car. He said in that regard: "Well, I stepped into the safety zone and while doing this I was observing the welfare of my family. I was looking after them * * * I was motioning to them to stay in the clear and not to run out in the street, stay in the safety zone, and as I was turning to the left the back right side of the street car struck me or collided me striking me to the sidewalk."

The motorman failed to call plaintiff's attention to the danger from the car overlapping the zone, and he failed to warn the plaintiff that the car was going to turn west on P street. The plaintiff said that he was struck "three or four seconds" after he alighted. The car must have started immediately after plaintiff and his family left it. The plaintiff's back was toward the rear end of the car as it swung out over the safety zone. He did not see the protruding end of the car. The plaintiff said that if he had known the car was going to turn westerly on P street he would have remained on the car until it reached 27th street, because they would then have been one block nearer their destination. The plaintiff was seriously injured. It is not contended the verdict was excessive.

[1] The appellant contends that the defendant was negligent in failing to inform the plaintiff that the street car was about to make the turn to the left on P street and that it would be dangerous for passengers to alight in the safety zone on account of the protruding rear end of the car under such circumstances, or that the zone was erroneously outlined. It is asserted there is ample evidence to support the implied findings that the defendant was guilty of negligence, under the circumstances of this case, and that plaintiff was not guilty of contributory negligence.

We are persuaded the plaintiff is correct in the first portion of the foregoing contention, and that the court therefore erred in granting the motion for judgment in favor of the defendant notwithstanding the verdict.

[2] A motion for judgment notwithstanding the verdict of a jury should be granted, under Section 629 of the Code of Civil Procedure, only when it appears from a full and fair consideration of the whole evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict.

[3] The rule applying to the granting of a motion for judgment notwithstanding the verdict is precisely the same as the one with respect to a motion for nonsuit. *Neel v. Mannings, Inc.*, 19 Cal.2d 647, 122 P.2d 576; *Myers v. Southern Pacific Co.*, 14 Cal.App.2d 287, 58 P.2d 387. If there is any evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, such a motion should be denied.

[4] The duty devolving upon a street railway company toward its passengers requires it to exercise utmost care and diligence for their safe carriage, and a reasonable degree of skill, and to provide everything reasonably necessary for that purpose. Section 2100 of the Civil Code provides in that regard: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

A marked safety zone in a street, adjacent to a street railway track, is ordinarily an assurance to passengers entering or alighting from the cars operated thereon that they are reasonably safe within the limits of the zone, from injury on account of the movement of the cars. Section 88 of the Vehicle Code, St.1935, p. 99, defines a safety zone as: "The area or space lawfully set apart within a roadway for the exclusive use of pedestrians and which is protected, or which is marked or indicated by vertical signs, raised markers or raised buttons, in order to make such area or space plainly visible at all times while the same is set apart as a safety zone."

[5,6] We do not mean to infer that the defendant was guilty of negligence in setting apart and erroneously marking the zone which is involved in this case, so that it tended to deceive passengers alighting from a passing street car into believing they are safe from injury from the cars while the passengers remain within the out-

lined borders thereof, since we assume the City of Sacramento outlined and maintained that zone. But the marked zone was not safe from cars which turned abruptly at that corner to travel westerly on P street. Such cars overlap the marked zone a distance of two feet, and become a menace to passengers standing thereon. The defendant's motorman knew that fact. The plaintiff was ignorant of it. Moreover, he assumed the car was going straight ahead up 28th street. The defendant asserts that it is relieved of negligence in failing to call the passenger's attention to the dangerous and misleading marked zone because it was outlined and maintained by the City of Sacramento. We think not. There was still a duty devolving on the defendant, under the circumstances of this case, to warn its passengers of the danger. The defendant adopted that zone as a proper place to discharge its passengers, knowing that it was marked so as to become misleading and dangerous. It could have stopped the car twenty or thirty feet before reaching the intersection and thus have avoided the danger to discharged passengers from the overlapping rear end of the car as it rounded the curve. It did not do so. On the contrary, it stopped only a few feet from the intersection, thus tending to assure them of the safety of the erroneously marked zone. Under such circumstances, we think it was the duty of the motorman to warn the passengers alighting in that zone, by either informing them of the danger, or by seeing that they were safely beyond the overlapping car before he proceeded to move it around the curve. At least, we believe it was the province of the jury to determine whether the conduct of the motorman constituted negligence under the circumstances of this case. That issue was determined by the jury against the defendant. There is substantial evidence to support that finding.

[7] The duty of a street railway company toward its passengers does not necessarily cease immediately upon their alighting from the cars. *Mangan v. Des Moines City R. Co.*, 200 Iowa 597, 203 N.W. 705, 41 A.L.R. 368; *Dwyer v. Los Angeles Railway Corp.*, 115 Cal.App. 709, 2 P.2d 468; *Chunn v. City & Suburban Railway*, 207 U.S. 302, 28 S.Ct. 63, 52 L.Ed. 219; *Lagomarsino v. Market St. Ry. Co.*, 158 P.2d 982. In the case last cited it is said, at page 985 of 158 P.2d: "It is not important to determine whether she had

become a passenger. Intending to become a passenger she had come to a place recognized by the practice of the defendant as a convenient and suitable one from which to enter the car, and the car stopped to receive her. The defendant owed her an affirmative duty. It was bound to use that care for her protection, which was reasonably required in view of the situation in which she had at the defendant's invitation placed herself, of the purpose for which she was there, of the approach of the car which she was intending to enter, and of the dangers to be apprehended * * *."

[8] It is true that passengers who board or alight from cars which stop on a curve of the track are ordinarily bound to anticipate that the end of the car will protrude beyond the outside curve of the track as the car moves around the curve. *Laurent v. United Railways of St. Louis*, Mo.Sup., 191 S.W. 992; *Mangan v. Des Moines City R. Co.*, supra. But in the present case the car did not stop on the curve of the track. It stopped before it reached the curve, opposite the misleading marked safety zone. The plaintiff did not know that the car would turn westerly on the curve after it started forward. If the car had stopped some thirty feet southerly of the turn the danger of the protruding end of the car would have been avoided.

[9] For the reasons previously stated, we may not hold as a matter of law that plaintiff was guilty of contributory negligence. Since the plaintiff assumed that the car would proceed straight north along 28th street, and he had no knowledge that it would turn westerly on P street, and he did not know the safety zone had been erroneously marked to indicate that it was ordinarily safe for passengers alighting from the cars to remain within the outlines thereof, it became a question for the jury to determine, under the facts of this case, whether he was or was not guilty of contributory negligence. *Mangan v. Des Moines City Ry. Co.*, supra; 38 Am. Jur. 866, § 190. If the plaintiff had no cause to apprehend the danger, he would not be guilty of contributory negligence as a matter of law. In the text last cited it is said in that regard: "Contributory negligence is not imputed to a plaintiff for failing to look out for a danger which he had no reasonable cause to apprehend, or to a plaintiff who was deceived by appearances calculated to deceive an ordinarily prudent person."

In the *Mangan* case, supra, it is said [200 Iowa 597, 203 N.W. 709]:

"* * * Conceding that a pedestrian must be presumed to take notice of the obvious fact that the body of a street car in rounding a curve must necessarily swing out some little distance from the track on the outside of the curve, plaintiff herein had no reason to believe that the markings of the safety zone would be within the area of the overswing. * * *"

"Whether ordinarily prudent persons would have done what the plaintiff did under the circumstances is the test, and it cannot be said as a matter of law that she was guilty of negligence contributing to her injury. Negligence cannot be imputed to one who is deceived by appearances calculated to deceive an ordinarily prudent person. Care in avoiding injury implies that there is or would be, with all prudent persons, something to create a sense of danger, and it is for the jury to say whether or not the circumstances are such as would put a prudent and cautious person upon his guard."

The judgment notwithstanding the verdict is reversed and the court is directed to render judgment for plaintiff in accordance with the verdict of the jury.

ADAMS, P. J., and PEEK, J., concur.



72 Cal.App.2d 593

**PEOPLE v. ONE 1941 BUICK CLUB
COUPE, SERIAL NO. 13935358, ENGINE
NO. 74117731, LICENSE NO. 1-V-7654.**

Civ. 14887.

District Court of Appeal, Second District,
Division 3, California.

Jan. 18, 1946.

Hearing Denied March 18, 1946.

1. Forfeitures ◀5

Evidence that arresting officer saw registered owner park automobile and go briefly into hotel and then get into automobile and drive off, and that arresting officer shortly thereafter stopped the automobile, and in presence of registered owner, found six marihuana cigarettes on the floor board

and under the seat, warranted finding that automobile was used to conceal and transport marihuana within statute authorizing forfeiture of automobile so used. St.1940, 1st Ex.Sess., p. 23, § 11610.

2. Forfeitures ⇐4

Under Narcotics Act, no specific quantity of narcotics need be involved to result in a forfeiture of vehicle used to transport unlawfully a narcotic. St.1940, 1st Ex. Sess., p. 23, § 11610.

3. Automobiles ⇐19 Forfeitures ⇐3

In determining whether forfeiture of automobile used by registered owner in unlawful transportation of marihuana was binding as against registered co-owner not consenting to owner's use of automobile, owner had right to possession of automobile without obtaining consent of co-owner, notwithstanding that a few days prior to such use, the owner had told the co-owner that the automobile was to be the property of the co-owner, where the registration remained the same. St.1940, 1st Ex.Sess., p. 23, § 11610; Vehicle Code, § 66, St. 1940, 1st Ex.Sess., p. 9, and § 68, St.1935, p. 98.

4. Trial ⇐89

In proceeding for forfeiture of automobile used by registered owner in unlawful transportation of marihuana, the striking of registered co-owner's statement that co-owner had not given owner permission to use the automobile which owner had theretofore stated was to be the property of the co-owner, was proper where the registration remained the same, in view of rule that registered owner has legal right to possession of automobile without obtaining consent of co-owner. St.1940, 1st Ex. Sess., p. 23, § 11610; Vehicle Code, § 66, St.1940, 1st Ex.Sess., p. 9, and § 68, St. 1935, p. 98.

5. Forfeitures ⇐3

In proceeding for forfeiture of automobile used to transport narcotics, in determining validity of chattel mortgagee's claim against automobile for money loaned to registered owner, test is whether knowledge imparted by those who certified to character of owner would under circumstances warrant a reasonably prudent person to believe the owner possessed of the requisite moral attributes. St.1939, p. 768.

§ 11620; St.1940, 1st Ex.Sess., p. 23, § 11610.

6. Forfeitures ⇐5

Evidence warranted finding that automobile mortgagee failed to make such a reasonable investigation of the moral responsibility, character and reputation of registered co-owners executing mortgage to secure loan on the automobile, as was necessary to protect mortgagee's interest against forfeiture for use of automobile by one of the co-owners in the unlawful transportation of marihuana. St.1939, p. 768, § 11620; St.1940, 1st Ex.Sess., p. 23, § 11610.

7. Forfeitures ⇐3

The word "purchaser" in statute protecting against forfeiture for unlawful transportation of narcotics, an interest acquired in an automobile under a lien, mortgage or conditional sale contract after a reasonable investigation of moral responsibility, character and reputation of the purchaser of the automobile, includes a borrower who executes chattel mortgage on automobile to secure a loan. St.1939, p. 768, § 11620; St.1940, 1st Ex.Sess., p. 23, § 11610.

See Words and Phrases, Permanent Edition, for all other definitions of "Purchaser".

8. Forfeitures ⇐3

A lender taking chattel mortgage to secure loan to registered owners of automobile, was required to make a reasonable investigation of the moral responsibility, character and reputation of the owners to protect his interest against forfeiture for use of automobile by one of the owners in the unlawful transportation of marihuana. St.1939, p. 768, § 11620; St.1940, 1st Ex. Sess., p. 23, § 11610.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Proceeding by the People for the forfeiture of the interest of Willie L. Bowens and another, registered owners, and the interest of Fred W. Gray, named as Fred W. Gray Company, legal owner in one 1941 Buick club coupe, Serial No. 13935358, Engine No. 74117731, License No. 1-V-7654, which had been seized for allegedly having been used to conceal and transport mari-

huana. From a judgment in favor of the State, free of the lien of the legal owner, the legal owner appeals.

Affirmed.

MacFarlane, Schaefer & Haun, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

DESMOND, Presiding Justice.

In a proceeding instituted by the State to forfeit the interest of the registered and legal owners in a seized automobile which, it was charged, was used to conceal and transport marihuana in violation of section 11610 of the Health and Safety Code, St.1940, 1st Ex.Sess., p. 23, judgment was rendered in favor of the State free of the lien of the legal owner, from which judgment the legal owner of the vehicle appeals.

The registered owners of the vehicle were Willie L. Bowens and Mary L. Bowens, while Fred W. Gray, doing business as Fred W. Gray Company, was the legal owner. Both owners filed answers to the notice of seizure and intention to forfeit. Willie L. Bowens and Mary L. Bowens alleged in their joint answer that they owned an equity in the vehicle, but denied that it had ever been used to "unlawfully conceal, convey, carry or transport marihuana or any other narcotic or drug in violation of section 11610 of the Health and Safety Code," as charged in the forfeiture proceedings. As a second defense, Mary L. Bowens, alone, alleged she had never consented or permitted "any occupant or occupants or any other person to use said automobile for said alleged unlawful purpose." The legal owner, Fred W. Gray, in his answer alleged that Willie L. Bowens and Mary L. Bowens had borrowed \$1068.-76 from him, had executed their promissory note, payable in twelve monthly installments, and had given him a chattel mortgage on the vehicle subsequently seized; that he had made a "reasonable investigation of the moral responsibility, character and reputation" of the parties before his interest was created and found them to be good.

The court found that at the time of the seizure the vehicle was in the possession of one of the registered owners, Willie L. Bowens, and was "used to conceal, convey, carry or transport marihuana"; that the le-

gal owner's "right, title or interest * * * was bona fide," made without knowledge that the vehicle was being used in violation of the provisions of the law relating to narcotics, and that a "reasonable investigation" of the moral responsibility, character and reputation of the registered owners was not made by the legal owner before his interest was created. The court concluded therefrom that the vehicle should be forfeited to the State and entered judgment accordingly.

Appellant Gray challenges the sufficiency of the evidence to sustain the judgment. In this connection he argues that the evidence does not establish any "unlawful transportation or possession of narcotics against the registered owners within the contemplation of the statute," but this argument is without merit. The record supports the court's findings. The provisions of the Health and Safety Code relating to the forfeiture of vehicles are found in Division X, Chapter 7, Article 1, Sections 11610 to 11629, inclusive, St.1939, p. 767 et seq., and St.1940, 1st Ex.Sess., p. 23. Section 11610 provides that "A vehicle used to unlawfully transport any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed, or in which any narcotic is unlawfully possessed by an occupant thereof, shall be forfeited to the State."

The circumstances relating to the seizure of the vehicle in this case were stated by Lewis Walter, one of the arresting officers. He testified that on May 11, 1944, he and Officer Kelley were in the vicinity of the Rex Hotel, located at Fourth Street and Central Avenue in the city of Los Angeles, "investigating complaints of narcotics and other crimes"; that Willie Bowens and two other persons were first observed when "His [Bowen's] car or a car pulled up in front of the hotel and a man alighted from the car and went into the hotel and he was gone just a brief period of time, less than five minutes, and he returned and re-entered the car which was left at the curb and drove west on Fourth Street." The two officers followed the car and stopped it on a nearby street shortly after midnight. According to Walter, when he and Officer Kelley walked around to the side of the car, Bowens, the driver of the vehicle, "made a motion with his hand as though pulling something from under the seat * * *"; that they opened the door of the car, on the driver's side, and found a marihuana cigarette and a little white pill just directly be-

low the seat on the floor-board or on the mat over the floor-board. The vehicle and its occupants were then taken to the City Hall where, in their presence, the officers completed their search and found five more cigarettes underneath the seat of the car. Walter stated that he questioned Bowens concerning the cigarettes and he "denied any knowledge of them whatsoever," and stated they were not his. While at the City Hall, Walter secured some "debris" from Bowens' right coat pocket, the contents of which were preserved and placed in a white envelope.

On the trial it was stipulated by counsel for the registered owners and counsel for appellant legal owner that if the chemist who had examined the contents of the cigarettes were called on behalf of the plaintiff he would testify that they contained marihuana. The record does not indicate, nor was any claim advanced by the plaintiff, that the other items, i. e. the pill and the "debris" from Bowens' pocket, contained any narcotics. When Bowens was called as a defense witness he did not testify concerning any of the details of the arrest nor did he deny the possession or the transportation of the marihuana cigarettes, but confined his testimony principally to the details of the loan arrangement with appellant Gray.

[1,2] The testimony of Officer Walter sufficiently supports the court's finding that the vehicle was used to conceal and transport marihuana within the purview of the narcotic law. No specific quantity of narcotics need be involved to result in a forfeiture under the narcotics act. *People v. One 1940 Buick 8 Sedan*, 1945, Cal.App., 161 P.2d 264.

[3,4] Appellant claims that the forfeiture of the vehicle was improper as to Mary L. Bowens, one of the registered owners, and that the court erred in striking an answer given by her to the effect that she had not given Mr. Bowens permission to take the car. The basis of the argument upon this subject was that "these parties [Willie L. Bowens and Mary L. Bowens] were not married and that each had an undivided half interest in the automobile and it was the right of Mary L. Bowens to show that the car was not used with her consent, at least so far as her interest is concerned." It appears from the record that Willie L. Bowens and Mary L. Martin (Bowens) had been living together at 960 E. 47th

Street for over 2 years. According to the latter's testimony, Bowens had moved out of the home a few days prior to the arrest and seizure and at that time told her the automobile was to remain her property. However, on May 10, 1944, without her consent or knowledge, Bowens took the automobile from the home. Assuming the truth of this recital, nevertheless at the time of the seizure the vehicle was registered in the names of Mary L. Bowens and Willie L. Bowens, as owners, and under these circumstances Willie L. Bowens had a legal right to the possession of the vehicle without obtaining the consent or permission of his co-owner, secs. 66 and 68, Vehicle Code, St.1940, 1st Ex.Sess., p. 9 and St.1935, p. 98. The court's action in sustaining the objection to the answer remaining in the record was proper.

Appellant argues further that the court erred in finding that a reasonable investigation had not been made by the legal owner before making the loan, but, applying the "definitely settled" principles set out in *People v. One 1940 Buick 8 Sedan*, supra, 161 P.2d 264, the record, in our opinion, supports the findings.

Section 11620 of the Health and Safety Code reads as follows: "The claimant of any right, title, or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged."

Fred W. Gray testified that he had been engaged in the automobile financing and loan business for over twenty-five years; that on March 20, 1944, Willie L. Bowens and Mary L. Bowens, representing themselves as husband and wife, made the loan, signed the note and executed the mortgage mentioned in his answer; that other papers in connection with the loan were made, including a statement of the borrower, application for loan, statement of loan, and insurance application; that no payments had been made on the loan; that the following references were secured from the borrowers: The Kelley Kar Company, Roy Gardner, Mamie Chorn of Berkeley, California, and Troy Jackson. In answer to the query, "Did you make any investigation as to the character of these people,

their moral responsibility?" Mr. Gray stated, "I talked to Mr. Morgan who brought Mr. Bowens to our office to make the loan. * * * He is an outside collector for the Kelley Kar Company.

"Q. Had there been a transaction previously with the Kelley Kar Company? A. Yes.

"Q. And this is what you people call a pay-off of that previous loan? A. Yes. * * *

"Q. And what did he [Morgan] say? A. He said he had contacted * * * Mr. Bowens—in regard to the delinquent payments, that he was past due around thirty days with the Kelley Kar Company, that he had been ill and could not make the installment that was due and it would be approximately thirty days yet before he could accumulate enough money to catch the payments up to date and wanted him to refinance the account and he said that he had contacted or he had been to the residence at 960 East 47th Street on several different occasions, that he contacted Mr. Bowens and had him come to our office. * * * He said that there was [sic] some children there that appeared to be well dressed, the house was fairly neat in appearance and the neighborhood looked all right. * * * He said that he worked for the Union Pacific Railroad."

According to Mr. Gray, Mary L. Bowens told him that she was employed at the Post Office; that he checked there but "The information we got was very indefinite. * * * they said she was employed there for a considerable time and that is the only information they would give us"; that his inquiry was made "under the name of Mary L. Bowens"; that he also checked with the Union Pacific Railroad and found that Mr. Bowens "had been employed there on and off I believe it was or fairly steady for a period of seventeen months. * * * He was a waiter or chef. I was kind of indefinite on that. I think first I had it as a chef and later we found it was a waiter, or one way or the other." Gray was then asked, "Did they say anything as to character, reputation or integrity?" and replied, "I believe all I asked was whether he was fairly steady in his position and whether he got in trouble or not. * * * They said he was fairly steady in his employment." Mr. Gray stated that he telephoned Roy Gardner [owner of the Rex Hotel] and the latter said he had known Mr. Bowens over a period of several years. "I

asked him if he was in the habit of getting into trouble or difficulties and he informed me he was not." In answer to the question, "Now, you asked Mr. Gardner if he was getting into any trouble or difficulties and he said he was not?" Mr. Gray stated, "I believe, as I recall it, he said he had not been in any difficulties unless it might have been some minor thing like gambling. I believe that was the conversation." After having his memory refreshed, this witness then stated that the following testimony given in his deposition was correct, regarding an inquiry made at the Union Pacific as to the name of Bowens' wife:

"Q. What information did he give you? A. That the records showed he was married.

"Q. Did they give you his wife's name? A. They had it the same as we had on ours, Mary L.

"Q. Mary L. Bowens? A. Yes."

Mr. Gray made no inquiry of Troy Jackson or Mamie Chorn.

Two rebuttal witnesses were called on behalf of the plaintiff. One of these, a Mr. Werner McIntyre, assistant superintendent of mails in charge of the personnel section of the Post Office at Los Angeles, testified that the personnel records did not disclose the name of a Mary L. Bowens; that there was a record of a Mary L. Martin and it showed that she was "first appointed as a Christmas temporary substitute clerk on November 24, 1943, and when the Christmas season was practically over she was separated on January 21, 1944. Then she was re-employed on January 28, 1944, just one week later, as a war service substitute clerk and she was dropped for abandonment of service on April 30, 1944." Another rebuttal witness, W. G. Raymond, "commissary" in charge of the officer supervision of the Union Pacific Railroad Company, stated that he had the personnel records of the employees in the dining car service and they indicated that Willie L. Bowens was a dining car waiter; that the record showed that he was married, his wife's name being Etta Bowens, and listed the names of his four children; that his residence address was 960 East 47th Street, Los Angeles; that when persons called on the telephone for information regarding employees it was "a matter of policy of the Union Pacific to give the dates of the employment and the occupation. We try to

discourage the fact that salaries should be given although it is not controlled definitely to that extent."

From the foregoing testimony it is apparent that Gray did not personally know the Bowens until they were brought to his place of business by Mr. Morgan, outside collector for the Kelley Kar Co. The latter merely assured Gray that Bowens was employed by the Union Pacific and, in addition, stated that he had been to the residence of the parties and "the house was fairly neat in appearance and the neighborhood looked all right." The most that can be said of Gray's inquiry at the Union Pacific Railroad Company is that he was able to ascertain the fact that Mr. Bowens was in the employ of that company and was "fairly steady in his employment"; that he was married; that his wife's name was Mary L. Bowens. This latter information was contrary to the information given by the "commissary" of the railroad company when he was called to the witness stand, and how Mr. Gray received the information that Mary L. Bowens was employed at the Post Office is difficult to understand since, as has been indicated, she was listed there under her legal name, Mary L. Martin. As to Mr. Gray's telephone conversation with Mr. Roy Gardner, the record is very limited. It does not indicate in what capacity Gardner was acquainted with Bowens, nor how frequently he saw him; neither does it indicate the source of knowledge upon which Mr. Gardner based his opinion of Bowens. The trial court was not informed as to what standing in the community Mr. Gardner enjoyed and, as a matter of fact, Mr. Gray had no information on that subject at the time he spoke to him, for on cross-examination he was asked, "He [Gardner] operates the Rex Hotel, does he not?" and stated that "I am not sure of that. I just asked for Roy Gardner."

[5-8] As the court said in *People v. One 1939 Buick Coupe*, 56 Cal.App.2d 163, at page 166, 132 P.2d 308, at page 310, "* * * it must be observed by the courts that their concern is whether the knowledge imparted by those who certify to the character of a borrower would under the circumstances warrant a reasonably pru-

165 P.2d—4

dent person to believe the applicant possessed of the requisite moral attributes." Under the circumstances of the instant case we believe that the trial court was justified in its conclusion that the claimant, Mr. Gray, failed to make a reasonable investigation of the moral responsibility, character and reputation of the people who borrowed money from him. However, appellant claims that it was not incumbent upon him in order to establish an exemption in favor of his interest in the automobile to make any investigation whatever. He argues that according to section 11620, *supra*, inquiry is requisite only in the case of a "purchaser" and the Bowens, as to him, were not in that classification. We have not found in our examination of cases where, under section 11620, seizures have been made, that this argument has been urged or passed upon, but note that several of these cases involve transactions similar to the one presented here, namely, a loan secured by a mortgage, e. g., *People v. One 1939 Buick Coupe*, *supra*, and *People v. One 1937 Packard*, 1942, 50 Cal.App.2d 161, 123 P.2d 900. Since this section is drawn to exempt a claimant who holds a mortgage made after a reasonable investigation, we believe that counsel for respondent is correct when he states that the word "purchaser" should be given an interpretation broad enough to include "borrower" in cases such as the present. He reinforces his argument in the following language: "It should also be observed that this section provides an exception from forfeiture if such lienholder can prove a reasonable investigation. Without such an exception, the interest of a legal owner could be forfeited regardless of the showing made. It would follow the usual statutory interpretation that the inclusion of one thereby excludes all others. As far as this statute is concerned the statute exempts persons claiming a repair man's lien, section 11621, a common carrier, section 11629, and those listed in section 11620. Unless a claimant can show that he is included within the exceptions of any of these three sections, his interest in the vehicle is subject to forfeiture."

The judgment is affirmed.

SHINN and WOOD, JJ., concur.

72 Cal.App.2d 626

PALMER v. BURNHAM.

Civ. 12986.

District Court of Appeal, First District,
Division 2, California.

Jan. 22, 1946.

1. Trusts ⇐110

One who claims ownership of property of which legal title stands of record in another, or that property is held by such person in trust for claimant, must establish claim by evidence that is clear, satisfactory, and convincing.

2. Appeal and error ⇐1012(1)

Whether evidence is sufficiently clear, satisfactory, and convincing to impress a trust on real property must be determined by trial court, and its determination thereon, if supported by evidence, will be accepted on appeal as conclusive.

3. Trusts ⇐110

Evidence was not sufficiently clear and convincing to establish that funds used by plaintiff's sister, since deceased, in purchase of realty, were part of a joint tenancy bank account of plaintiff and sister, so as to impress a trust on the realty after sister's death.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Francis Henry Palmer against Amelia Kate Burnham, executrix of the estate of Elizabeth A. Gibbs, deceased, to impress a trust upon realty. From a judgment for defendant, the plaintiff appeals.

Affirmed.

David P. Hatch, of Los Angeles, for appellant.

George N. Foster, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to impress a trust upon real property. The trial court held that the property was the separate property of the decedent Elizabeth Gibbs and that plaintiff had no interest therein other than as devisee under Mrs. Gibbs' will by which he and Mrs. Burnham each took an undivided one-half interest. In his appeal from the

judgment the plaintiff attacks the conclusions of law only. He makes no attack upon the findings of fact, and states that there is no conflict in the evidence.

The case is founded on the theory that plaintiff and Elizabeth Gibbs opened a joint tenancy bank account through which the property was purchased, title having been taken in the name of Elizabeth Gibbs, and that she therefore held the property in trust. The trial court found from the evidence that all the material allegations of plaintiff's complaint were untrue. The evidence supporting these findings may be stated briefly. Plaintiff was the brother of Mrs. Gibbs and of the defendant Mrs. Burnham. He was a seafaring man who made his home with Mrs. Gibbs. In January, 1926, he and Mrs. Gibbs opened a joint tenancy bank account with a deposit of approximately \$880. In February, 1926, Mrs. Gibbs initiated the purchase of the lot in question by paying \$700 by check drawn on one joint tenancy account and \$300 on another. At the same time Mrs. Burnham paid \$500 from her own funds. In December, 1926, Mrs. Burnham advanced \$1921 which Mrs. Gibbs used to make a payment of \$3000 on the property. In May, 1929, Mrs. Burnham advanced the balance of \$2200. Her contributions were thus approximately \$4600, those of the joint tenancy account possibly \$700, while Mrs. Gibbs contributed the balance. It is not possible to state what amount plaintiff contributed because his testimony on that issue was more than evasive. The trial court rejected it in whole or in part and found that it was not true, as alleged in his complaint, that he contributed \$750 of the down payment; that it was not true that he agreed to furnish one-half of the purchase price, or to receive a one-half interest in the property or any fractional portion thereof, that it was not true that plaintiff contributed any portion of the subsequent payments; that it was not true that Elizabeth Gibbs agreed to hold the title or any portion of the same in trust for plaintiff; and that Elizabeth Gibbs never repudiated any trust in the property because no trust on any portion thereof had been made.

[1-3] Bearing in mind that this is an action in equity to impress a trust on real property after the death of the alleged trustee we may refer to the settled rules of decision as to the burden of proof. In

Harris v. Harris, 136 Cal. 379, 384, 69 P. 23, 25, it was said: "The rule is well settled that one who would claim the ownership of property of which the legal title stands of record in another, or that the same is held by such person in trust for the one so claiming, must establish such claim by evidence that is clear, satisfactory, and convincing. Woodside v. Hewel, 109 Cal. 481, 42 P. 152; Plass v. Plass, 122 Cal. 3, 54 P. 372. Whether the evidence in any particular case is of this character must be determined by the trial court, and its determination thereon will be accepted by this court as conclusive." In accord are 25 Cal. Jur. p. 348; Bollinger v. Bollinger, 154 Cal. 695, 703, 99 P. 196; Noble v. Learned, 153 Cal. 245, 251, 94 P. 1047; Lefrooth v. Prentice, 202 Cal. 215, 227, 259 P. 947; Taylor v. Bunnell, 211 Cal. 601, 606, 296 P. 288. Following these principles it must be held that, in view of the findings of the trial court and appellant's tacit concession that they are supported by the evidence, this court may not hold that, contrary to those findings, any trust was created in the property. It is a reasonable conclusion from the record that the joint tenancy bank account was created as alleged but that when the real property was being purchased through moneys advanced by Mrs. Burnham that account was merely used for the temporary purpose of depositing her money in the account to enable Mrs. Gibbs to draw her own checks for the payments due on the purchase. All this was done with the knowledge and consent of appellant; the purchase was completed in 1929, the bank account was closed in 1931, and Mrs. Gibbs held undisputed possession of the realty until her death in 1941.

For these reasons all the questions raised by appellant relating to the respective rights of joint tenants in property purchased by funds deposited in a joint tenancy account are beside the issues because the trial court found that appellant failed to prove that such funds were used in the purchase. It is also unnecessary to decide whether appellant is bound by his election to take under the will. The trial court held that he was not so bound. By the will he takes an undivided one-half interest in the property in the purchase of which he may have contributed one-tenth. The respondent takes a one-half interest and contributed four-sevenths of the purchase price. The trial court may have concluded that the equities were adminis-

tered by the will. In any event he found no equity in appellant's complaint and that concludes the controversy.

The judgment is affirmed.

GOODELL and DOOLING, JJ., concur.



72 Cal.App.2d 657

PEOPLE v. BROOKS et al.

Civ. 640.

District Court of Appeal, Fourth District,
California.

Jan. 23, 1946.

1. Burglary $\hookrightarrow$ 41(1)

Evidence sustained conviction of burglary in the second degree.

2. Criminal law $\hookrightarrow$ 232

A defendant need not be represented by counsel before committing magistrate unless he enters a plea of guilty or unless he waives preliminary examination. Pen. Code, §§ 859a, 860.

3. Criminal law $\hookrightarrow$ 236

Proceeding before committing magistrate need not be taken down in shorthand and transcribed by court reporter, except in homicide cases. Pen. Code, § 869.

4. Criminal law $\hookrightarrow$ 224

In burglary prosecution, absence of reporter's transcript of proceedings before committing magistrate from files of superior court was not evidence supporting contention of defendants that they had been committed without a preliminary examination. Pen. Code, § 869.

5. Criminal law $\hookrightarrow$ 274, 301

Permitting, or refusing to permit, the withdrawal of pleas already entered is generally a matter within sound discretion of trial judge.

6. Constitutional law $\hookrightarrow$ 106

The forms of procedure required by law in preliminary examinations establish a substantial right vested in every person charged with crime and should not be lightly waived aside.

7. Constitutional law ☞263

A legal preliminary examination is one of the steps required to establish due process of law where prosecution in superior court is by information and is necessary to confer jurisdiction on that court.

8. Criminal law ☞301

Where defendants and their counsel were not ignorant of any purported defect in proceeding before committing magistrate at time defendants entered their pleas of not guilty, and before pleas were entered they had raised by motion and by demurrers the question that they had not had a preliminary examination, refusal to permit defendants to withdraw their pleas so that they might again move to set aside information on ground that they had been held to answer without any preliminary examination was not an abuse of discretion.

9. Criminal law ☞301

The withdrawal of pleas of not guilty to permit objections to be made to proceedings prior to filing of information is not a matter of right.

10. Criminal law ☞338(1)

The sufficiency of proceedings before committing magistrate is not a question for determination during trial of criminal case, and evidence offered for purpose of showing that defendants had been held to answer without any preliminary examination was properly excluded.

Appeal from Superior Court, of Riverside County; R. A. Moore, Judge presiding.

Loyce Edward Brooks and McKinley Simpson were convicted of burglary in the second degree and they appeal.

Affirmed.

Joseph Seymour, of Riverside, for appellants.

Robert W. Kenny, Atty. Gen., Henry A. Dietz, Deputy Atty. Gen., and John Neblett, Dist. Atty., and William W. Shaw, Deputy Dist. Atty., both of Riverside, for respondent.

MARKS, Justice.

This is an appeal from judgments following convictions of defendants of burglary in the second degree and from an order denying their motion for new trial. Defendant Simpson has also appealed from an order committing him to the Youth

Authority of the State of California, he being 20 years of age. Section 1737.5 of the Welfare and Institutions Code St.1943, p. 2746, provides that a commitment to the Youth Authority is a judgment that is appealable. We have here an appeal by Brooks from the judgment committing him to the penitentiary for the term prescribed by law, and from the order denying his motion for new trial, and an appeal by Simpson from the order of commitment to the Youth Authority and from the order denying his motion for new trial.

Defendants argue that the evidence is insufficient to support the verdict and judgments against them. This requires a brief outline of the pertinent facts.

Juanita's Shop is a woman's apparel shop located at 120 West Sixth Street in the city of Corona in Riverside County. At about 3:30 o'clock on the afternoon of May 9, 1945, defendants entered the shop and Simpson asked for a "will call" package containing a lady's suit. While the proprietress was in the rear of the shop looking for the package Simpson told her it contained a dress and not a suit and went to the rear where she was looking for the package. She could not find it and defendants left the shop. At about five o'clock P.M. of the same day defendants returned and Simpson purchased a pair of hose and said they were sorry about the trouble caused concerning the "will call" package as they had found it.

At about eight o'clock the following morning it was discovered that the shop had been burglarized and about everything of value stolen. The total value of the articles taken was between four and five thousand dollars. Entry had been made into the shop by chiseling a hole in a panel in the rear door. There were tire marks of an automobile near this rear door.

Defendants were arrested in the city of Corona on May 14, 1945. They were together in an automobile. A search of the car disclosed about fifteen dresses and other articles which had been taken from Juanita's Shop. There was a screw driver on the floor boards of the car. Its blade fitted exactly into the marks on the rear door of Juanita's Shop made in chiseling the hole through the panel. This hole was large enough to admit a hand.

Simpson took officers to Palm Springs where other articles stolen from Juanita's Shop were recovered from women living in houses that were pointed out by Simpson.

Another trip was made to Indio where the same thing occurred.

[1] It needs no citation of authority to support the conclusion that this evidence is sufficient to support the judgments against both defendants.

Defendants' main contention is that they had no preliminary examination and were held to answer without probable cause. This argument is based chiefly on the fact that neither defendant was represented by counsel in the justice's court, and the further fact that there was no transcript of the proceedings before the committing magistrate filed in the superior court.

These matters were properly raised on motions to set aside the information, and also by demurrers presented, and were argued before defendants entered their pleas. Their motions were denied and their demurrers overruled. They then entered pleas of not guilty.

[2,3] It is not necessary that a defendant be represented by counsel before the committing magistrate unless he enters a plea of guilty (Sec. 859a, Penal Code) or unless he waives a preliminary examination. Sec. 860, Penal Code. Nor is it necessary, except in homicide cases, that the proceedings be taken down in shorthand and transcribed by a court reporter. Sec. 869, Penal Code; *People v. Williams*, 129 Cal. App. 504, 19 P.2d 37.

[4] Neither defendant either produced, or offered to produce on the hearing of their motions, any evidence by affidavit or otherwise even tending to indicate that he had pleaded guilty in the justice's court to the offense charged, or had waived a preliminary examination there when not represented by counsel. Nor did either of them attempt to prove by affidavit or otherwise that they had been committed without a preliminary examination. Seemingly they were content to rely on the absence of a reporter's transcript of the proceedings before the committing magistrate from the files of the superior court. As this was a case in which burglary, not homicide, was charged, the presence of a reporter was not required by law so the absence of a reporter's transcript was not evidence supporting their contention that they had been committed without a preliminary examination.

At the commencement of the trial counsel for defendants asked leave to permit them

to withdraw their pleas of not guilty so that they might again move to set aside the information on the ground that they had been held to answer without any preliminary examination. Their counsel made a proffer of proof which, if supported, would have shown that they had not been legally held to answer. The trial court denied the motion and proceeded with the trial. This is now urged as an abuse of discretion on the part of the trial judge.

[5-7] It is admitted that permitting or refusing to permit the withdrawal of pleas already entered is generally a matter within the sound discretion of the trial judge. If counsel had been able to show that he first learned, or had reasonable grounds to believe, after the entry of the pleas of not guilty, that defendants had been improperly held to answer without a preliminary examination we would be inclined to the opinion that the trial judge should have granted the motion so that the matter could have been fully and fairly determined. The forms of procedure required by law in preliminary examinations establish a substantial right vested in every person charged with crime and should not be lightly waived aside. *People v. Weatherford*, Cal., 164 P.2d 753. A legal preliminary examination is one of the steps required to establish due process of law where the prosecution in the superior court is by information and is necessary to confer jurisdiction on that court.

[8,9] In the instant case defendants and their counsel were not ignorant of any purported defects in the proceedings before the committing magistrate at the time they entered their pleas. Before those pleas were entered they raised the same questions by motions and by demurrers. They then failed to substantiate their claims of defects in the proceedings before the committing magistrate which they had the opportunity to do. How many times defendants should be permitted to raise the same question after it had already been presented, argued and ruled upon, should be considered a matter within the discretion of the trial judge, to say the least, and the denial of the motion to permit the withdrawal of the pleas cannot be held to be an abuse of discretion as the withdrawal of a plea to permit objections to be made to proceedings prior to the filing of the information is not a matter of right. *People v. Ronsse*, 26 Cal. App. 100, 146 P. 65; *People v. Williams*, *supra*.

[10] During the trial defendants attempted to introduce evidence on the same question. This evidence was properly excluded because the sufficiency of the proceedings before the committing magistrate is not a question for determination during the trial of a criminal case.

The order denying the motions for new trial and the judgments are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



72 Cal.App.2d 614

LYNN v. HERMAN.

Civ. 3179.

District Court of Appeal, Fourth District,
California.

Jan. 18, 1946.

Hearing Denied March 18, 1946.

1. Automobiles ⇨20

The title of an automobile evidenced by the registration certificate is not conclusive. Vehicle Code, § 186, St.1943, p. 3072, and § 223, St.1935, p. 124.

2. Evidence ⇨424

In action for possession of an automobile purchased by defendant and her husband and given by husband to plaintiff who was issued a registration certificate, where defendant had nothing to do with attempted transfer, parol evidence attacking plaintiff's title as shown by certificate was not inadmissible on ground it tended to vary terms of a written contract. Vehicle Code, § 186, St.1943, p. 3072, and § 223, St.1935, p. 124; Code Civ.Proc. § 1856; Civ.Code, § 3097.

3. Evidence ⇨384, 424

The rule against admitting parol evidence to vary terms of a written contract applies only between parties to a transaction or their successors in interest. Code Civ. Proc. § 1856; Civ.Code, § 3097.

4. Evidence ⇨429

Oral evidence is competent to prove that a purported promissory note or written contract was executed as a mere artifice affecting parties' relationship or conduct, and that it was not the parties' intention that it should be binding on them, since

reception of oral evidence does not vary the written instrument but tends to prove invalidity of challenged document. Code Civ.Proc. § 1856; Civ.Code, § 3097.

5. Husband and wife ⇨265

A husband having management and control of community personal property cannot give it away or dispose of it without consideration without wife's written consent. Civ.Code, § 172.

6. Husband and wife ⇨254, 265

An automobile purchased and paid for by husband and wife out of their separate earnings was community property which husband could not give away without consideration without wife's written consent. Civ.Code, § 172.

7. Husband and wife ⇨265

Where an automobile was husband and wife's community property, and husband, without consideration and without wife's consent, gave automobile to plaintiff, wife was entitled to possession of automobile as against plaintiff notwithstanding plaintiff was issued a registration certificate for automobile. Civ.Code § 172; Vehicle Code, § 186, St.1943, p. 3072, and § 223, St.1935, p. 124.

8. Husband and wife ⇨270(8)

In action for possession of an automobile which was the community property of defendant and her husband, and which husband gave to plaintiff, defendant's uncontradicted testimony that plaintiff stated that plaintiff "didn't pay for the car" was sufficient to support conclusion of a gift without consideration, so as to entitle defendant to possession of automobile. Civ.Code, § 172.

9. Replevin ⇨103(4)

In action for possession of an automobile, possession of which was retained by defendant on giving a bond, a verdict and judgment providing that defendant was entitled to return of automobile "or if that cannot be had, the value thereof", in a stated sum, was erroneous.

10. Appeal and error ⇨1152

Where defendant in action for possession of an automobile gave bond and retained possession, but verdict and judgment provided that defendant was entitled to return of automobile, "or if that cannot be had, the value thereof, the sum of \$1499.00", on appeal the District Court of Appeal was authorized to amend the judgment

by striking the quoted words. Code Civ. Proc. §§ 53, 662; Const. art. 6, § 4¾.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by Berniece Lynn against Betty Herman for the possession of an automobile. Defendant filed a cross-complaint. From a judgment denying plaintiff's claim, plaintiff appeals.

Judgment modified and affirmed.

Alfred Siemon, of Bakersfield, for appellant.

W. C. Dorris and C. Fleharty, Jr., both of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment denying plaintiff's claim to the right of delivery of an automobile to her.

Plaintiff brought this action in the usual form of claim and delivery to recover possession of a Studebaker sedan, alleging that defendant wrongfully removed it from her possession on May 24, 1944. Defendant admitted taking possession of the car on that date. Her counsel states that she gave bond to retain possession and that the car has remained in her possession ever since, which we assume to be true.

Among many incompetent and irrelevant matters set forth in the pleading and evidence of defendant we gather the following pertinent facts: That Charles Herman and defendant were husband and wife at all times material here; that they purchased the automobile in question in July, 1943; that \$100 of the purchase price was paid by Charles Herman out of his earnings; that all other payments were made out of the earnings of defendant; that Charles Herman was inducted into the Armed Services some weeks before May 24, 1944; that he gave the car to plaintiff without consideration and without defendant's consent; that plaintiff had possession of it for about a month prior to May 24, 1944; that a registration certificate (pink slip) was issued, dated May 31, 1944, showing plaintiff to be the legal owner of the car; that the reasonable rental value of the car was two dollars a day.

Plaintiff did not testify and was not present at the trial. Her counsel introduced the registration certificate in evidence and rest-

ed. If we understand his position correctly, he maintains that the registration certificate is conclusive and unimpeachable evidence of title and ownership; that the right of possession follows ownership; that parol evidence tending to impeach plaintiff's title, as shown by the registration certificate, was improperly admitted over his objection because it contradicted the terms of a written instrument. He cites various sections of the Vehicle Code having to do with registration of vehicles, and particularly section 186 of that Code, St.1943, p. 3072, and Coca Cola Bottling Company v. Feliciano, 32 Cal. App.2d 351, 89 P.2d 686, and Bank of America v. National Funding Corp., 45 Cal.App. 2d 320, 114 P.2d 49.

[1] Clearly section 186 of the Vehicle Code cannot be given the construction urged by plaintiff. It deals with the vesting of title in a new owner and provides that title shall not pass until the formalities of registration have been undertaken. It does not purport to provide that the title evidenced by the registration certificate shall be conclusive, unimpeachable, and free from all forms of attack. That the legislature did not intend to give any such effect to a registration certificate is shown by section 223 of the Vehicle Code, St.1935, p. 124, which, in subdivision "a," provides for the revocation of a registration certificate, "when the department is satisfied that such registration or that such certificate, card, plate or permit was fraudulently obtained or erroneously issued."

The case of Coca Cola Bottling Company v. Feliciano, supra, does not aid plaintiff here. The Coca Cola Bottling Company was a judgment creditor of Frank Feliciano and levied execution on four trucks of which Feliciano was the registered owner. He had transferred the trucks to a third party claimant who had failed to have new registration certificates issued in his name. On appeal it was very properly held that the lien of the judgment creditor was superior to the claim of the third party claimant as title had not vested in the new owner by the issuance of a new registration certificate as provided in section 186 of the Vehicle Code.

The case of Bank of America v. National Funding Corporation, supra, was decided on the doctrine of estoppel under the familiar rule of equity that where one of two innocent persons must suffer by the act of a third, he whose negligence caused the loss

must be the sufferer. If that case is authority at all here it favors the defendant for the lien of the Bank of America and the ownership of it and the innocent purchaser was upheld although no registration certificate had been issued to either.

[2-4] The argument that it was error to admit parol evidence to attack the title of plaintiff to the automobile as shown by the registration certificate, on the ground that it tended to vary the terms of a written contract, lacks convincing force for several reasons. In the first place that rule applies only between the parties to a transaction or their successors in interest. Sec. 1856, Code Civ.Proc.; *Heinfelt v. Arth*, 4 Cal.App.2d 381, 41 P.2d 191. There is nothing to indicate that defendant had anything to do with the attempted transfer or even knew of it until after plaintiff had possession of the car.

Further, as said in *Cooper v. Cooper*, 3 Cal.App.2d 154, 39 P.2d 820, 822:

"Oral evidence is competent to prove that a purported promissory note or written contract was executed as a mere artifice affecting the relationship or conduct of the parties thereto, and that it was not the intention of the parties that it should become binding upon them. Under such circumstances the reception of oral evidence does not have the effect of varying the terms of the written instrument, but rather tends to prove the invalidity of the challenged document. *P. A. Smith Co. v. Muller*, 201 Cal. 219, 256 P. 411, 412; *Texas Co. v. Berry Garage*, 121 Cal.App. 455, 9 P.2d 241; *Gleeson v. Dunn*, 113 Cal.App. 347, 298 P. 119; *Allen's Collection Agency v. Lee*, 73 Cal.App. 68, 238 P. 169; section 3097 Civ. Code."

[5, 6] Section 172 of the Civil Code provides in effect that while a husband has the management and control of the community personal property he cannot give it away or sell or dispose of it without consideration without the written consent of his wife. Here it is clear that the automobile was community property and that the defendant wife did not consent to its gift to plaintiff by Charles Herman.

This section has been applied in many cases in California. In *Ballinger v. Ballinger*, 9 Cal.2d 330, 70 P.2d 629, 631, it was said:

"The gift of community property by the husband without the consent of the wife

may be set aside in its entirety by the wife during the lifetime of her husband, *Britton v. Hammell*, 4 Cal.2d 690, 52 P.2d 221, and after his death may be set aside as to one-half thereof, *Trimble v. Trimble*, 219 Cal. 340, 26 P.2d 477."

See also, *Blethen v. Pacific Mutual Life Ins. Co. of California*, 198 Cal. 91, 243 P. 431; *Britton v. Bryson*, 216 Cal. 362, 14 P.2d 502; *Mundt v. Connecticut General Life Ins. Co.*, 35 Cal.App.2d 416, 95 P.2d 966; *Matthews v. Hamburger*, 36 Cal.App. 2d 182, 97 P.2d 465; *Bazzell v. Endriss*, 41 Cal.App.2d 463, 107 P.2d 49.

[7] Under the foregoing authorities we are of the opinion that the trial court was correct in awarding the automobile to defendant on proof that she was the wife of Charles Herman, that the automobile was their community property and that it was given to plaintiff by Charles Herman without consideration and without the consent of the wife.

Plaintiff argues there is no evidence in the record justifying the conclusion that Charles Herman gave the car to her without consideration. Defendant testified that two days after she had taken possession of the automobile she had a conversation with plaintiff in which the latter stated, "I took your husband and I didn't pay for the car."

[8] This is the only evidence we can find in the record on the subject of consideration for the attempted transfer of title to plaintiff. While the evidence is meager it was not contradicted in any way and we regard it as sufficient to support the conclusion of a gift without consideration.

[9, 10] In the verdict returned by the jury, and the judgment entered on the verdict, it was provided that defendant was entitled to the return of the automobile, "or if that cannot be had, the value thereof, in the sum of \$1499.00." On motion for new trial the quoted words were stricken from the judgment because defendant had possession of the car. There may be some question of the trial court's power to amend the judgment under the circumstances of this case. See, Sec. 662, Code Civ.Proc. However, on appeal this court has such power Sec. 43½, Art. 6, Const.; Sec. 53, Code Civ. Proc. and without pursuing the question further we will exercise it.

The judgment is modified by striking from the last paragraph thereof, the follow-

ing words and figures: "Or if that cannot be had, the value thereof, in the sum of \$1499.00", and as so modified the judgment is affirmed, respondent to recover her costs on appeal.

BARNARD, P. J., and GRIFFIN, J.,
concur.



72 Cal.App.2d 540

**GUNDELFINGER v. MARIPOSA COM-
MERCIAL & MINING CO.**

Civ. 7154; Sac. 5708.

District Court of Appeal, Third District,
California.

Jan. 14, 1946.

Hearing Denied March 14, 1946.

1. Judgment ⇨461(5)

Evidence did not justify setting aside a default judgment on ground of an alleged fraudulent statement of judgment creditor which was made after the default was entered, where the debtor's act of being lulled into a false sense of security was due to his own unreasonable conduct rather than to any act or omission of the judgment creditor.

2. Judgment ⇨461(5)

In suit to set aside a default judgment on ground of alleged fraud, where plaintiff admitted he never asked his attorney to represent him in defense of suit in which default was entered, evidence did not warrant finding that plaintiff was induced to forego his defense because of alleged wrongful conduct of his attorney.

3. Fraud ⇨50, 58(1)

Judgment ⇨461(5)

The presumption is against fraud, approximates in strength to that innocence of crime, and when asserted, including an assertion in a suit to set aside a default judgment on ground of fraud, must be proved beyond a mere peradventure.

4. Judgment ⇨407(6), 443(1)

In suit to have a judgment set aside on ground of alleged extrinsic fraud, every

165 P.2d—4½

essential element of actionable fraud must be made to appear and, in addition, plaintiff must excuse failure to make application to court that rendered judgment, within the six months period allowed by law for the filing of such a motion. Code Civ.Proc. § 473.

5. Judgment ⇨407(6)

In suit to set aside a default judgment on ground of alleged fraud, in absence of showing a reason why plaintiff did not make timely application to court that rendered judgment, after he discovered facts on which his charge of fraud was predicated, evidence did not entitle plaintiff to have judgment set aside. Code Civ.Proc. § 473.

6. Specific performance ⇨97(1), 119

Plaintiff was not entitled to a specific performance of a modified contract to sell mining property, where he did not tender the purchase money or show that he would be able to perform the contract, or that he had a good defense to defendant's claim for possession under the contract, or that the terms thereof were just and reasonable and that the consideration was adequate. Civ. Code, § 3391.

Appeal from Superior Court, Mariposa County; Andrew R. Aschotky, Judge.

Suit by Emil Gundelfinger against the Mariposa Commercial & Mining Company, a corporation, to set aside a default judgment and for specific performance of an agreement to sell realty, submitted to court without a jury. From a judgment for defendant, plaintiff appeals.

Judgment affirmed.

Ralph Robinson, of Fresno, for appellant.
• Charles W. Slack and L. V. Edwards,
both of San Francisco, for respondent.

PEEK, Justice.

The present controversy is the outgrowth of an agreement dated October 19, 1942, wherein appellant agreed to purchase from respondent corporation certain mining property located in Mariposa county. After the execution of said contract, disagreements arose concerning the effect and wording of a reservation in a deed from the respondent to appellant as provided for in said agreement. The numerous discussions between the parties were unproductive of

definite results, and on May, 27, 1943, the company filed suit against appellant for recovery of the possession of the premises in question and for incidental relief. Summons was served on him on June 11, 1943. He failed to appear and default was entered on July 28, 1943. Judgment thereupon was entered on September 8, 1943. On February 9, 1944, appellant filed a motion under section 473 of the Code of Civil Procedure to vacate said judgment on the grounds of mistake, inadvertence, surprise and excusable neglect, but the motion was abandoned by appellant for the reason that it was not made within the time provided therefor by said code section.

On March 6, 1944, appellant brought suit in equity against the company on two counts, the first one to set aside the default judgment on the ground of fraud, and the second for specific performance of an alleged modified agreement of sale. After submission of the case to the court sitting without a jury, findings of fact, conclusions of law and judgment were adopted and entered in favor of the company. Appellant's motion for a new trial was granted in order to permit the introduction of further evidence, but the subsequent findings of fact, conclusions of law and judgment were for all purposes identical with those entered at the conclusion of the first hearing.

It is appellant's contention herein that the findings are unsupported by the evidence, but neither does his own analysis thereof nor our independent search of the record sustain him in this regard.

The fraud which appellant charges appears to consist chiefly of (1) the statement alleged to have been made by Charles W. Slack, president of the company, that nothing further would be done with the litigation, that negotiations were progressing satisfactorily, and that there would be an amicable adjustment, and (2) the alleged circumstance that the attorney who was acting for appellant in certain matters was friendly toward the corporation, had an indirect interest in it, and failed to protect appellant's interests in the suit in which his default was taken.

[1] However, it appears without dispute that the alleged statement by Charles W. Slack was made after the default had been entered, and that if, as appellant asserted repeatedly, he was "lulled into a false sense of security," this was due to his own incautious or unreasonable conduct

rather than to any act or omission on the part of the company or its officers. Appellant does not charge that said Charles W. Slack made any direct promise to him, and it is apparent that there was no fiduciary relationship between the parties. Here, as in the case of *Truett v. Onderdonk*, 120 Cal. 581, 588, 53 P. 26, 29, the parties were dealing at arm's length and in the face of litigation, yet plaintiff took no measure whatsoever to verify the alleged statements of defendant's agents as to the actual facts with reference to the alleged contract, apparently content to rest in blind confidence upon the representations and conduct of said agents—even though here, just as in that case, the conduct on which plaintiff relied, if it was such as he charges in his complaint, was sufficient to "arouse his just suspicions, and put him upon inquiry as to the defendant's good faith." See, also, *Rudy v. Slotwinsky*, 73 Cal.App. 459, 464-465, 238 P. 783.

[2] The further contention, that appellant was induced to forego his defense of the suit brought by the company against him by reason of the wrongful conduct of his attorney induced by the collusive action of the company, is likewise without support in the evidence. While testifying in his own behalf appellant admitted that he never asked his attorney to represent him in the defense of the suit, and there is nothing to show that he had reason to assume that this would be done without a special agreement.

Indeed, appellant's theory on this phase of the case is too vague and equivocal to permit any rationalized discussion thereof. A summary of this portion of his brief shows that it was only "since the trial of the case" that he came to the conclusion that his counsel was either deceived, or was careless and negligent and let the time for appearance go by for that reason, or was attempting to act as Gundelfinger's attorney and also as the attorney for the Mariposa Company, the last being the position which he feels the exhibits produced by the defendant company clearly establish—a position which he contends was thoroughly brought to the court's attention upon the hearing of the motion for new trial.

However, appellant fails to call to our attention the particular evidence that so clearly establishes any of these theories, and our search of the record does not disclose such evidence.

[3] It always must be borne in mind that fraud should not be charged lightly. It is a serious impugnation of the integrity of the accused, and when asserted must be proved beyond a mere peradventure. As stated in the previously cited case of Truett v. Onderdonk, 120 Cal. 581, at page 588, 53 P. 26, at page 29:

"The presumption is always against fraud,—a presumption approximating in strength to that of innocence of crime; and it should not be deemed overcome, even prima facie, upon a showing so intangible and shadowy."

[4, 5] Moreover, where, as here, it is sought to have a judgment set aside on the ground of extrinsic fraud, every essential element of actionable fraud must be made to appear, and in addition the plaintiff must excuse his failure to make application to the court that rendered the judgment, within the six month period allowed by law for the filing of such a motion. No valid reason is apparent why appellant did not make timely application after he discovered the facts on which his charge of fraud is predicated. Wheat v. McNeill, 111 Cal.App. 72, 78, 295 P. 102; Hersom v. Hersom, 67 Cal.App. 116, 119, 226 P. 937 see also 15 Cal.Jur., p. 26, sec. 127.

[6] With regard to the second count of the complaint, wherein appellant seeks specific performance of an alleged modification of the contract, there is no evidence whatsoever to show that he would be in a position to perform his part of the agreement if he were permitted to do so. He does not tender the purchase money, neither does he show that he has a good defense to the claim of the company for possession of the property under a modified agreement. Furthermore, appellant fails to allege or prove that the terms of the contract sought to be enforced specifically are just and reasonable and that the consideration is adequate—fundamental requirements that may not be disregarded. Civ.Code, sec. 3391; 23 Cal.Jur., p. 438, sec. 16; Eichholtz v. Nicoll, 66 Cal.App.2d 67, 69, 70, 151 P.2d 664.

The determination reached by the trial court in this case is amply sustained by the pleadings and the evidence.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J.,
concur.

Hearing denied; SCHAUER, J., dissenting.

* Subsequent opinion 177 P.2d 273.

BROCK, Director of Agriculture, v. SUPERIOR COURT IN AND FOR STANISLAUS COUNTY et al.*

Civ. 7217.

District Court of Appeal, Third District,
California.

Jan. 24, 1946.

Hearing Granted March 21, 1946.

1. Venue ⇨11

Statute, providing that actions against a public officer for acts done by him in virtue of his office shall be tried in the county where the cause or some part thereof arose, applies only to affirmative action of the officer by which he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty. Code Civ.Proc. § 393(b).

2. Venue ⇨11, 21

Where action against State Director of Agriculture sought to prevent enforcement of proposed regulations relative to the fig industry, no claim being made that defendant had committed any affirmative action which interfered with the property rights of plaintiff, venue was not controlled by statute relative to actions against public officer for acts done by him in virtue of his office, but was controlled by statute requiring action to be brought in county where defendant resided. Code Civ.Proc. §§ 393(b), 395.

3. Venue ⇨22(1)

Where express provision is not made to the contrary, the proper county for trial, subject to the power of the court to change place of trial for stated causes, is the county in which the defendants, or some of them, reside at commencement of the action. Code Civ.Proc. § 395.

Petition by A. A. Brock, Director of Agriculture of the State of California, against the Superior Court of the State of California, in and for the County of Stanislaus, and G. B. Hjelm and B. C. Hawkins, Judges thereof, for a writ of prohibition commanding respondent court to cease and desist from any further proceedings in an action brought in said court against petitioner and others, other than to vacate an order therein denying change of venue.

Writ issued.

Robert W. Kenny, Atty. Gen., and Ward Sullivan and Paul M. Joseph, Deputy Attys. Gen., for petitioner.

Bush & Ackley, of Oakdale, and Frank B. Collier, of Modesto, for respondent.

ADAMS, Presiding Justice.

Petitioner seeks issuance of a writ of prohibition commanding respondent court to cease and desist from any further proceedings in an action brought in said court, other than to vacate an order therein denying change of venue and to order said action transferred to the Superior Court of Sacramento County.

The action which petitioner seeks to have transferred was brought in Stanislaus County against petitioner Brock as Director of Agriculture, Fig Proration Zone No. 1, a public corporation, and nine persons alleged to be directors of said corporation and members of Dried Fig Program Committee of said Zone No. 1. The complaint alleges that plaintiff S. S. Sorrenti is a grower of figs in said Zone No. 1; that the Dried Fig Committee for said zone had theretofore proposed quality and diversion regulations for the year 1945, which had been approved and put into effect by the Director; that said regulations are unreasonable, discriminatory, illegal and void in certain respects; that defendants have signified their intention of enforcing said regulations and unless restrained and enjoined from so doing plaintiff will suffer great and irreparable damage. The prayer of the complaint is for a decree adjudging said regulations to be unreasonable, illegal and void, and for an order restraining defendants from enforcing them.

To said complaint defendants demurred, and at the same time filed a notice of motion for change of venue to Sacramento County on the ground that Brock, as Director of Agriculture, is the principal defendant in the action, that he is a resident of the County of Sacramento, and that said county is the proper county for the trial of said action. This motion was supported by the affidavit of Director Brock in which he averred his residence in Sacramento County, the further fact that none of the defendants reside in Stanislaus County, and that plaintiff himself resides in San Joaquin County. Sorrenti, in an opposing affidavit, alleged that he is a grower of figs in both Stanislaus and San Joaquin Counties though residing in the latter county;

that under the provisions of Section 393(b) of the Code of Civil Procedure the Superior Court of each of the counties in Zone No. 1 is a proper county for the trial of said action, and that said section restricts the right of a defendant in the action to have same tried in the county of his residence. The trial court denied the motion for change of venue, the filing of this petition followed, and we issued an alternative writ.

No contention is made that prohibition is not the proper remedy in the premises, and counsel for respondent, in his argument before this court, expressly stated that any question of propriety of the writ was waived, and that the only question is as to venue.

Petitioner relies upon Section 395 of the Code of Civil Procedure as authorizing transfer of the action to the county of his residence. Respondent on the other hand contends that the allegations of his complaint show that Section 393(b) of the Code of Civil Procedure governs. The latter section provides that "the county in which the cause, or some part thereof, arose," is the proper county for the trial of an action "Against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office." And it is urged by respondent that plaintiff's cause of action, or some part of it, arose in Stanislaus County, and that it is against Brock, as a public officer, "for an act done by him in virtue of his office" as Director of Agriculture, particular reliance being placed upon *Cecil v. Superior Court*, 59 Cal.App.2d 793, 140 P.2d 125. Petitioner argues that the Cecil case is clearly distinguishable, and that under the decisions in the earlier cases of *Bonestell*, *Richardson & Co. v. Curry*, 153 Cal. 418, 419, 420, 95 P. 887; *State Commission in Lunacy v. Welch*, 154 Cal. 775, 99 P. 181; *Bloom v. Oroville-Wyandotte Irrigation Dist.*, 34 Cal.App.2d 102, 93 P.2d 164, and *People ex rel. McMillan v. Vischer* (*McMillan v. Richards*), 9 Cal. 365, 420, 70 Am.Dec. 655, the cause should be removed to the county of his residence.

[1-3] We think that petitioner's contention must be sustained. In *Bonestell*, *Richardson & Co. v. Curry*, *supra*, the action was brought against the Secretary of State and other public officials and the members of the partnership firm of A. Zellerbach & Sons, to which latter firm the

named officials had awarded a contract for furnishing paper for use in the office of the state printer. Plaintiff corporation, which was engaged in the same line of business as A. Zellerbach & Sons, claimed that it had been the lowest bidder and therefore was entitled to the contract; and it sought to enjoin further action upon the contract with A. Zellerbach & Sons, upon the ground that it was illegal and void. The action was commenced in the City and County of San Francisco, the place of business of A. Zellerbach & Sons. The official defendants moved to change the place of trial to Sacramento County, not on the ground of residence, but under Section 393(b), *supra*, claiming that their official acts in connection with the contract were performed in Sacramento, and were done by them by virtue of their offices. The court said, 153 Cal. at pages 419, 420, 95 P. at page 887:

"This subdivision is not applicable to the case at bar. This action is not one against a public officer '*for an act done by him in virtue of his office*' within the meaning of those words as the same are used in this law. It was held in [People ex rel.] McMillan v. Vischer, 9 Cal. [at page] 420, 70 Am.Dec. 655, that a similar provision in our practice act was not applicable to a proceeding in *mandamus* to compel a sheriff to execute a deed, the court saying through Field, J.: 'The second subdivision of section nineteen, which provides that actions against a public officer for *acts done* by him in virtue of his office shall be tried in the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, by which, in the execution of process, or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty. Elliott v. Cronk's Adm'rs, 13 Wend. 35; Hopkins v. Haywood, 13 Wend. 265.' The cases cited, construing a practically similar New York statute, fully sustain the text. The provision was subsequently made a part of our Code of Civil Procedure in the light of the construction previously given by the courts, and with the intention, we must assume, that it should continue to be so construed. This construction contemplates only such affirmative acts of an officer as directly interfere with the personal rights or property of the person complaining, such as wrongful arrest, trespass, conversion, etc.

The complaint in the case at bar shows no such case. Moreover, the action is not one against public officers for an act done by them, but is an action against them and certain other persons solely to prevent the doing of certain acts by such officers and by the other defendants in the future. It is thoroughly established, both by statute and by the decisions, that in all cases as to which express provision is not made to the contrary the proper county for trial, subject to the power of the court to change the place of trial on account of convenience of witnesses, disqualification of judge, and inability to have an impartial trial (Code Civ.Proc., § 397), is the county in which the defendants, or some of them, reside at the commencement of the action. (Code Civ.Proc., § 395.)" (Italics by the Court.)

In *People ex rel. McMillan v. Vischer*, above cited, the action against defendant Vischer was in *mandamus* to compel him, as sheriff, to execute a deed to a redemptioner, and it was argued that it was brought in the wrong county. It was in this connection that the court used the language quoted above, it being contended that an action to compel a public officer to perform, is not an action against him for acts done by him in virtue of his office, but to compel him to do an act, and that therefore the action fell within the general rule contained in the 20th section of the Practice Act providing for the trial of an action in the county in which the parties or some of them reside.

In *State Commission in Lunacy v. Welch*, *supra*, an action in *mandamus* against a county officer to compel him to pay a certain sum of money to the state treasurer was held triable, under section 395 of the Code of Civil Procedure, in the county in which the defendant resided. The court said that Section 393(b) did not apply, citing *McMillan v. Richards* (*People ex rel. McMillan v. Vischer*) and *Bonestell, Richardson & Co. v. Curry*, *supra*.

Bloom v. Oroville-Wyandotte Irrigation District, *supra*, also involved a proceeding in *mandamus*, its purpose being to compel an irrigation district and its officers to pay moneys due on bond obligations of the district or to levy an assessment for such payment. This court held that an order changing the place of trial to the county in which defendants resided was proper,

citing *State Commission in Lunacy v. Welch*, *supra*.

We think that *Cecil v. Superior Court*, *supra*, relied upon by respondent, is distinguishable upon its facts. There Cecil, the Director of Agriculture, sought to secure the removal to Sacramento County, the county of his residence, of a mandamus proceeding instituted by Arden Farms Company in Los Angeles County. It was there shown that an administrative proceeding against Arden Farms Co., a milk distributor, to cancel its license as such distributor, had been held in Los Angeles County, and that thereafter the Director, at Sacramento, had made an order that the license of Arden Farms Company should be revoked unless it should, within a given time, make certain payments to producers from whom it had purchased milk. The distributor refused to make the payments and sought, in the proceeding in mandamus, to have a retrial of the issues involved in the administrative proceeding before the department, asking also for revocation of the order revoking its license and an injunction against interference with its business by reason of said order. The court distinguished the cases cited hereinabove, and said, 59 Cal.App.2d at pages 796, 797, 140 P.2d at page 127:

"We are not considering a mere general order issued by the Director of Agriculture applicable alike to all milk distributors in the state or to those engaged in certain branches of the industry, but an adjudication relating to particular practices and transactions of a single milk distributor engaged in business in Los Angeles County and which directly affects its property located in its principal place of business. We think that the act of the director which will thus operate to Arden's detriment is essentially of the type of acts which the courts have had in mind and which they have described as affirmative acts and those which interfere with the property or rights of third persons. Certainly it is the act which has brought Arden to court for redress."

In the action before us (which was filed in July, 1945) it is not alleged that there has been any adjudication relating to particular practices and transactions of a single producer of dried figs engaged in business in Stanislaus County. On the contrary, plaintiff attacks the regulations proposed by the Proration Program Committee of Fig Proration Zone No. 1, which zone comprises 18 counties, including the county of Sacramento, which regulations are applicable alike to all dried fig producers in all of said counties. And assuming that plaintiff is a producer of dried figs, which he does not allege, the regulations affect him no more than any of the other producers in the zone. It is not alleged by plaintiff that the regulations have been put into effect. The allegation is that defendants have signified their intention of enforcing them during the marketing season of 1945 and that "unless the defendants are restrained and enjoined from enforcing said Regulations, plaintiff will suffer great and irreparable damage." It is not even alleged why and how plaintiff will suffer such damage or how the enforcement of the regulations will affect him or that they will affect him any differently than other fig growers in the zone.

We think it is apparent that Sorrenti's cause of action—if he has stated one at all—is not one which arose in Stanislaus County, that it is not "for an act done" by a public officer in virtue of his office within the contemplation of section 393(b), *supra*, and that the cause is properly removable to the county of residence of defendant Brock, as requested by defendants.

It is therefore ordered that the writ prayed for issue commanding respondent to vacate its order denying the motion for change of venue and to enter an order transferring the action entitled *S. S. Sorrenti v. A. A. Brock et al.*, No. 30051, to the Superior Court of the State of California in and for the County of Sacramento.

THOMPSON and PEEK, JJ., concur.

27 Cal.2d 503

In re MARVICH.

Cr. 4490.

Supreme Court of California, in Bank.

Jan. 18, 1946.

1. Habeas corpus ☞90

In original habeas corpus proceeding on ground that petitioner was convicted on perjured testimony, wherein referee was appointed and every person for whose attendance petitioner requested a subpoena and who could be served with process in state either testified before referee or was not called as a witness pursuant to a ruling either acquiesced in or not objected to by petitioner and as to others petitioner did not state what he expected to prove and did not request leave to take their depositions but at conclusion of hearing stated that he had nothing further to offer, there was no restriction of petitioner's right to present evidence. Pen.Code, § 118.

2. Habeas corpus ☞90

In original habeas corpus proceeding, Supreme Court was not bound by findings of fact made by referee but referee's conclusions were entitled to consideration where he had opportunity to observe demeanor of witnesses and to weigh their testimony during progress of examination and cross-examination.

3. Habeas corpus ☞85(1)

In original habeas corpus proceeding on ground that petitioner was convicted on perjured testimony procured by and given with knowledge of prosecuting officer, evidence was insufficient to establish that conviction was based on perjured testimony. Pen.Code, § 118.

4. Habeas corpus ☞90

In original habeas corpus proceeding on ground that petitioner was convicted on perjured testimony procured by and given with knowledge of prosecuting officer, contention that petitioner was unable properly to prepare his case because referee failed to comply with request for a transcript of evidence given at first criminal trial, in which court declared a mistrial, until hearing was almost completed, did not present error, where state was not obliged to provide him with such transcript and after one was loaned to him, as a matter of courtesy, he made no request for a continuance and did not ask that any witness be

recalled for further examination. Pen. Code, § 118.

5. Habeas corpus ☞90

In original habeas corpus proceeding on ground that petitioner was convicted on perjured testimony procured by and given with knowledge of prosecuting officer, the state was not obliged to provide petitioner with transcript of evidence given at first criminal trial in which court declared a mistrial because jurors were unable to agree on verdict. Pen.Code, § 118.

6. Criminal law ☞1202(6)

The charge of prior conviction in each of informations and defendant's admission of that fact under oath on witness stand could be considered as supplementing judgments which ordered sentences then imposed to run concurrently with unexpired sentence on prior conviction and judgments corrected nunc pro tunc to include determination of prior conviction of felony did not authorize any punishment different from that imposed by judgments as originally entered so that defendant could not complain because he was not given notice of order correcting the judgments and was deprived of opportunity to appeal.

7. Robbery ☞30

The maximum term of imprisonment which may be imposed as a sentence for crime of robbery of first degree is not five years but is life sentence, until and unless board charged with duty of fixing prison terms determines that it should be for a lesser period of time.

Original habeas corpus proceeding by Mike Marvich to obtain his release from state prison.

Writ discharged and petitioner remanded to custody of warden of state prison.

Mike Marvich in pro. per.

Morris Lavine, of Los Angeles, for petitioner.

Robert W. Kenny, Atty. Gen., Walter L. Bowers, Asst. Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and Harry F. Keeler, Deputy Dist. Atty., of Los Angeles, for respondents.

EDMONDS, Justice.

Mike Marvich was charged with two crimes of robbery and a judgment of con-

viction was affirmed. *People v. Marvich*, 44 Cal.App.2d 858, 113 P.2d 223. In the present original proceeding, by writ of habeas corpus, Marvich is endeavoring to obtain his release from the state prison upon allegations that he was held to answer and convicted upon the perjured testimony of Edgar J. Black procured by and given with the knowledge of the prosecuting officers.

Following the denial of a writ, the Supreme Court of the United States, upon certiorari, remanded the cause for further proceedings (320 U.S. 712, 64 S.Ct. 193, 88 L.Ed. 418) which were initiated by an order appointing Honorable A. L. Pierovich, Judge of the Superior Court of Amador County a referee to take testimony and make findings of fact upon the issues presented by Marvich's allegations. The order fixed the scope of the reference by the following questions: "(1) Did any witness who testified against Mike Marvich in the trial which led to his conviction on the charges for which he is now deprived of his liberty, commit perjury as defined in section 118 of the Penal Code of the State of California; that is, did such witness testify to any material matter which he knew to be false? (2) In the event that any witness did commit perjury, did the representatives of the State of California, the District Attorney, or any of his deputies or assistants cause or suffer such testimony to be introduced knowing that such testimony as given was perjured?"

It appears that two complaints were filed against Marvich. In one of them, he was accused of robbing Chester E. Slocum on March 31, 1940, and taking \$2,300 from him. By the other complaint, he was named with James W. Gibbons as one of the persons who, in June of the same year, robbed Virgil White of \$850. At the times of these robberies, Slocum and White, as partners, were engaged in the business of distributing the Los Angeles Examiner in the city of Long Beach and each robbery occurred at the office maintained by them.

A week after the second robbery, Marvich was arrested near San Diego. Gibbons was later taken into custody at Omaha, Nebraska. Following a preliminary examination upon each complaint, Marvich and Gibbons were held to answer. In the superior court, by stipulation of counsel, the two cases were consolidated for trial. The jurors being unable to agree upon a verdict, the court declared a mistrial. At

the second hearing, each of the defendants was convicted.

As grounds for relief by habeas corpus the petitioner asserts that he was held to answer upon the testimony of Black who, as a witness for the State at the first trial, repeated that testimony and then told a different story more directly implicating Marvich in the robbery of March 31st. The petitioner alleges that in explanation of the change in testimony, the witness stated that during a recess he had been talking with the prosecutor and Deputy Sheriff Mason. At the second trial, Marvich declares the witness repeated his last version of the occurrences of March 31st and during the trial, "out of hearing of the jury and petitioner, the trial Judge, prosecutor and petitioner's attorney all conceded that said State's witness was giving perjured testimony." Notwithstanding these facts, the petition concludes, the prosecutor in his argument to the jury vouched for the truthfulness of the testimony of Black, knowing that it was perjured.

Marvich's petition also includes the allegations that after he and Gibbons were convicted, Harry Keeler, the Deputy District Attorney who represented the State, asked them for certain data to be presented to the Board of Prison Terms and Paroles in their behalf. When Marvich asked Keeler why he wished to do this after having used perjured testimony, the petition continues, Keeler replied that he did not like the way he secured the convictions; that he had made Black, who could be sent to prison for life as an habitual criminal because of two prior convictions, change his testimony; "that petitioner and Gibbons should have accepted the prosecutor's offer to plead guilty to a lesser offense, for petitioner and Gibbons did not have a chance to win the case as long as the prosecution had Eddie Black for a witness."

Pursuant to the order of reference, several hearings were held at which Edgar J. (Eddie) Black and eight other persons testified. The record of the proceedings also includes the transcripts of the testimony taken at the preliminary examinations and the transcript of each of the trials in the superior court. According to these transcripts, at the first trial, Black testified that he first met Marvich about the middle of March, 1940. Meyer Kroll, Black's half-brother, lived with Black, and brought Marvich to their home. Late on a Sunday

evening, about a week after the first meeting Black and his wife were in their home at San Diego. Hearing conversation, Black investigated and found Kroll and Marvich in another room. They showed him a suitcase with money in it. Some of the rolls of silver were marked, "Los Angeles Examiner." Black asked, "My God, where did you get it? He says, 'shut up. Just got this from the Los Angeles Examiner.'" At a later time, which Black fixed as June, 1940, Marvich left a package containing silver coin at Black's house.

Black also told the jury that before March, 1940, he had bought a gun and given it to Kroll. Later he saw the same gun in the possession of Marvich.

According to the record of this trial, immediately following a recess, Deputy District Attorney Keeler reported to the court that Black had asked him for an opportunity to correct certain errors in his testimony given upon direct examination. Recalled to the witness stand for that purpose, Black changed his testimony and admitted that his prior statements were untrue. He then declared that on March 31st, he accompanied Marvich and Kroll from San Diego to Long Beach. The trip was made in Black's automobile which he had loaned to them with the knowledge that they were going to rob the office of the Los Angeles Examiner.

After reaching Long Beach, the trio continued on to Los Angeles, Black doing the driving while Marvich and Kroll looked for a car to steal. Later they went back to Long Beach and, at a skating rink, Black left his companions, who continued on their way in his automobile. They returned for him three or four hours later and he got into the car with them. The trio started for San Diego but seeing a lot of money in the car, Black became frightened and left the automobile. He then went back to Long Beach and, later in the evening, returned to San Diego by bus. Eventually he received \$90 out of "this haul."

At this trial there was no inquiry as to how Marvich was dressed on the night of the robbery, and Black did not testify that Marvich, at any time, put on or took off a sailor's uniform. When asked if he brought a sailor from San Diego to Long Beach, Black replied, "No." But in the second trial Black told the jury that when he met Marvich and Kroll at the skating rink, Marvich was taking off a sailor's

uniform which he tossed out of the car as they drove away from Long Beach.

When called as a witness before the referee, Black was asked: "You told one story at the preliminary hearing, and at the first trial of the case, you testified to substantially the same story that you told at the preliminary hearing. Then a recess was called, and you were outside there talking to A. B. Mason * * * Deputy Sheriff of San Diego County. Did he ask you to change your testimony?" Black's reply was: "Well, at that time he did not, but on several occasions, he did ask me to change my testimony."

Upon further examination, Black declared Mason asked him to change his testimony "or else." But when asked: "Do you remember what part of the testimony Mason asked you to change, or what he told you to testify to?" Black answered: "No, I don't. There was so many questions involved, that they would fill a whole book. I don't remember none of them." When further pressed as to whether Mason asked him to testify concerning particular facts, Black said: "If your Honor please, I would like to say a few little words, if I may at this time. Some years ago,—I was living in San Diego at the time,—I had my family—when that crime was committed,—after the crime, I was really scared, and Mr. Mason at the time told me—'Well, you know what predicament you are in,—if you don't testify the way you are supposed to, you know what will happen to you.' And being afraid for my family,—not only my family, but myself, also, I testified to that fact,—a lot of it,—quite a few of it was untrue at the time, and at this time, I have got it out of my memory, and I have forgotten all about it, I am living a decent life, and I don't want to remember anything that happened years ago. Now that I am practically a changed person, and I have got a nice family, and I want to continue to do so at this time, and I came up here at my own request."

The referee then took up the questioning: "What parts of this testimony did Mr. Mason ask you to testify to?" Black's answer was: "That I don't remember at this time, your Honor. There was some testimony that he told me to change my music, or I would know the consequences if I didn't. At the time I was a felon,—a long time before,—and he knew it."

Urged to be more specific, Black was asked: "You can't tell us at this time just

what testimony or what parts of your testimony were influenced by Mr. Mason?" The reply was: "No, your Honor, I cannot." Continuing the examination, the referee asked: "You contend that he did not influence you? * * * To color your testimony?" "Yes, he did, in order to have different testimony," Black answered. "There were several questions that he brought up, and he asked me whether it was so, in regard to the guns, and in regard to how he was dressed and he told me I had to change it around a little bit, in order to get everything clear,—in order to get myself cleared up,—and that is all I can remember at the time,—at this time."

Again the referee endeavored to have the witness particularize and asked him to pick out from his testimony in the transcript anything that Mason requested him to change or color. Black replied: "There is one question in my mind: Mr. Mason told me to identify Marvich,—which I did know Marvich,—and he wanted to know how he was dressed, and he was really dressed in civilian clothing. I don't believe he had any sailor's suit on. I don't recall him having any. * * * At that time, your Honor, they told me he was supposed to have been dressed in sailor's clothing at the time, and he was supposed to have been in a car going back to San Diego in sailor's clothing. He was not in a sailor's outfit * * * but still I testified to that effect,—that he was in a sailor's uniform." The referee then asked: "Is there anything else in there that you can point out, that Mr. Mason directed your attention to, and told you to testify to, one way or the other?" Black answered: "No, your Honor. It has been so muddled in my mind and in my memory, entirely."

Upon cross-examination Black fixed the time when Mason told him to change his testimony as being "after the preliminary." Then when asked if the only false testimony which he gave after the recess in the first trial was in regard to Marvich's dress, he said, "That is one of them. * * * There was so many things I can't recollect everything. * * * I have a very slight memory of all that happened." Then Black was asked: "Would it be fair to say, Mr. Black, that you have no recollection at all at this time." His reply was: "That is right."

Equally evasive were Black's replies to other questions asked him concerning vari-

ances in his testimony at different times. For example, "Now, did you ever see me with a gun, Eddie?" Black was asked by Marvich, who is appearing in propria persona in the habeas corpus proceeding. "I couldn't tell. Right now, I couldn't tell," Black replied. "Do you remember ever seeing me with a gun,—with the gun in question?" Marvich continued. "The gun in question—I don't think I did," said Black. "I don't remember at the time. It has been so long ago, your Honor, that I couldn't remember whether he did or whether he didn't."

A. B. Mason, Deputy Sheriff of San Diego County, testified before the referee that in July, 1940, he received an anonymous telephone call. The speaker stated that Marvich, then a parolee from the state prison, was carrying a gun. Mason arrested Marvich, who did not have a gun either on his person or in his automobile. However, Mason placed him in the county jail under a booking of "Hold for State Parole Officer."

Soon afterward Mason discovered that his informant was Black. At Black's suggestion, Mason communicated with the Long Beach police who reported that Marvich was wanted for robbery. According to Mason, Black kept coming to his office with more information about the robbery of the Examiner office, finally involving Meyer Kroll, his step-brother, and giving information leading to the arrest of Gibbons.

During these conversations, said Mason, he asked Black how Marvich was dressed on the day of the robbery. His inquiry was made at the request of the Long Beach officers, based upon the statement of one of the victims that the robber wore a sailor's uniform. Black then stated to him, said Mason, that Kroll had obtained such a uniform for Marvich. Black also told him, Mason continued, that he operated a cleaning establishment from which Kroll had taken the suit.

Referring to a conversation with Black during the first trial of Marvich when Mason, with other witnesses, was excluded from the court room, Mason told the referee that Mrs. Black came to him and said that Eddie had not told the truth. This conversation occurred during a recess. Mason then asked Black, in the presence of his wife, about his testimony. Black then admitted for the first time and contrary to

prior denials, that he had gone to Long Beach with Marvich and Kroll on the day of the first robbery. Black also stated that Marvich, while in the automobile at the commencement of the return trip to San Diego, changed from a sailor's uniform into civilian clothes. "I called [Deputy District Attorney] Keeler's attention to it," Mason went on; "* * * Black was scared to death, because he said, 'If I testify to that, they will prosecute me.' What Keeler told him in regard to it, I don't know. * * *

In further testimony before the referee Mason declared that he did not at any time or in any manner tell Black how he was to testify, or suggest any particular thing that he was to say in his testimony. Also, said Mason, he never threatened Black, nor did he intimate to him that if he did not testify in a particular way, something would happen to him; it was Black's idea, from the time of the first telephone call, to get Marvich returned to prison. Moreover, according to Mason, he not only did not promise Black immunity as the reward for his testimony but he urged the Long Beach police to prosecute Black as well as Marvich.

The testimony of Keeler as to what transpired at the time of the recess is that Mason came to him and said, "Eddie here has been lying like a goat, and he wants to go in there and tell the truth." Keeler then told Black, "We don't want anything but the truth, and nothing but the whole truth," and "If you have been lying up to this time, you better tell the truth from here on out, or it will not go easy for you." When the trial was resumed, after further questioning, Black changed his testimony, said Keeler, and told of going to Long Beach with Marvich and Kroll.

Marvich and Gibbons both related to the referee their versions of a conversation with Deputy District Attorney Keeler just after the jury had returned verdicts of conviction. Marvich quoted Keeler as saying that without the testimony of Black he could not have secured a conviction. Also, said Marvich, Keeler agreed to make a favorable report to the Board of Prison Terms and Paroles concerning him if there was no appeal. But Marvich did not testify that there was then any charge by him or admission by Keeler of perjury committed by Black. As Gibbons related the conversation, Marvich told Keeler that they could not have been convicted with-

out Eddie Black's testimony. "Mr. Keeler says that as long as he had a life term to hold over Eddie Black, he would testify to anything he wanted him to."

There was a conversation between him and Marvich and Gibbons at the conclusion of the trial, Keeler told the referee. He went to the detention room and asked Gibbons to write him a letter giving some of his background for use in preparing the usual report to be sent to the Board of Prison Terms and Paroles. Marvich came to the door and said, "What are you going to do for me?" "Nothing," Keeler said was his reply. There was some further conversation there relative to the claimed perjury of Black, Keeler told the referee, and the attorney stated that according to his recollection of the occurrence he said to Marvich, "I didn't like to use witnesses like Eddie Black." But Keeler denied telling Marvich that he had been convicted on perjured testimony.

Other testimony presented to the referee, with the possible exception of that of Mrs. Josie Kroll, is entirely irrelevant to the charges of perjury made by Marvich. Mrs. Kroll, the mother of Black and Meyer Kroll, died after Marvich was convicted. At the second trial she testified that Black, Gibbons and Marvich stayed overnight at her home in Long Beach, just prior to the second robbery, which occurred on June 30, 1940. However, she admitted that shortly before the trial she had made a different statement to Officer Kirkpatrick at the Long Beach police station. According to her testimony, when Marvich, who was then in custody, was pointed out to her, she told the officer that she had never seen him before.

Marvich contends that Mrs. Kroll testified falsely in an effort to help Meyer Kroll, her youngest son. The transcript of the several trials shows that the son related to the jury a conversation with his mother concerning her testimony. "In that conversation," counsel for Gibbons asked Kroll, "did you ask her why she had testified at this case and did she state to you that she had been told by some man in the District Attorney's office that he would aid her in getting your term shortened with the Parole Board?" In reply, Kroll did not quote his mother's answer directly but said: "Well, it might not have been the same words but it was something. * * * I surmise that it was something like that."

This evidence went before the jury with the testimony of Black who declared that he, with Marvich and Gibbons, about June 23d drove to his mother's home in Long Beach and stayed overnight. Black's statements concerning this visit were not referred to at the referee's hearing and stand unchallenged.

Donald Waters, who at the preliminary examination and at each trial of Marvich identified the petitioner as the person who committed the second robbery, was examined before the referee concerning certain discrepancies in his testimony. Although the petition of Marvich specifically charges that perjury was committed by Black and makes no complaint as to the testimony of any other witness, Waters' attention was called to his varying descriptions of the robber. At the first trial, the transcripts show, Waters said that Marvich was bare-headed and did not wear dark glasses. On the second hearing of the case, Waters said that he thought that Marvich wore a hat. Before the referee Waters declared that his last testimony was true to the best of his knowledge at the time. "Did any one approach you or try to influence your testimony regarding the matter of the hat, or other identification?" the referee asked. "No, sir. No one did," was the reply.

Another witness called by Marvich was Allen Moore, a parole officer. At the second trial, Marvich laid great stress upon the fact that a parole report for the month of March, 1940, assertedly made by him and sent to the State Parole Officer, was not on file. Moore told the referee that he did not appear as a witness at the second trial and was not then a parole officer. According to his testimony he knew nothing as to the reports made by Marvich other than was disclosed by the file.

Walter C. Reid, called as a witness for the petitioner at the referee's hearing, also testified at the second trial of Marvich. According to the transcript of the former proceeding, he told the jury that in April, 1940, Marvich made a down payment on an automobile which he registered in the name of his wife and that Mrs. Marvich turned back the car the following June. Marvich claims that the car was returned a month or two later. Reid stated to the referee that his testimony was correct and that no one had ever asked him to testify in any particular way.

Upon this evidence, the referee made extensive findings of fact. He found that

the testimony of several of the witnesses "threw no light" upon the questions submitted to him, but he made particular reference to the testimony of Black, Waters, Mason and Mrs. Kroll. Because Black's memory "was so befuddled and confused," the referee reported, about the only positive testimony procured from him was the bald statement that "on several occasions" Mason asked him to change his testimony "or else."

Black's present testimony is that prior to the robbery Marvich was dressed in civilian clothes. The variance relied upon to support the charge of perjury, the findings state, concerns the statement at one time made by Black that he saw Marvich take off a sailor's uniform. Upon this point the referee summarized the evidence as follows: "There are no supporting facts or testimony except Witness Black's own admission. At the trial Petitioner Marvich took the witness stand in his own behalf but did not specifically deny the incident of taking off of the sailor's uniform as related by Black, nor was he asked regarding the same; Captain A. B. Mason testified that Black told him Marvich was dressed in a sailor's uniform; and there is other positive corroborating circumstances in support of Black's testimony at the trial to the effect that Petitioner was seen taking off the sailor's uniform, to-wit; Witness Slocum positively identified Marvich, the Petitioner, as one of the robbers on that occasion, and testified that the latter was dressed in a sailor's uniform at that time. Slocum gave the same testimony at the first trial." In conclusion, after characterizing Black's testimony before him as "wholly and completely vague and indefinite," the referee declared that it "cannot be used as a basis for any charge of perjury against any witness connected with the case."

Considering the testimony of Captain Mason, the only alleged perjury attributed to him, the referee reported, relates to the reason given Marvich for placing him under arrest. Summarizing the evidence, it was the finding of the referee "that Witness Mason testified at the preliminary hearing and at each trial that Petitioner was being investigated in connection with robbery and no particular robbery was referred to. What he told Petitioner at the time of his arrest, with reference to the charge, or the booking, is immaterial. * * * Whatever the booking was for

is of no consequence here, if no perjured testimony or framing of a robbery charge took place, and the Referee finds that there was no perjury, coercion, framing or coaching in connection with any witness who testified at the trial wherein Petitioner was convicted of robbery."

In regard to the testimony of Donald Waters, the referee found that the only variance in it was as to whether Marvich did or did not wear a hat at the time of the commission of the robbery. Marvich was positively identified as the robber and the uncertainty of Waters upon this point was before the jurors. "They found against the petitioner," said the referee, "and so it must be held." He also reported that nothing which had been submitted to him shows the commission of perjury by Mrs. Kroll.

The conclusion of the referee is "that no witness at the trial [of Marvich] * * * committed perjury as defined in Section 118 of the Penal Code of the State of California, and that no witness testified to any material matter which 'he knew to be false.' No perjury being found, it naturally follows that no representative of the State of California, the District Attorney, or any of his deputies or assistants, caused or suffered any perjured testimony to be introduced knowing that such testimony as given was perjured."

Marvich filed "Objections to and Motion to Strike the Referee's Findings of Fact from the Record." First, he attacks a recital by the referee that a subpoena was issued for each person named by the petitioner with the exception of "such witnesses as Petitioner eventually admitted to be unnecessary." Upon that point, the record shows that Marvich requested subpoenas for 18 persons. Black, Mason, Moore, Reid, Waters and Judge Leslie Still appeared and testified. It appears that E. C. Thompson and Mrs. Josie Kroll were dead. In a discussion concerning the attendance of court reporters D. A. Little and Mrs. Lola Stanley, Marvich stated that they "would not throw any light on the issue of perjury." As to Judge Dockweiler, petitioner himself said, "I think we could eliminate him."

Although Marvich did not expressly state that Judge Downs of the Municipal Court need not appear as a witness, the petitioner made no objection to the ruling of the referee that he did not "see any point in bringing Judge Downs or Judge Dockweil-

er into the hearing." Judge Downs conducted the preliminary examinations of Marvich and Judge Dockweiler presided at the trial which resulted in a disagreement of the jury. The transcript of each of these proceedings was before the referee and Marvich does not contend that either judge could have testified to any fact not shown by the records.

Of the other persons for whom Marvich requested subpoenas, the record shows that Grove, Whitmer, Denning, Kirkpatrick and Shields were all in the Armed Forces and unavailable for service of process. Police Inspector Hall was with the Federal Bureau of Investigation and assigned to duty in Florida. The referee offered to issue a subpoena for him but later stated that he would be eliminated. Petitioner made no objection to that ruling.

[1] It therefore appears that every person for whose attendance Marvich requested a subpoena and who could be served with process in this state either testified before the referee or was not called as a witness pursuant to a ruling either acquiesced in or not objected to by the petitioner. As to the others, Marvich did not state what he expected to prove by any one of them nor did he request leave to take their depositions. Furthermore, at the conclusion of the hearing he stated to the referee that he had nothing further to offer. Under these circumstances there was no restriction of his right to present evidence upon the issues of fact before the referee.

A second ground stated by the petitioner as justifying his objections and motion is that he has proved the allegations of his petition by a preponderance of the evidence and beyond a reasonable doubt. According to his analysis of the evidence, Black, Waters, Mason and Mrs. Kroll falsely testified to material matters in the trial which resulted in his conviction, and Mason, Police Officer Kirkpatrick and Harry Keeler, the Deputy District Attorney conducting the prosecution, were well aware of the perjury committed by these witnesses. The petitioner's contentions in this connection concern the merits of his case and will be considered as exceptions to the findings of the referee.

[2] In his brief, Marvich quotes or refers to testimony which, he insists, supports the charges of his petition. Generally speaking, his arguments rest upon the premise that the conflicts in the mass of

evidence which the referee considered should be resolved in his favor. Black changed his testimony during the first trial of Marvich and his story at the second trial was so unsatisfactory that Judge Still, out of the presence of the jury, remarked: "Eddie Black probably committed perjury at this trial." But the uncertainty in the evidence which was recognized by the trial judge was resolved by the jury, as it had a right to do, against the petitioner. And although this court is not bound by the findings of fact made by the referee (see *In re Mooney*, 10 Cal.2d 1, at p. 17, 73 P.2d 554), his conclusions are entitled to consideration for the reason that he had the opportunity to observe the demeanor of the witnesses and to weigh their testimony during the progress of examination and cross-examination. The referee has called attention to conflicts and discrepancies in the evidence presented to him as well as that shown in the transcripts of the prior proceedings. But from all of this evidence, it may not be said with certainty that Black committed perjury.

[3] As to the testimony of the other persons who testified for the State, Marvich relies upon variances which are of much less significance than those in the various accounts given by Black. Many of the differences in testimony stressed by the petitioner relate to immaterial matters; each of them is entirely consistent with failure of recollection or innocent misrecollection which are common traits of human experience. And although the petitioner insists that the testimony of Mason, Kirkpatrick and Deputy District Attorney Keeler conclusively shows that they forced Black to commit perjury in order to secure a conviction, the evidence falls far short of proof of that charge. The fact that Mason placed Marvich in jail under a booking of "Hold for Parole Officer" while investigating the charge of robbery is immaterial. Also, even if Black's testimony concerning the robbery amounted to a confession, there was no objection to it upon the ground that it was not freely and voluntarily given and the evidence relied upon by Marvich to prove that Black committed perjury in order to save himself from prosecution is directly contradicted by other evidence.

[4, 5] Marvich asserts that he was unable properly to prepare his case because the referee failed to comply with his several requests for a transcript of the evidence at the first trial until the hearings

were almost completed. But the State was not obliged to provide him with such a transcript, and after one was loaned to him, as a matter of courtesy, he made no request for a continuance nor did he ask that any witness be recalled for further examination.

[6] In the return to the writ of habeas corpus, it is alleged that Marvich is confined in Folsom Prison in accordance with the provisions of two judgments of conviction which are pleaded in *haec verba*. By a "Reply to the Answer and Return" and in a brief, Marvich asserts that those documents are not true copies of the judgments which were rendered by the court following his second trial upon the two robbery charges. He asserts that, in each of the informations filed against him, the prior conviction of a felony was alleged but that, upon arraignment, he denied the accusations. The judgments entered and considered by the District Court of Appeal, and upon which he was received by the Warden of the State Prison, says Marvich, do not include the finding of a prior conviction of a felony. The petitioner explains the situation in this regard as follows: After the decision of the District Court of Appeal which, in affirming the judgments mentioned a prior conviction (*People v. Marvich*, 44 Cal.App.2d 858, 113 P.2d 223), and some ten months after the trial, each of the judgments was corrected *nunc pro tunc* to include the determination of the prior conviction of a felony as charged in the information. Marvich asserts that he received no notice of the order made after judgment. For that reason, he says, he was deprived of the right to appeal from the order and his terms of imprisonment have been fixed upon the judgments as corrected. Although this and other points presented in the "reply" and the brief have nothing to do with the charge in the petition for the writ of habeas corpus that Marvich was convicted upon perjured testimony, as he is appearing in *propria persona* each of his contentions will be considered.

Considering the complaint of Marvich that his terms of imprisonment should have been fixed under the judgments as originally entered, the record shows that each of the informations in which Marvich was accused of robbery alleges that, before the commission of the offense then charged, "in the Superior Court of the State of California, in and for the County of San Joaquin,

[Marvich was] convicted of the crime of Robbery, First Degree, a felony, and the judgment of said Court against said defendant, in said connection, was, on or about the 4th day of December, 1934, pronounced and rendered, and said defendant served a term of imprisonment therefor in the State Prison." Both of the judgments rendered at the time of the trial recite the conviction of Marvich upon the charge of robbery of the first degree and declare that, as punishment therefor, he should be imprisoned "in the State prison of the State of California at Folsom for the term prescribed by law, which sentence is ordered to run concurrently with his unexpired sentence on the Prior Conviction." Accordingly, it affirmatively appears, not only was the prior conviction of Marvich and his imprisonment therefor adequately pleaded in the informations, but the judgments as originally rendered, ordered that his sentences upon the charge of robbery "run concurrently with his unexpired sentence on the Prior Conviction." And although the court's minutes show that upon arraignment, Marvich denied the charges concerning the prior conviction, at the second trial, when testifying in his own behalf, he admitted that he had served a term of imprisonment following his conviction and was on parole from San Quentin prison at the time of his arrest by Mason.

The record here is therefore much more explicit than the one which was before the court in the case of *In re Basuino*, 22 Cal. 2d 247, 138 P.2d 297, 298. According to certain documents set out in the return to the writ of habeas corpus, Basuino was in court when an information was presented which charged him with a violation of the State Narcotic Act "and one prior conviction of a Felony." Although these documents also showed his admission of the prior conviction and his plea of guilty to the information, the judgment rendered recited only a conviction "of the crime of Felony, to wit: Violating the State Narcotic Act." However, it was held that the accompanying record might be considered as supplementing the language of the judgment and imprisonment "for the term prescribed by law upon the record of the facts was necessarily implied." In connection with this conclusion, the cases of *People v. Noland*, 30 Cal.App.2d 386, 86 P.2d 363, and *People v. Schneider*, 36 Cal.App.2d 292,

98 P.2d 215, relied upon by Marvich, were distinguished with the added comment that any contrary conclusion which might be drawn from the language of the opinions in those cases was disapproved. The later decision of *Ex parte Schneider*, 23 Cal.2d 427, 144 P.2d 329, also cited by Marvich, is not in point because the holding there made was based upon the doctrine of the law of the case.

Marvich does not claim that the omission from the judgments of a specific finding concerning his prior conviction has prejudiced him in any way; his complaint is that lack of notice of the order correcting the judgment nunc pro tunc deprived him of the opportunity to appeal from it. But applying the rule of the *Basuino* case to the Marvich record, the charge of the prior conviction in each of the informations and the petitioner's admission of that fact under oath upon the witness stand may be considered as supplementing the language of the judgments which ordered the sentences then imposed "to run concurrently with his unexpired sentence upon the prior conviction" and justified the terms of imprisonment which have been fixed by the Board of Prison Terms and Paroles. The corrected judgments, therefore, did not authorize any punishment different from that imposed by the judgments as originally rendered.

[7] Also, the maximum term of imprisonment which may be imposed as a sentence for the crime of robbery of the first degree is not five years, as the petitioner contends, but is a life sentence, until and unless the board charged with the duty of fixing prison terms, determines that it should be for a lesser period of time. *People v. McNabb*, 3 Cal.2d 441, 45 P.2d 334. The decision of *Ex parte Quinn*, 25 Cal. 2d 799, 154 P.2d 875, followed this construction of the statute but held that because a life sentence may be reduced to a specified number of years, a trial court may direct whether multiple sentences shall run consecutively or concurrently.

The writ is discharged and the petitioner is remanded to the custody of the Warden of the State Prison at Folsom.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

27 Cal.2d 520

PEOPLE v. HESLEN.**Cr. 4619.****Supreme Court of California, in Bank.****Jan. 18, 1946.****Criminal law** ⇨1184

Motion to modify judgment of conviction of first-degree murder by reducing it to judgment of second-degree murder, made by prosecution upon rehearing following reversal of judgment for erroneous instruction relative to distinction between first and second-degree murder and not resisted by defense counsel, should be granted and judgment modified by reducing it to second-degree murder, and as so modified, judgment should be affirmed.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

On rehearing.

Former opinion modified, judgment of first-degree murder modified by reducing it to second-degree and as so modified judgment affirmed and cause remanded with directions.

Prior opinion, 163 P.2d 21.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., John Quincy Brown, Dist. Atty., of Sacramento, Albert H. Mundt, Chief Deputy Dist. Atty., of Represa, and John B. Heinrich, Deputy Dist. Atty., of Sacramento, for respondent.

CARTER, Justice.

In this case a judgment imposing the death penalty upon defendant for first-degree murder was reversed by this court on November 1, 1945, on the ground that the jury was erroneously instructed relative to the distinction between first and second-degree murder. *People v. Heslen*, Cal., 163 P.2d 21. On November 29, 1945, pursuant to respondent's petition, a rehearing was granted. The case was then placed on the calendar for argument at which time the respondent made a motion to modify the judgment by reducing it from a judgment of first-degree murder to a judgment of second-degree murder. Counsel for defendant appeared and stated that he would not resist the motion. Under all the circumstances the motion should be granted.

The judgment of the trial court is, therefore, modified by reducing it to murder of the second degree, and as so modified, is affirmed. The cause is remanded to the trial court with directions to pronounce judgment upon defendant sentencing him for the term prescribed by law for murder of the second degree.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



72 Cal.App.2d 662

In re CATTALINI et al.**Civ. 7145.****Sac. 5705.**

District Court of Appeal, Third District,
California.

Jan. 24, 1946.

1. Infants ⇨18

In order for juvenile court to have jurisdiction to declare a minor child free from control of his parents, such child must have been left with another without provision for support or without communication from either or both of his parents for one year, and all such acts are subject to the qualification that they must have been done with intent to abandon the child. St.1943, p. 1333, § 701.

2. Infants ⇨18

The statute extending jurisdiction of juvenile court to any person who should be declared free from custody and control of either or both parents and defining such person as a minor child who has been "left" by either or both parents in care and custody of another, etc., uses quoted word as connoting voluntary action. St.1943, p. 1333, § 701.

See Words and Phrases, Permanent Edition, for all other definitions of "Left".

3. Infants ⇨18

Where divorce decree awarded minor children to care and custody of mother, father could not be said to have "left" the

children in the care and custody of mother within statutory definition of a person who should be declared free from custody and control of either or both parents. St.1943, p. 1333, § 701.

4. Infants ⇐18

Evidence established that father's failure to provide support for minor children who were awarded by divorce decree to care and custody of their mother was attributable in part to his inability to do so and in part to indications by mother that contributions to their support were neither necessary nor welcome, as respects jurisdiction of juvenile court to determine that the children had been abandoned by father and were "free" from his custody and control. St.1943, p. 1333, § 701.

5. Infants ⇐18

Failure for one year to provide for support of minor child does not constitute the child an abandoned child, but is merely presumptive evidence of intent to abandon, and presumption thus created may be overcome by opposing evidence, and when it appears that the failure to provide was due to inability to do so, less evidence than under other circumstances would be required to overcome such presumption. St.1943, p. 1333, § 701.

6. Infants ⇐18

Father through Christmas and birthday cards and gifts to minor children who were awarded by divorce decree to care and custody of mother and through letters written at his specific request by second wife, communicated with the children within meaning of the word "communication" as used in statute defining jurisdiction of juvenile court to determine that a child has been abandoned and is free from custody and control of parent. St.1943, p. 1333, § 701.

See Words and Phrases, Permanent Edition, for all other definitions of "Communication".

7. Infants ⇐18

Father's repeated insistence that he had no intention of giving up minor children, who were awarded by divorce decree to custody of mother without provision for their support by father, coupled with explanation of failure to provide for their support because of inability to do so and mother's discouragement of contributions toward their support, dispelled presumption of intentional abandonment arising from

failure to support and required a determination that father in fact did not intend to abandon the children. St.1943, p. 1333, § 701; Civ.Code, § 196.

8. Statutes ⇐188

Language of statute should be given its usual and ordinary meaning unless legislative intent to give it another and narrower meaning is to be clearly discerned in the context and from the whole language of statute.

9. Infants ⇐18

The statute providing for determination by juvenile court that a minor child has been abandoned by either or both parents and is therefore free from custody and control of such parent, since it contemplates depriving a parent of his child in derogation of his natural rights, should be construed in support of right of natural parent and every intendment should be in favor of the claim of the parent under the evidence. St.1943, p. 1333, § 701.

10. Divorce ⇐324

Where by divorce decree custody of a minor child is awarded to mother without any provision for support of child by father and child in such custody is being supported in a proper manner, as between the parents, the immediate legal duty of support rests upon the mother as long as such conditions continue. Civ.Code, § 196.

11. Infants ⇐18

A showing that father has intentionally shirked responsibility to support minor child at a time when and under circumstances where he should have assumed such responsibility, is necessary to charge father with dereliction in such regard. St. 1943, p. 1333, § 701.

12. Infants ⇐18

In determining whether father abandoned minor children after they had been awarded by divorce decree to care and custody of mother without any provision for their support by father, so as to justify determination that they were free from father's custody and control, whether father's conduct before divorce would have warranted such a determination was immaterial. St.1943, p. 1333, § 701.

13. Adoption ⇐7 Infants ⇐18

That motivating reason for proceeding for a determination that minor children

who were awarded by divorce decree to custody and care of mother, had been abandoned by father and were therefore free from his custody and control may have been to dispense with necessity of procuring father's consent to adoption of children by stepfather and of citing father to appear in adoption proceeding was immaterial and stepfather's willingness to adopt the children should not be considered. St.1943, p. 1333, § 701.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Proceeding in the matter of Hazel Cattalini and Carolyn Cattalini, persons within the Juvenile Court Law, upon the petition of Mary Horr, formerly Mary Cattalini, for a determination that the children had been abandoned by their father, Mark Cattalini, and were therefore free from his custody and control. From a judgment determining that the children had been so abandoned and were free from his custody and control, Mark Cattalini appeals.

Judgment reversed.

John A. Hodges, of San Francisco, and Oliver J. Carter, of Redding, for appellant.

Glenn D. Newton, of Redding, for respondent.

PEEK, Justice.

This is an appeal by the father of two minor children from an order of the Juvenile Court of Shasta County determining that said children had been abandoned by him and therefore were free from his custody and control.

Mark and Mary Cattalini were formerly husband and wife. Two children, Hazel and Carolyn, who are minors, of the present ages of about 9 and 7 years, respectively, were born as the issue of the marriage. Dissensions arose between the spouses. On November 30, 1940, Mary Cattalini secured a divorce from her said husband in Nevada on the ground of failure to provide her with the necessities of life. The children were awarded to the custody of the mother, but no order for their maintenance was made. On December 7, 1940, the mother married Clifford Horr, and since then has lived with him and her said minor children in Shasta County. On April 11, 1942, Mark, the father of said children, married

his present wife, Helen, and since that time they have resided in South San Francisco. At the time of their marriage, Helen had one minor child by a former husband. Two other children were born as the issue of Mark Cattalini's second marriage.

By her petition, respondent alleges that "since the entry of said final decree of divorce, the father has contributed nothing whatever towards the support of said minor children, Hazel Cattalini and Carolyn Cattalini, save and except the sum of Eighty and no/100 (\$80.00) Dollars, nor has he shown any interest whatever in said minors, and in fact has never, on his own volition, visited said minors since said final decree of divorce; that your petitioner took said minor children to see said Mark Cattalini in the summer of 1942; that said Mark Cattalini since said date has never visited with, nor attempted to visit with, said minor children. That the last payment for the support of said minor children by Mark Cattalini was the sum of Ten and 00/100 (\$10.00) Dollars in the month of February, 1943, and more than one year has passed since any contribution has been made by said Mark Cattalini for the support of said minor children." The petition further alleges that Clifford Horr, the present husband of respondent, in whose home the children have resided since their mother's remarriage, "is willing to adopt said minors as his own daughters."

Appellant's demurrer to the petition, on the ground of want of jurisdiction and failure to state a cause of action, was overruled. He thereupon answered, denying the material allegations of the petition, and alleged that during all the times mentioned therein he communicated with his children and has contributed to their support to the extent of his financial ability.

On the issues thus joined a hearing was had before said court, and at the conclusion thereof the court found and concluded: that it had jurisdiction of the persons and of the subject matter and that the procedure laid down in sections 720-727 and 775-777 of the Welfare and Institutions Code, St.1937, pp. 1033-1036, 1041, 1042, had been regularly followed; that all the allegations contained in the complaint were true; that the custody of the minors by judicial decree had been given to their mother; that appellant, their father, for a period of one year had wilfully failed to pay for the care, support and education of said children when able to do so; that "in

case of adoption of said minor children that the petitioner, Mary Horr, formerly Mary Cattalini, alone, may consent to such adoption"; and that Hazel and Carolyn Cattalini should be declared free from the custody and control of their father, Mark Cattalini, and he should be deprived of their custody and control.

The appeal from said order presents three principal questions for determination: (1) Did the trial court have jurisdiction to make said order; (2) Is there substantial evidence to support the findings; and (3) Do the findings support the judgment?

Section 701 of the Welfare and Institutions Code, St.1943, p. 1333, provides, in part:

"The jurisdiction of the juvenile court extends also to any person who should be declared free from the custody and control of either or both of his parents. The words 'person who should be declared free from the custody and control of either or both of his parents' shall include any person under the age of 21 years who comes within any of the following descriptions:

"(a) Who has been left by either or both of his parents in the care and custody of another without any provision for his support, or without communication from either or both of his parents, for the period of one year with the intent on the part of such parent or parents to abandon such person. Such failure to provide, or such failure to communicate for the period of one year, shall be presumptive evidence of the intent to abandon. Such person shall be deemed and called a person abandoned by the parent or parents abandoning him."

[1] It is readily apparent from a reading of the quoted portion thereof of said section that it is composed of three main elements: (1) the child must have been left with another; (2) without provision for support or without communication from either or both of his parents for a period of one year; and (3) all of such acts are subject to the qualification that they must have been done "with the intent on the part of such parent or parents to abandon such person."

[2,3] We turn then to the first question to be resolved; Were the children "left" by appellant in the custody and care of the mother, within the meaning of said section, when they were placed in her cus-

tody by a court order? According to Webster's International Dictionary, "leave" means "to put, deposit, deliver, or the like, so as to allow to remain;—with a sense of withdrawing oneself from; as *leave* your hat in the hall; we *left* our cards." Thus the term appears to connote voluntary action. Therefore, it may not be said that appellant left his children in the care and custody of the respondent when, by an order of the court, they were taken from the joint control of their parents and placed in the sole care and custody of the mother.

This very point was considered in the Matter of Cozza, 163 Cal. 514, 528, 126 P. 161, 167, Ann.Cas.1914A, 214, where the Supreme Court, in construing Civil Code section 224, stated: "It contemplates a case where a child has been *voluntarily* surrendered or left for a year in the care and custody of another, without any agreement or provision for its support. This is not the situation here. The care and custody of this child was not so *left* by the mother with either Mrs. Merriman or the petitioners for adoption. It was *taken away* from her and placed in the custody of the former *by order of the juvenile court*. * * * It was *taken* from her under process of court—*by force of law—invoked or, at least, employed for the very purpose of depriving her of the custody of the child.*" (Italics added.)

The same rule may well be applied to the present controversy. Here, as in the Cozza case, the children were not voluntarily surrendered or left by appellant; they were taken away from him and placed in the custody of the mother by order of the court. There would appear to be no reason why this rule is not applicable to the facts disclosed herein.

If then the children were not "left" by appellant with respondent, as that word is used in said section 701 of the Welfare and Institutions Code, does the record disclose evidence as to the conduct of appellant subsequent to said divorce sufficient to bring him within that portion of the said section relating to the failure of a parent (1) to make any provision for the support of a child, or (2) to communicate with the child for a year? We have heretofore summarized in full the allegations in respondent's petition with regard to these essential elements. It remains to be seen whether the evidence supports them, or at any rate whether the evidence supports

the findings which, in language at least, vary considerably from said allegations.

The evidence shows that it was only during the seven or eight months immediately preceding the filing of the complaint that appellant was able to make provision for the children's support. Prior to that time, the births of two babies, about a year apart, to his wife, Helen, the death of his father, an operation on his eye, and a journey to see respondent and their children (which proved futile, as appellant could not find them), were matters that required the expenditure of all the wages appellant made—which he regularly turned over to Helen. Furthermore, it is made evident that, even under those circumstances, appellant and his wife would have contrived to send money for Hazel and Carolyn had not respondent discouraged them from doing so by indicating quite plainly at that time that such action would be neither necessary nor welcome. They were given to understand by respondent that she and her husband, Clifford Horr, were able to support the two girls without assistance, and that Horr would resent the sending of gifts.

[4, 5] From such evidence it would appear that at least in part the failure of appellant to furnish support for the children might well be attributed to his inability to do so. In the case of *Moch v. Superior Court*, 39 Cal.App. 471, 477, 179 P. 440, 442, it was held that "failure to provide for a period of one year does not operate to constitute the child an abandoned child. It is merely 'presumptive evidence of an intent to abandon.' The presumption thus created could therefore be overcome by opposing evidence, and, when it is made to appear that the failure to provide was by reason of the inability to do so, less evidence than under other circumstances would naturally be required to overthrow such presumption."

Turning again to the record, we find that when all was well with respondent and her second husband no demands were made upon appellant for assistance in providing for the children. In fact, appellant, as noted, was specifically requested to remain away from them and not to assist financially nor to send presents. When all was not well between respondent and Horr demands were made upon appellant. This was true, for example, when respondent was desirous of obtaining appellant's services

as a witness in her behalf in opposing divorce proceedings which Horr had instituted against her.

No contention is made by respondent that appellant failed to communicate with the children; neither did she so contend at the hearing. As previously mentioned, the allegations in her complaint were that appellant had shown no interest in the children and of his own volition had never visited them since the divorce decree. Upon this question the evidence shows that appellant communicated with the children both directly and indirectly—directly when he sent Christmas and birthday cards and a locket, and indirectly when he communicated with them through the letters written at his specific request by his wife.

[6] Such actions on his part surely come within the meaning of "communication" which, according to the text in 15 C.J.S., Communication, pp. 638, 639, means "intelligence, news, that which is communicated or imparted, a written or verbal message," and is not restricted to mere words, but "includes acts as well, embracing every variety of affairs which can form the subject of negotiation, interviews, or actions between two persons, and every method by which one person can derive impressions or information from the conduct, condition, or language of another." See also 8 Words and Phrases, Perm.Ed., p. 142 et seq.

As previously noted, the provision in said section 701 relative to the failure to provide for a child left with another for a period of one year is qualified by the phrase "with the intent on the part of such parent or parents to abandon such person."

[7] Upon this question the evidence shows without contradiction that appellant at all times, including the period between February 23, 1943, and March 16, 1944—the period when appellant and his wife did not send money for the support of Hazel and Carolyn—kept insisting that he had no intention of giving up his children. This, coupled with the undisputed facts upon which is based the explanation of appellant and his wife of their failure to send money during said period, should have been deemed sufficient to dispel the presumption of intentional abandonment that otherwise would have arisen, and requires a determination that appellant in fact did not intend to abandon said children.

The crucial issue here then was whether or not the alleged acts of appellant were committed by him "with the intent to abandon" the children, and, if so, whether or not such intent persisted for a period of one year thereafter. *Moch v. Superior Court*, supra. In other words, each of the elements set forth in said section 701(a) is qualified by the provision "with the intent on the part of such parent or parents to abandon such person"; and this in turn is qualified by the further provision that such failure to provide or communicate for one year shall be only "presumptive evidence of the intent to abandon."

[8] In the case of *In re Cordy*, 169 Cal. 150, 146 P. 532, 534, wherein the principal question involved was the interpretation to be placed upon the word "abandon", as it was used at that time in section 224 of the Civil Code, the court, 169 Cal. at page 153, 146 P. 533, 534, stated that "The first and most pertinent question raised by a reading of this section is the question as to whether it contemplates that a child, left in the care and custody of another without provision for its support, may be declared by the court to be 'an abandoned child,' without an intent on the part of the parent to abandon it having been shown." First the court quoted the definition of "abandon" as found in Webster's New International Dictionary, as follows: "To relinquish or give up with the intent of never again resuming or claiming one's rights or interests in; to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert, as a person to whom one is bound by a special relation of allegiance or fidelity; to quit; to forsake." The court further went on to say that "If this is the usual and ordinary meaning of the word 'abandon,' then it is not to be construed as having a different signification in the section of the Code above quoted, unless the intent of the Legislature to give it another and narrower meaning is to be clearly discerned in the context and from the whole language of the section." Concluding this portion of its discussion, the court said: "We think rather that the meaning of the word 'abandoned' as above given, was intended by the makers of the law to dominate the section, and to cause to be read into every part and provision of it the idea that the acts of the parent in relation to the child enumerated in the statute must have been done with an intent

to abandon the child. She must have left it to the care and custody of others with that intention, and a like intent must be shown to underlie her failure, if she has failed, to make provision for its support."

[9] In this the court was reiterating in different language the rule as enunciated in *Guardianship of Snowball*, 156 Cal. 240, 104 P. 444, and in the case of *Matter of Cozza*, supra. In the latter case it was held that the word "abandon" must be given its strict meaning when applied to an adoption proceeding wherein it is sought to deprive a parent of his child in derogation of his natural right. The proceeding herein likewise involves the exercise of a special power which may be likened to the power of a court in adoption proceedings. This being so, as the court in the case last cited stated, where absolute severance of the relation of parent and child is sought "the inclination of the courts, as the law contemplates it should be, is in favor of maintaining the natural relation," and "every intendment should have been in favor of the claim" of the parent under the evidence, and "if the statute was open to construction and interpretation, it should have been construed in support of the right of the natural parent." See also *Matter of Petition of Kelly*, 25 Cal.App. 651, 653, 145 P. 156.

This same rule was followed in the case of *In re Edwards*, 117 Cal.App. 667, 4 P. 2d 560, wherein the court specifically held that "abandon" must be given the same meaning in the Juvenile Court Law that it was designed to convey when used in the early language of section 224 of the Civil Code.

With respect to the absence of a sufficient showing of an intent to abandon, appellant places a considerable amount of reliance on the previously cited cases of *In re Edwards*, *Matter of Kelly*, *In re Cordy*, and *Matter of Cozza*, cases involving the alleged abandonment of a child by its parent to a third person. Appellant's position in this regard appears to be entirely proper, for if he is to be charged with the duties and responsibilities of a parent who has turned over the custody of his child to a stranger, certainly he should be permitted to make the same defense that the parent in such a case would be permitted to make.

[10] However, even if it properly could be said that appellant had failed to sup-

port the children, this circumstance alone would be of no avail to respondent, for it is the law of this state that in a case where, by the decree of a divorce court, custody of a minor child has been awarded to the mother without any provision for the support of the child by the father, and where in such custody the child is being supported and maintained in a proper manner, as between the parents the immediate legal duty of support and maintenance rests with the mother as long as such conditions continue. Civ.Code, sec. 196; *Pacific Gold Dredging Co. v. Industrial Acc. Comm.*, 184 Cal. 462, 465, 194 P. 1, 13 A.L.R. 725; *Watkins v. Clemmer*, 129 Cal.App. 567, 574, 576, 19 P.2d 303; see also *Gully v. Gully*, 111 Tex. 233, 231 S. W. 97, 15 A.L.R. 569; *Kelly v. Kelly*, 329 Mo. 992, 47 S.W.2d 762, 81 A.L.R. 887. As was stated in the case of *Watkins v. Clemmer*, supra, 129 Cal.App. at page 577, 19 P.2d at page 308, "the primary parental obligation in this case was with the mother, and will continue with her until the order (under section 138) is modified or vacated; that, so long as the order remains in force, it is the measure—at least as between the former spouses—of the father's obligation."

[11] Of course this is not to say that one who by his own misconduct has made himself unfit to be the custodian of his child has by the same misconduct absolved himself from all legal responsibility for the child's support. On the other hand, before a father may be charged with dereliction in this regard it must be made to appear that he has intentionally shirked that responsibility at a time when, and under circumstances where, he should have assumed it.

[12] In the case at bar the evidence on this phase of the matter is not conflicting, nor is it reasonably susceptible of different inferences. As we have pointed out, during the critical period herein involved appellant was not called upon to discharge the duties of a father toward these children but was expressly discouraged from so doing. On the one occasion which may be said to fall generally within this period, when he was requested to give aid to his daughter on account of illness, he responded readily and eagerly. The circumstance that in 1939, prior to his divorce, his conduct might have warranted a different determination, is immaterial.

[13] It is likewise immaterial to this case that the motivating reason for the proceeding herein, as indicated by respondent in her petition, and its indirect effect, as indicated by the court, may be to dispense with the necessity of procuring appellant's consent to an adoption of the children by their stepfather, Horr (and presumably also to dispense with the necessity of citing appellant to appear in the adoption proceeding and show cause, if any, why the petition therein should not be granted). The willingness of Horr to adopt the children has no place in a consideration of whether or not they were left by appellant in the custody of respondent or "another", as that word is used in said section 701, without support or communication for a period of one year with the intent on the part of appellant to abandon them.

The judgment is reversed.

ADAMS, P. J., and THOMPSON, J.,
concur.



72 Cal.App.2d 619

LOPER v. FLYNN et al.

No. 12925.

District Court of Appeal, First District,
Division 1, California.

Jan. 21, 1946.

1. Specific performance ⇨39

A cause of action for specific performance of testatrix' agreement, not embodied in or confirmed by writing, to devise to plaintiff testatrix' half-interest in realty, owned by them as tenants in common, was barred by statute of frauds. Code Civ.Proc. § 1973, subd. 6.

2. Specific performance ⇨114(2)

An amended complaint, alleging oral agreement by defendants' testatrix to devise to plaintiff testatrix' half-interest in realty, owned by them as tenants in common, in consideration of plaintiff granting testatrix all rents, issues and profits thereof until her death, was insufficient to

state cause of action for specific performance of agreement as failing to plead or show adequate consideration for testatrix' promise, though pleading set forth agreement with sufficient particularity and accuracy.

3. Specific performance ⇨114(2)

In action for specific performance of testatrix' agreement to devise her half-interest in realty to plaintiff, where complaint affirmatively alleged that agreement was oral, plaintiff, in order to obviate bar of statute of frauds on ground of equitable estoppel to assert such defense, was required to plead sufficient facts tending prima facie to show such estoppel, though defense was raised by demurrer to complaint. Code Civ.Proc. § 1973, subd. 6.

4. Frauds, statute of ⇨129(5)

Payment of money is not such "part performance" of oral contract as will take it out of statute of frauds. Code Civ.Proc. § 1973, subd. 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Part Performance".

5. Pleading ⇨204(3), 225(1)

An amended complaint, alleging that testatrix, in violation of her oral agreement to devise to plaintiff testatrix' half-interest in realty owned by them as tenants in common, conveyed interest to named defendants, who collected rents, issues and profits of realty after testatrix' death, and praying accounting, stated cause of action for accounting which court erroneously terminated by sustaining special demurrer to complaint without leave to amend, though complaint stated no cause of action for specific performance of agreement, in absence of demurrer on ground that cause of action for accounting was not separately stated. Code Civ.Proc. § 430, subd. 5, § 1973, subd. 6.

6. Pleading ⇨225(1)

Where complaint is not fatally defective in statement of cause of action, court should not sustain special demurrer thereto without leave to amend, but should give plaintiff opportunity to meet objections, so that litigation may be decided on its merits. Code Civ.Proc. § 472c.

7. Pleading ⇨225(1)

A court is rarely justified in sustaining demurrer to complaint, representing

plaintiff's initial attempt to state cause of action, on grounds of uncertainty, without granting leave to amend it. Code Civ. Proc. § 472c.

8. Pleading ⇨225(2)

Where defendants filed no special demurrer pointing out any of deficiencies in complaint on any ground other than bar of statute of frauds, court abused its discretion in sustaining demurrer to complaint without leave to amend. Code Civ.Proc. § 472c; § 1973, subd. 6.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Ray M. Loper against Montgomery Flynn, as executor of the will of Frances B. Rank, deceased, and others for specific performance of testatrix' oral agreement to devise her half-interest in certain realty to plaintiff. Judgment for defendants, and plaintiff appeals.

Reversed, with directions.

W. I. Follett, of Oakland, for appellant.

Aaron Turner and John Felton Turner, both of Oakland, for respondents.

ATTERIDGE, Justice pro tem.

This is an appeal from a judgment entered following an order sustaining a special demurrer to a first amended complaint without further leave to amend. It comes up on the judgment roll. No general demurrer was interposed, and the order does not specify the ground upon which the special demurrer was sustained. The first ground of demurrer, to wit, an alleged improper joinder of two causes of action, was not well taken, and defendants have abandoned it on the appeal; the second ground, viz., that the specified cause of action was barred by the statute of frauds, was well taken and meritorious.

The amended complaint was plaintiff's very first attempt to state the cause of action against which defendants' second ground of demurrer was properly leveled,—as his original complaint only stated another and distinct cause of action for the partition of property owned equally by defendants' testatrix and plaintiff as tenants in common. This last-mentioned cause of action is not involved on the appeal, as the above-referred-to judgment

and order did not operate on or terminate it.

[1] The cause of action which plaintiff attempted to plead, and against which the second ground of demurrer was directed, was for the specific performance of an oral agreement on the part of defendants' testatrix to devise to him by last will and testament her one-half interest in said real property which was then owned by both as tenants in common, in consideration of the granting to her by plaintiff, from that time forward and until her death, of all the rents, issues and profits of said property. Plaintiff alleged the full performance of the said agreement on his part and the failure and neglect of defendants' testatrix to perform her said agreement.

Generally, and in the first instance, an agreement of the above-described character is unenforceable because all such agreements are, in the absence of a writing embodying or confirming them, expressly declared to be invalid by the terms of subdivision 6 of section 1973 of the Code of Civil Procedure. It was evidently upon this ground, which was one of two specified grounds of defendants' demurrer, that the trial court sustained the same and entered its judgment terminating the said cause of action.

An inspection of plaintiff's complaint reveals that the trial court was amply justified in sustaining the demurrer on the last-above-specified ground.

[2] It further appears that although the amended complaint sets forth the agreement itself with sufficient particularity and accuracy as to render it invulnerable in those respects, it nevertheless fails to plead sufficient facts as are required in order to entitle plaintiff to the specific performance thereof; and it is especially deficient in failing to plead or show that an adequate consideration passed from plaintiff to defendants' testatrix as would warrant the enforcement of her said promise to him. The complaint, therefore, would not have been good against a general demurrer, had one been interposed. *Stiles v. Cain*, 134 Cal. 170, 66 P. 231; *Bonney v. Petty*, 125 Cal.App. 527, 530, 13 P.2d 969.

[3] Plaintiff, however, contends that defendants were equitably estopped from asserting the defense of the statute of frauds. But in the court below, as in this, he was under the misapprehension that because the

defense of the statute of frauds had been raised by defendants' demurrer he therefore was not obligated or required to plead in his own complaint such sufficient and proper facts as would prima facie tend to show that defendants were equitably estopped from pleading the said defense. His erroneous view in this respect arises out of a misconception of the effect of such cases as *Corporation of America v. Harris*, 5 Cal.App.2d 452, 462, 43 P.2d 307, and *Taylor v. Odell*, 50 Cal.App.2d 115, 125, 122 P.2d 919 which hold that an anticipatory pleading of an equitable estoppel against the setting up of the defense of the statute of frauds is not required of a plaintiff where that defense appears for the first time in and through the answer of a defendant. An important distinction is to be noted between those cases and the present one. In the last-above-cited cases it did not appear on the face of the complaints that the causes of action were barred by the statute of frauds, and therefore the respective plaintiffs were not required to assume or anticipate that the defense would be pleaded; while in the present case it is directly and affirmatively alleged in the complaint that the agreement between the parties for the devise of property by last will was oral, and it therefore directly appears that said agreement was invalid and in express violation of subdivision 6 of section 1973 of the Code of Civil Procedure. Under these circumstances, plaintiff, in order to obviate the plainly appearing bar of the statute, was required to sufficiently plead as against defendants the elements of an equitable estoppel, as was successfully done in *Notten v. Mensing*, 3 Cal.2d 469, 45 P.2d 198, but which plaintiff here has wholly failed to do.

The distinction pointed out with respect to cases where the bar of the statute of frauds appears in the complaint itself is similarly recognized in 37 C.J.S., *Frauds, Statutes of*, § 274, at pages 798, 799.

[4] In order then to state and establish a cause of action for the relief he seeks, it will therefore be necessary for plaintiff to amend his complaint so as to allege sufficient facts as will prima facie entitle him to the specific performance of the agreement, and also such further sufficient facts as will show that defendants are equitably estopped from pleading the statute of frauds. The only consideration.

passing from him to defendants' testatrix for her promise was money in the form of rentals. In *Trout v. Ogilvie*, 41 Cal.App. 167, 182 P. 333, the court was considering, as here, a suit in equity to compel the specific performance of an oral agreement to make a testamentary disposition of property. There it declared, 41 Cal.App. at page 171, 182 P. 334, "It needs no authority to sustain the universally recognized rule that the payment of money is not such an act of part performance as will take a contract out of the operation of the statute of frauds. The remedy at law for a recovery of the money paid, with interest, is a complete and adequate remedy, and the payment does not work a fraud upon the party paying if the other party refuses or neglects to perform his part."

[5] A reversal of the judgment is required, however, for other reasons and upon a different ground. Embraced within the allegations of the complaint, and unreached and unaffected by any of the specifications of the demurrer, is the complete and sufficient statement of another and distinct cause of action. This cause of action has been erroneously and finally terminated by the trial court's order sustaining the demurrer without leave to further amend, and by the judgment entered thereon.

The allegations referred to are substantially as follows: It is alleged that at all times plaintiff and defendants' testatrix owned an undivided one-half interest as tenants in common of the real property that is the subject of the action; that defendants' testatrix, in violation of her promise, conveyed her own one-half interest therein to three named defendants, and that since December 30, 1943 (when the testatrix died), said defendants have collected *all* the rents, issues and profits of said real property and have converted the same to their own use. Wherefore plaintiff prayed: "5. That said defendants, and each of them, be compelled to account for all rents, issues, and profits collected by them from said real property since December 30, 1943, and that said plaintiff have judgment against said defendants for the amount so collected by them." As previously pointed out, no general demurrer was interposed, and there was no demurrer upon the ground that this cause of action was not separately stated. Code Civ.Proc. § 430, subd. 5.

It clearly appears, therefore, that plaintiff has in his amended complaint stated a cause of action; and irrespective of the fact that he was also attempting to state another cause of action for the specific performance of the agreement and failed to do so, the court nevertheless erred in finally terminating his action and in barring him from the relief to which his said allegations (taken as true) entitled him. For, in any event, plaintiff, after the death of defendants' testatrix, with her promise to him remaining unfulfilled, at least then reacquired his right to receive his own one-half of the rentals. In *Schaake v. Eagle Automatic Can Co.*, 1902, 135 Cal. 472, 480, 63 P. 1025, 1027, 67 P. 759, it was declared that "* * *" if a complaint states a cause of action, the face of the record would 'show an abuse of discretion' in sustaining a demurrer upon any ground without leave to amend." Many years subsequent thereto, the Supreme Court, in *Haddad v. McDowell*, 1931, 213 Cal. 690, 693, 694, 3 P.2d 550, ascribed the foregoing language to be dictum. In the interval between these decisions the case had been several times cited to the precise effect its language imports by courts other than the Supreme Court. Since the *Haddad* decision it has again been cited to its original effect in *Zimmer Construction Co. v. White*, 8 Cal.App.2d 672, 674, 47 P.2d 1087; *McCune v. Harris*, 9 Cal.App.2d 719, 722, 50 P.2d 837; and *Black v. Browne*, 39 Cal. App.2d 606, 607, 103 P.2d 1012; although the *Haddad* decision was of course authoritative and controlling.

[6] It is not necessary, however, to base the reversal of the present judgment upon the authority of *Schaake v. Eagle Automatic Can Company*, *supra*, for, since the rendition of the *Haddad v. McDowell* decision and the enactment of section 472c of the Code of Civil Procedure in 1939 (leaving open on appeal the question as to whether or not a trial court has abused its discretion in refusing leave to amend a pleading, even though no such request has been made therefor), the Supreme Court has itself promulgated a rule of decision in this respect which is substantially in accordance with its earlier herein quoted declaration in the *Schaake* case; and it also in so doing has rejected the *Haddad* case as applicable to a situation such as here is presented, where a plaintiff has been denied leave to amend after a demur-

rer has been sustained to a complaint which states a cause of action. Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 718-720, 128 P.2d 522, 141 A.L.R. 1358. The rule to which reference has been made is stated in Wilkerson v. Seib, 20 Cal.2d 556, 564, 127 P.2d 904, 909, as follows: " * * * where the complaint is not fatally defective in its statement of a cause of action, it is improper to sustain a special demurrer without leave to amend. In such case the plaintiff should be given the opportunity to meet the objections advanced in order that the litigation may be decided upon its merits. [Citing authorities.]"

[7,8] As the judgment must be reversed for the foregoing stated reasons, plaintiff should also be given an opportunity, if so advised, to amend his complaint so as to permit him (if he can) to state a cause of action for specific performance of the agreement and to plead the requisite elements of an equitable estoppel with such sufficiency as to remove the otherwise controlling bar of the statute of frauds. The amended complaint represented, as we have pointed out, his very first effort to state a cause of action for specific performance, and as is declared in Blakeslee v. Wilson, 190 Cal. 479, at page 484, 213 P. 495, 498: " * * * it very rarely happens upon an initial attempt to state a cause of action that the court [upon the grounds of uncertainty and unintelligibility] is justified in sustaining a demurrer upon those grounds, without leave to amend. Such action is ordinarily altogether too drastic upon a pleader's first attempt to present his cause." See, also, to similar effect: Adkins v. San Francisco, 8 Cal.App.2d 620, 47 P.2d 751; Metzger v. Vestal, 76 Cal. App. 409, 418, 244 P. 942; Payne v. Baehr, 153 Cal. 441, 447, 95 P. 895. Moreover, plaintiff was not placed upon inquiry concerning the sufficiency of his complaint in the court below because defendants neglected to file a special demurrer pointing out (on any ground other than the bar of the statute of frauds) to the trial court any of the many deficiencies in the complaint which they have urged us to consider on the appeal—although the efficacy of such a demurrer was plainly indicated. Both the trial court and plaintiff were entitled to have the deficiencies of the complaint pointed out by demurrer, unless it was defendants' intention to waive the same and to treat the complaint as sufficient.

Under the circumstances, it was an abuse of discretion to have sustained the demurrer without leave to amend.

The judgment is reversed, with directions to the trial court to vacate only that part of its order which denied plaintiff leave to amend his complaint, and to accord him leave to amend in all respects.

PETERS, P. J., and WARD, J., concur.



72 Cal.App.2d 550

SCAFIDI et al. v. WESTERN LOAN & BUILDING CO. et al.

No. 12943.

District Court of Appeal, First District,
Division 1, California.

Jan. 15, 1946.

Hearing Denied March 14, 1946.

1. Fraud ⇨41

Limitation of actions ⇨192(3)

In pleading cause of action based on fraud or pleading fraud in avoidance of bar of statute of limitations, facts constituting fraud should be set out with sufficient particularity to apprise defendant of what he must answer and enable court to determine whether there is any foundation, prima facie at least, for charge of fraud.

2. Fraud ⇨43

A complaint was insufficient to state cause of action based on fraud as definitely limiting all allegations of fraud to defendant's alleged concealment of cause of action for money had and received and not directing them at such cause of action itself.

3. Fraud ⇨41

Generally, fraudulent representations, to be relied on, must be pleaded.

4. Fraud ⇨41

Allegations of fraud must be clear and unequivocal.

5. Fraud ⇨42

To plead cause of action for fraud in making promise without intention to perform it, plaintiff must allege that promise

was made without such intention or with intent to deceive or defraud plaintiff. Civ. Code, § 1572, subd. 4.

6. Fraud ⇨42

A complaint, not alleging that defendants knowingly made any false representations relied on by plaintiff, but alleging only that defendants made a request to plaintiffs for money to be applied to particular purpose and inferentially that defendants did not apply money received from plaintiffs to such purpose, and not alleging that promise so to apply it, was made without intention to perform it or with intent to defraud plaintiffs, stated no cause of action in fraud, but at most a cause of action on mere nonfraudulent broken promise. Civ.Code, § 1572, subd. 4.

7. Pleading ⇨350(3)

The trial court has right to act on clear and explicit admissions by plaintiff's counsel that certain allegations of complaint are untrue in testing sufficiency of complaint.

8. Fraud ⇨17

A person's mere silence or inaction is insufficient to establish his "fraudulent concealment" of existence of cause of action against him, in absence of confidential relationship between him and plaintiff or specially appearing circumstances equitably estopping plaintiff from relying on such silence or inaction and sufficient to impose positive duty on defendant to speak or act.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraudulent Concealment".

9. Fraud ⇨43

Facts pleaded in complaint were insufficient to establish defendant's alleged fraudulent concealment of existence of plaintiff's cause of action for money had and received by defendants for completion of buildings on plaintiff's land.

10. Limitation of actions ⇨104(1)

A party's performance of act or making of statement to conceal existence of cause of action against him over eight years after attachment of bar of statute of limitations does not remove such bar, though such act or statement is then untrue. Code Civ.Proc. §§ 337-339; § 338, subd. 4.

11. Limitation of actions ⇨95(1)

A person's mere ignorance of facts constituting cause of action in his favor

does not prevent running of statute of limitations, unless induced by defendant's fraud.

12. Limitation of actions ⇨95(1)

Failure to discover a cause of action does not, as in case of its fraudulent concealment, suspend running of statute of limitations.

13. Limitation of actions ⇨195(5)

To litigate cause of action, barred by statute of limitations, on ground of defendant's fraudulent concealment of existence thereof, plaintiff must affirmatively excuse his failure to discover fraud within three years after it occurred by establishing facts showing that he was not negligent in failing to discover it sooner and had no actual or presumptive knowledge of facts sufficient to put him on inquiry. Civ.Code, § 19.

14. Limitation of actions ⇨100(13)

Means of knowledge of fact, such as existence of cause of action, are equivalent to knowledge thereof only where there is duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious.

15. Fraud ⇨22(1)

A "diligent inquiry", as for discovery of fraud, is inquiry involving exercise of ordinary or reasonable diligence such as business men usually exercise when their interests depend on obtaining correct information.

See Words and Phrases, Permanent Edition, for all other definitions of "Diligent Inquiry".

16. Fraud ⇨22(1)

"Ordinary diligence", as in the making inquiry to discover fraud, is diligence which men of common prudence generally exercise about their own affairs in age and country wherein they live.

See Words and Phrases, Permanent Edition, for all other definitions of "Ordinary Diligence".

17. Fraud ⇨22(1)

Persons advancing \$12,000 to loan company and individual for completion of buildings, in construction of which \$80,000 had already been spent, on lots sold by such persons to original builder and re-acquired by them after such builder's abandonment of construction and default in payment of purchase money notes secured by

trust deed, were guilty of gross negligence, barring recovery of money advanced on ground of borrowers' fraudulent concealment of cause of action therefor, in making no inquiries of or demands on architects, artisans, materialmen, original builder, or borrowers for over nine years, in absence of showing that any person's act or statement impeded such inquiries.

18. Fraud ⚡38

Persons failing to bring timely action for accounting or for money had and received against parties to whom such persons advanced money on borrowers' mere request to complete construction of buildings on lenders' land or to plead borrowers' fraudulent concealment of existence of such causes of action in pending action against them for amount advanced, but dismissing such action and waiting 15 months before bringing action against borrowers for money had and received, could not recover therein on ground of such concealment.

19. Pleading ⚡239(2)

The trial court did not err in allowing plaintiffs' counsel only ten minutes in which to amend insufficient complaint, where jury, just impaneled at plaintiffs' request, was being held in attendance outside courtroom awaiting determination of defendants' motion for judgment on pleadings, and plaintiffs' counsel, when interrogated, was unable to suggest or state orally any further facts which he desired to embody in complaint.

20. Pleading ⚡37

On plaintiffs' counsel's request for leave to amend complaint after trial court indicated that he thought complaint insufficient, court had right to presume that plaintiffs had stated their side of controversy as strongly and as favorably to them as all facts known to them would permit, in absence of contrary representation by plaintiffs' counsel.

PETERS, P. J., dissenting.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action in *assumpsit* by Joseph G. Scaffidi and another against the Western Loan & Building Company, a corporation, and an-

other, for money had and received. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Byron Arnold, of San Francisco, for appellants.

Hardin, Rank, Meltzer & Fletcher, of Oakland, H. L. Mulliner, of Salt Lake City, Utah, and Donahue, Richards & Hamlin, of Oakland, for respondents.

ATTERIDGE, Justice pro tem.

Plaintiffs' appeal is from a judgment on the pleadings entered by the trial court on motion of the defendants.

The basic cause of action which plaintiffs attempted to plead in their complaint appears to be that form of *assumpsit* denominated as "money had and received," but both in the trial court and before this reviewing court they contend otherwise and take the position that theirs is in essence an action for fraud and deceit. If the action is of the first ascribed classification it must be held, as the trial court found, to have been barred by the statute of limitations (Code Civ.Proc. §§ 337, 338, 339) applicable to an action of the given character unless the facts (hereinafter examined in detail) attempted to be pleaded by them are *prima facie* sufficient to establish the fraudulent concealment of the existence of their cause of action for money had and received, and can be held legally sufficient to place their case within the purview of the exception created by subdivision 4 of section 338 of the Code of Civil Procedure. Conversely, if their cause of action is, as they contend, to be considered as one based upon actual and active fraud in its inception, they must likewise fail by reason of their complete failure to state a cause of action of that character, as also will later appear.

The determination of these matters, as well as substantially all others involved on the appeal, can be made only from an appraisal of the sufficiency or insufficiency of the factual matters alleged in plaintiffs' amended complaint.

[1] In pleading a cause of action based upon fraud or in pleading fraud in avoidance of the bar of a statute of limitations, "It is essential that the facts and circumstances which constitute the fraud should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called on to answer,

and to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud." 37 C.J.S., Fraud, § 78, p. 371. Plaintiffs' complaint fails signally to comply with these requirements. A special demurrer designed to point out certain of its obvious deficiencies in these respects was interposed and erroneously overruled under extenuating circumstances by a judge other than the trial judge ultimately passing on the merits of the motion. The order overruling the demurrer recites: "No one appearing as counsel for either party, said demurrer is submitted without argument"—a circumstance having some tendency toward causing the judge to believe that plaintiffs considered their complaint as sufficient, and that defendants did not regard their demurrer as meritorious, since neither felt sufficiently concerned to advise him of their views. Nevertheless, the deficiencies and uncertainties of the complaint are so great that in our analysis of the pleading which follows we take frequent occasion to parenthetically point out some of them, because they later enter into and become part of the reasons for some of the determinations made on this appeal. It will therefore be understood that all observations contained within brackets are our own and are no part of the allegations of the pleader.

Omitting all preliminary and various other allegations having no relevancy to the contentions under consideration, the amended complaint in substance sets forth the following:

(1) On June 7, 1928, plaintiffs were the owners of two corner lots in the Marina district of San Francisco. On said date plaintiffs conveyed [and inferentially sold] said lots to Louis A. Goldstein pursuant to an arrangement [a contract or agreement is not alleged], whereby Goldstein was to construct apartment house buildings on said lots, and the money necessary for the cost of construction of these buildings was to be borrowed by Goldstein from defendant Western Loan and Building Company, which company in turn was to be secured for said loans by first mortgage liens upon said properties; that said Goldstein executed two promissory notes and two first mortgages securing the same in favor of said Western Loan and Building Company for, respectively, the sums of \$45,000 and \$35,000 [i.e., the money advanced Gold-

stein for construction costs, as aforesaid]. Plaintiffs further allege that Goldstein agreed to execute promissory notes to them, secured by deeds of trust, for the purchase price payable from Goldstein to themselves for said lots [nowhere alleging the amount thereof and nowhere, or at all, stating if any cash was received by them from Goldstein], and further allege that said trust deeds were to be subject to and subordinate to the first mortgages in favor of defendant Western Loan and Building Company. Plaintiffs next allege that Goldstein duly executed all of the aforesaid notes, mortgages and trust deeds.

It further is alleged therein that Goldstein commenced the construction of the buildings according to plans and specifications on file with defendant Western Loan and Building Company [but the date of said commencement is nowhere alleged]; and that after receiving advances of moneys [the amounts of which are nowhere stated], secured by the above-referred-to mortgages, as the construction work progressed and prior to the completion of the buildings, Goldstein [then] abandoned the construction thereof and defaulted in the terms of the written instruments evidencing the loans and securing the same [nowhere, however, alleging the date of said abandonment or to what extent toward completion the work had then progressed].

It will be noted that up to this point in the complaint there is no allegation placing the plaintiffs in the slightest privity of contract with defendants, and that no obligation whatsoever on the part of defendants to plaintiffs has as yet been pleaded.

The next succeeding allegation, which is the only one in the entire complaint which has any tendency toward pleading the establishment of a contractual relationship between the parties, and upon which allegation alone any cause of action plaintiffs may ever be said to have possessed can be predicated, will be quoted verbatim:

"* * * thereafter [no date being specified] said defendants requested of plaintiffs the sum of Twelve Thousand (\$12,000.00) Dollars, to be applied on account of certain work, labor and material [but nowhere mentioning the kind or amount of any work, labor or material] required for the completion of the aforesaid buildings, which said sum, together with the moneys secured by the mortgages hereinabove referred to held by said defendants was to

be disbursed by said defendants for the cost of the completion of such structures; that on or about the 29th day of October, 1928, the said sum of Twelve Thousand (\$12,000.00) Dollars was deposited on behalf of said plaintiffs with the said defendants [and], that thereafter [no date, however, being specified] said buildings were completed under the supervision, direction and control of said defendants." (Italics ours.)

(2) The complaint then proceeds to further allege that the real properties were sold under the deeds of trust in favor of plaintiffs, and plaintiffs thereupon became the owners thereof subject to the mortgages held by defendant Western Loan and Building Company.

The next succeeding are the only allegations bearing upon the question as to whether or not the same sufficiently plead the fraudulent concealment by defendants of the *existence* of plaintiffs' primary cause of action for money had and received; and it should here be noted, as will later more definitely appear, that the pleading of the facts constituting a cause of action and which give to the same its own intrinsic character is an entirely distinct legal concept and undertaking from the pleading of sufficient facts as will prima facie show the successful fraudulent concealment by a defendant of the existence of the cause of action itself. The purpose of the former undertaking is to state facts sufficient to entitle a plaintiff to the particular relief he seeks; while the purpose of the latter undertaking is simply to relieve him from the bar of the statute of limitations or the statute of frauds. The allegation relating to concealment follows.

[2] In section VII of the complaint plaintiffs allege:

"That from time to time plaintiffs demanded from defendants * * * accounting of all moneys expended by said defendants [nowhere, however, stating or even approximating any given date or year when they made such or any demand, and nowhere or at all alleging that they ever made any such demand at any date prior to the expiration of the period of limitations for the bringing of an action that is provided by sections 337 and 339 of the Code of Civil Procedure] * * * in connection with the construction and completion of the aforesaid buildings, which [accounting] said defendants had, from time to time, promised and agreed to render

[again, however, no date or year is stated as to when defendants made the alleged promises or so agreed]; that no accounting having been rendered, plaintiffs were required to and did, on or about the 17th day of June, 1940, commence a certain action in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled Joseph G. Scafidi and Adelina S. Scafidi, plaintiffs, vs. Western Loan and Building Company, a corporation, defendant, numbered 295708; and thereafter *issue was joined and, pending trial* of said cause, and on or about February 1, 1941, defendants rendered to plaintiffs a statement of moneys alleged to have been disbursed in connection with the construction and completion of the aforesaid buildings, from which statement * * * it *would* [not that it did] appear that defendants had disbursed in connection with the construction and completion of the aforesaid buildings a sum equal to or in excess of the amount of the aforesaid mortgages * * * and the aforesaid sum of Twelve Thousand (\$12,000.00) Dollars delivered to defendants by or in behalf of plaintiffs as foresaid." (Italics ours.)

In section VIII of their complaint plaintiffs next allege:

"That said statements and accounts [to wit, that statement made and rendered on February 1, 1941, which was the only one ever rendered] were false and untrue, and were known by defendants to be false and untrue *at the time they were furnished plaintiffs* herein [to wit, February 1, 1941]; that *said statements* [of February 1, 1941] were furnished to plaintiffs with intent on the part of defendants to conceal from plaintiffs the fact that defendants had not expended a sum in excess of the amounts of the mortgages in favor of Western Loan and Building Company and thereby [by the false account of February 1, 1941] to conceal the fact from plaintiffs that no part of said sum of \$12,000.00 advanced by plaintiffs on or about October 29, 1928, had been expended on the construction or completion of said buildings." (Italics ours.)

In section IX, as amended, plaintiffs next allege:

"That prior to the rendition on or about February 1, 1941, of the statement of the account of the moneys alleged [on said date] to have been disbursed by the defendants for the construction and completion of the buildings in said Complaint referred

to, neither plaintiff had any knowledge of nor had either plaintiff discovered the facts hereinafter in this paragraph alleged. * * * That the facts are that at the time Louis A. Goldstein * * * abandoned the construction of the aforesaid buildings, said Louis A. Goldstein was constructing other apartment buildings likewise financed by defendant Western Loan and Building Company; that in order to conceal from plaintiffs herein the fact that the aforesaid sum of \$12,000.00 advanced for or in behalf of plaintiffs with defendant had not been used for the completion of the buildings herein described in which plaintiffs were interested, defendants * * * paid out moneys for the completion of other buildings financed by them for said Goldstein and charged said sums against the particular properties in which plaintiffs were interested; * * * That the facts hereinabove alleged were discovered subsequent to February 1, 1941, and shortly prior to the commencement of this action [to wit, May 21, 1942]."

It will be noted that this last-stated interval is an indefinite period which grants plaintiffs, who alone know the date of their alleged discovery of an alleged fraudulent concealment, a leeway of uncertainty of more than fifteen months as to when they made the discovery, without in any manner disclosing *how* they discovered it other than the bare foregoing assertions by way of recital to the effect that more than nine years after the statute of limitations had run against their original and only cause of action defendants *then* rendered them a false account, while at the same time wholly failing to plead, in the manner and to the extent invariably exacted in actions based upon fraud, that the original transaction was itself fraudulent.

It is self-evident that the foregoing allegations of the complaint are wholly insufficient to state a cause of action based upon fraud primarily because every one of the allegations relating to fraud is definitely limited by the pleader to the alleged concealment of the cause of action for money had and received, and is not directed at that cause of action itself.

[3-6] It should first be observed with respect to the said cause of action that it is nowhere alleged that defendants ever made any false or fraudulent representations; on the contrary, it is alleged only that defendants made a mere "request" for money to be applied to a particular purpose

and that plaintiffs complied with the request, and that then (and this appears only inferentially from indirect allegations) defendants did not apply the money to the purpose for which they had requested it. It is a general rule that fraudulent representations in order to be relied upon must be pleaded (*Mayer v. Mayer*, 207 Cal. 685, 694, 279 P. 783; *Vandervort v. Farmers etc. Nat. Bk.*, 7 Cal.2d 28, 30, 31, 59 P.2d 1028) and that when pleaded the allegations of fraud must be clear and unequivocal. *Davis v. Rite-Lite Sales Co.*, 8 Cal.2d 675, 681, 67 P.2d 1039. There is in the foregoing summarization of the complaint no allegation that any representation was ever made by defendants, or that if made it was false when made, or that defendants knew it was false, or that plaintiffs believed and relied upon it, or that it was made with the intent to deceive and defraud plaintiffs. Moreover, it is quite apparent that the only cause of action in fraud which plaintiffs could ever have successfully pleaded (but did not), under any aspect of the factual matters under survey, would be one based on that kind of actual fraud which is given specific recognition as such by section 1572, subdivision 4 of our Civil Code, to wit: "A promise made without any intention of performing it." However, in order to successfully plead a cause of action that will come within the purview of this provision, it has always been held necessary for a plaintiff to allege that the promise so made was made without any intention of performing it, or at least that it was made with the intent to deceive or defraud the plaintiff. A complaint which is silent with respect to these essential allegations fails to state a cause of action for fraud. *Ayers v. Southern Pacific Railroad Co.*, 173 Cal. 74, 79, 159 P. 144, L.R.A. 1917F, 949; *Wilmans v. Weissman*, 38 Cal.App.2d 693, 696, 102 P.2d 382; *Maynes v. Angeles Mesa Land Co.*, 10 Cal.2d 587, 589, 76 P.2d 109; *Rheingans v. Smith*, 161 Cal. 362, 366, 119 P. 494, Ann.Cas.1913B, 1140. There is, as has been pointed out, a total dearth of allegations in this vital respect, and as a consequence plaintiffs' cause of action is at most one upon a mere non-fraudulent broken promise. The conclusion is inevitable, therefore, that plaintiffs' complaint does not state a cause of action in fraud, and we so hold.

The remaining question to be determined is whether or not the facts pleaded by plaintiffs are *prima facie* sufficient to show

a fraudulent concealment by defendants of the existence of their cause of action for money had and received. At this time it would be peculiarly difficult and inexpedient for an intermediate appellate court to attempt the formulation of an accurate or exclusive definition purporting to state what essential factors are sufficient to constitute the fraudulent concealment of a cause of action, and the question must be examined with due regard to such modifications in the pre-existing rules of decision on this subject as may have been effected by the decisions of our Supreme Court in the cases of *Kimball v. Pacific Gas & Electric Company*, 220 Cal. 203, 30 P.2d 39; *Pashley v. Pacific Electric Railway Company*, 25 Cal.2d 226, 153 P.2d 325; and *Hobart v. Hobart Estate Company*, 159 P.2d 958. Reference particularly is made to the *Pashley* decision for a succinct and accurate recital of the historical sequences of the doctrine of fraudulent concealment in the jurisprudence of this state and for a comprehensive listing of the cases wherein it has been involved.

Before determining the applicability of the doctrine of fraudulent concealment to the facts of this case, as disclosed by plaintiffs' complaint, it is advisable to again restate just what those facts are and to point out how extremely limited and meager they are. The facts, together with the inferences that seem to us to arise naturally and logically therefrom, may be stated as follows:

In June, 1928, when plaintiffs sold their property to Goldstein they owned two lots of such sufficient value, although the same is nowhere stated, as would warrant the erection thereon of two buildings costing \$80,000. In October, 1928, on the bare request of defendants (nothing else being pleaded), plaintiffs advanced the additional sum of \$12,000 for the further cost of constructing said buildings. So that in 1929, when plaintiffs acquired full ownership of the land and buildings, subject to the outstanding liens in favor of defendants but which plaintiffs subsequently fully satisfied, they had an investment in these properties, exclusive of the value of the lands, of over \$92,000, or, more accurately stated, their investment coupled with their contractual liability exceeded the sum of \$92,000. It is admitted that the buildings were completed in January, 1929; and from that date, at which time the statute of limitations began to run against their cause of

action, plaintiffs did not, insofar as their complaint anywhere discloses, take one single step or make one single inquiry of anyone to ascertain either what had become of their money (\$12,000), or to what purposes it had been applied, until the year 1940. Indeed, as presently will appear, they expressly admit such to be the fact. When, in 1940, plaintiffs made their very first and only inquiry of defendants, and for the first time demanded an accounting, their cause of action had then been barred by the appertinent statute of limitations (Code Civ.Proc. § 339) for more than nine years. At no time during this long interval are the defendants charged with having made a single promise or a single representation, nor are they charged with having during said period performed a single act which could in any manner tend to prevent or impede plaintiffs from ascertaining the facts or making an inquiry. Neither are they charged with conspiring or acting in concert with any other person to do any act of the above-described character. The only factual claim that plaintiffs under any aspect of their allegations urge against defendants is simply that defendants, in the total absence of any demand to or inquiry having been made of them by plaintiffs, remained silent and inactive. The foregoing comprises plaintiffs' entire factual showing with respect to a fraudulent concealment of a cause of action.

[7] It will be noticed, however, that we have eliminated from our statement of the factual matters pleaded by plaintiff with respect to the alleged concealment of a cause of action the only allegation in plaintiffs' entire complaint which has the slightest tendency toward charging defendants with the performance of any act calculated to have that effect, to wit, the allegations in section VII thereof, which read: "From time to time plaintiffs demanded from said defendants, and each of them, accounting of all moneys expended by said defendants * * * which said defendants had, from time to time, promised and agreed to render [and did not do]." We here point out that this elimination of said allegations is advisedly made and for the following reasons: This appeal is accompanied by a reporter's transcript which shows that the learned trial judge in passing upon the motion for judgment on the pleadings afforded counsel an ample opportunity to argue the sufficiency of his pleading and permitted its

amendment after it had thus been challenged; and that during the discussion of these matters the court interrogated counsel for plaintiffs as follows:

"The Court: What facts could you plead other than the facts used in this Complaint?

"Mr. Arnold: Maybe they will be the same facts because I am of the opinion that the facts are set out. The only thing I haven't done * * * as I understand from your Honor's view of the matter, is that I have not pleaded facts which would excuse the plaintiffs for not having demanded an accounting prior to 1940. Is that your Honor's view?

"The Court: That is in effect my view."

Counsel, however, after having been afforded further opportunity, was unable then, and was similarly unable before this court, to suggest or state any fact or facts not already pleaded which would tend to excuse this long delay; and in the course of the foregoing presentation of the motion plaintiffs' counsel then made the following definite admissions going directly to the truth of the above-quoted allegations:

"Mr. Arnold: * * * I asked her [plaintiff Adelina Scafidi] whether or not she had ever demanded an accounting, *and she said she had not*. I asked her to authorize me to do so, which she did; my demand was refused; *whereupon I promptly and immediately* [to wit, June 17, 1940; see Complaint, section VII] commenced an action for those accounts and in due course an accounting was rendered to me. [It is to be noted that it is *this* account alone and *not* any other anterior act of *concealment* which plaintiffs claim was false and fraudulent.] * * *

"Mr. Rowell: Counsel said here there had been no demand of any kind until she [plaintiff Adelina Scafidi] came to him.

"Mr. Arnold: That is correct." (Italics ours.)

These admissions by plaintiffs' counsel made directly to the trial court had the immediate effect of eliminating from plaintiffs' complaint the allegations set forth in section VII thereof, to wit: "That from time to time plaintiffs demanded from said defendants * * * accounting of all moneys * * * which said defendants had, from time to time, promised and agreed to render," because these admis-

sions were and are an express concession that the said allegations were in fact untrue and could not be supported by proof.

These admissions further show: First, that no accounting was ever promised or agreed to, and that therefore plaintiffs were never lulled into a sense of security by any act whatsoever of defendants; and, secondly, that the first and only demand ever made on defendants to account was made in June, 1940, which was more than eight years after the statute of limitations had run.

The right of the trial court to act on these admissions in testing the sufficiency of plaintiffs' complaint was full and complete. In *Oscanyan v. Arms Company*, 103 U.S. 261, at page 263, 26 L.Ed. 539, Mr. Justice Field speaking for the court said: "In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. *Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof.* And if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion, or that of counsel, act upon it and close the case." (Italics ours.)

The *Oscanyan v. Arms Company* decision is cited with the approval of the Supreme Court in *Bias v. Reed*, 169 Cal. 33, 37, 145 P. 516, where, on the principles that it enunciates, the court upheld the direction of a verdict upon an opening statement by counsel for plaintiff in said action. It should, of course, be understood that the rule just enunciated should not be given application with respect to admissions which are improvidently or unguardedly made, or which are in any degree ambiguous. The admissions hereinbefore referred to are not of that character; on the contrary, they are clear and explicit.

[8] Where mere silence and inaction on the part of the alleged concealor are alone relied upon to establish the fraudulent concealment of the existence of a cause of action, it is almost universally held in all jurisdictions that in the absence of the existence of a confidential relationship between the parties, or unless some

specially appearing circumstances are shown which of themselves equitably estop a person from relying on his silence or inaction, and which of themselves are sufficient to create on the part of the non-revealer a positive duty to speak or act, mere silence or inaction, or both, are by themselves insufficient to establish such a concealment. A long line of California cases, some of which are presently adverted to, similarly so hold.

In support of the foregoing statement, it is pointed out that in 17 Words and Phrases, Perm. Ed. pp. 607-609, there are to be found nineteen definitions, all relating to the "fraudulent concealment" of a cause of action where silence and inaction are the only elements relied upon. Of these, eight definitely hold that the mere silence of a person is not a "fraudulent concealment," and, of the others, five hold that "fraudulent concealment" *must consist* of affirmative acts or representations designed to prevent discovery of the cause of action. Three of the remaining definitions are predicated upon the fact that a trust or fiduciary relationship existed between the parties, which made it the duty of the person charged with the concealment to make a disclosure. No such relationship ever existed between the present plaintiffs and defendants. The remaining three are not in point with respect to any aspect of the present case, but it may be observed that in two of them it appears that although affirmative acts were shown which had some tendency to mislead and prevent discovery, it was nevertheless held that there had been no fraudulent concealment despite the presence of these additional factors. Likewise in 8 Words and Phrases, Perm. Ed. p. 339, there are fifteen definitions of the word "concealment" with reference to its application to cases involving, as here, only "silence or inaction" on the part of the party sought to be charged with concealment. Of these, twelve declare positively that mere silence or inaction does not constitute concealment. One of these is from *People v. Garnett*, 129 Cal. 364, at page 366, 61 P. 1114, 1115, where in defining the word "conceal," in reference to a criminal statute, our Supreme Court said: "'Conceal' * * * means more than a simple withholding of knowledge possessed by a party * * * [but] includes [i. e., requires] the element of some *affirmative* act upon the part of the person tending to or look-

ing towards the concealment * * *." (Italics ours.)

In *Kimball v. Pacific Gas & Electric Company*, supra, the Supreme Court declares (220 Cal. at page 217, 30 P.2d at page 45): "Mere silence [on the part of the defendants] would not constitute, under well-settled principles, a fraudulent concealment"; and in *Lencioni v. Fidelity Trust & Savings Bank*, 95 Cal.App. 490, at page 498, 273 P. 103, 106, 274 P. 75, this court said: "The 'concealment' of facts by a party to a contract, which amounts to fraud, implies design or purpose and mere silence is not of itself concealment" [citing *Barrett v. Lewiston, B. & B. St. R. Co.*, 110 Me. 24, 85 A. 306]. 'We do not' generally 'speak of a person concealing a thing unless he is in some way called upon to produce it' [citing *Watertown Sav. Bank v. Mattoon*, 78 Conn. 388, 393, 62 A. 622]. Likewise, in *Fink v. Weisman*, 129 Cal.App. 305, at page 318, 18 P.2d 961, 966, the court states: "'In the absence of confidential relations mere silence, without fraudulent acts or omissions connected therewith, would not be unconscionable' [citing *Heydenfeldt v. Osmont*, 178 Cal. 768, 773, 175 P. 1], and then proceeds further to point out that "The suppression or concealment of a fact is only actionable when done 'by one who is bound to disclose it.' Civ.Code, § 1710, subd. 3." See also, to similar effect: *American B. M. Co. v. Indemnity Ins. Co.*, 214 Cal. 608, 618, 7 P.2d 305; *Stern v. Sunset Road Oil Co.*, 47 Cal.App. 334, 346, 190 P. 651; *Eltinge v. Santos*, 171 Cal. 278, 284, 285, 152 P. 915, Ann.Cas.1917A, 1143, C.I.T. Corporation v. Hawley, 34 Cal.App.2d 66, 72, 93 P.2d 216.

The clear import of the foregoing decisions to the effect that mere silence, or inaction, alone is not sufficient to establish a fraudulent concealment is in nowise changed or weakened by anything that is stated or held in the cases of *Kimball v. Pacific Gas & Electric Company*, supra, and *Pashley v. Pacific Electric Railway Company*, supra. These cases are readily distinguishable, by reason of their wholly different factual situations, from the instant case, which presents as its only element of concealment the mere silence of a party occupying no confidential relationship toward its adversary. In the *Kimball* case the plaintiff's employer, a corporation, advised him that it was responsible for his injuries. This definite representation was in fact false. Unknown to *Kimball*, he

had in fact been injured through the negligence of an employee of another and distinct corporation against whom his cause of action existed. While Kimball was unable by reason of the extent and severity of his injuries to inform himself of the actual facts, and while his employer was continuing to represent to him that it was responsible for his injuries, it entered into an arrangement or compact with the actual tort-feasor whereby it was agreed between them that the latter would assume one-half of the amount of money to be paid Kimball as and for a full settlement of his injuries under the provision of the Workmen's Compensation Act. Such a settlement was in fact consummated with Kimball by his employer, while the former was completely ignorant of the existence of his cause of action against the party that was actually responsible. The circumstances discussed in the Kimball decision further disclose a studied effort on the part of the two non-disclosing corporations to conceal from him not only the existence of his real cause of action but also to keep from him the fact that after elaborate negotiations and reports, all of which were kept secret from him, they had entered into an agreement which would directly contribute to the accomplishment of that designed result. A disclosure of these matters to him would, of course, have led to a discovery of the existence of his cause of action. It was under these and other appearing circumstances that the Supreme Court held and declared (220 Cal. at page 217, 30 P.2d at page 45) that when the two corporations "began to negotiate between themselves * * * a positive duty existed to disclose those negotiations to plaintiff [Kimball]." The corporation actually responsible for Kimball's injuries was held equally responsible for the suppression of these matters because it was in privity of contract with the non-disclosing employer and ratified and approved all that the latter did for the obvious purpose of concealing its own liability. The Kimball case, therefore, is not one presenting mere silence alone as its only ingredient of concealment, but is one whose special circumstances establish the existence of a positive duty to speak on the part of those remaining silent, and the case also exhibits the performance of affirmative acts designed to accomplish the concealment.

In *Pashley v. Pacific Electric Railway Company*, supra, the second paragraph of

the decision sets forth a whole series of false and fraudulent misrepresentations, all of which are properly and appropriately pleaded, extending and continuing to extend, in furtherance of their designed aims of concealment and deception, over a long period of years. It is not a case involving, as does the instant case, only mere silence; on the contrary, it is a case where the defendant's employees spoke early and often with the design and intent of deceiving and concealing from plaintiff the existence of his cause of action.

[9-12] Having thus examined the facts pleaded by plaintiffs here in claimed support of an alleged fraudulent concealment of the existence of their cause of action for money had and received, and having also compared them with the established principles of law applicable thereto, we find them wholly insufficient to establish such a concealment, and we so hold. It is also evident from the same facts that the said last-mentioned cause of action had been barred by the statute of limitations for more than eight years before plaintiffs ever took a single step toward making the discovery or asserting it, and that no statement, act or refusal by defendants during said period operated in any degree to prevent its discovery. Under these circumstances, it is hardly necessary to here point out that a concealing act or statement shown or made more than eight years ex post facto of the attachment of the bar of the statute of limitations would in no manner operate to remove said bar, even though such act or statement might then be untrue. This is because the period in which plaintiffs could litigate their cause of action had already run and they could not thereafter in any manner then be injured or aided by any act of deception or concealment practiced by defendants. Our courts have repeatedly affirmed that mere ignorance, not induced by fraud, of the existence of the facts constituting a cause of action on the part of a plaintiff does not prevent the running of the statute of limitations (*Lightner Mining Co. v. Lane*, 161 Cal. 689, 696, 120 P. 771, Ann.Cas.1913C, 1093; *Rose v. Dunk-Harbinson Co.*, 7 Cal.App.2d 502, 505, 46 P.2d 242; *Medley v. Hill*, 104 Cal.App. 309, 311, 285 P. 891; 37 C.J. sec. 350, p. 969); and that "mere ignorance of the facts, * * * without some valid excuse for ignorance, was of no consequence." *Dennis v. Bint*, 122 Cal. 39, 44, 54 P. 378, 380, 68 Am.St. Rep. 17 [citing authority]. Such, only, is

the position in which the plaintiffs' complaint places them in this case. The last-cited cases are, in effect, a recognition of the prevailing rule that a failure to discover a cause of action does not, as in the case of its fraudulent concealment, suspend the running of the statute of limitations.

We have deferred to this more appropriate point a discussion of the possible effect on this appeal of the recent and important case of *Hobart v. Hobart Estate Company*, supra, 159 P.2d 958, mainly in order that it should first sufficiently appear that, irrespective of anything held or stated by the court in the *Hobart* decision, the present case is not affected by that decision for the reasons, first, that fraud has not been pleaded, and, secondly, that plaintiffs have not been able to successfully plead the fraudulent concealment of the existence of their cause of action. The *Hobart* case was one in which the plaintiff's cause of action was based exclusively upon fraudulent deceit. The Supreme Court was nowhere therein concerned with a claimed fraudulent concealment of the cause of action itself. With respect to the statute of limitations, the court considered its effect only insofar as it related to the discovery of the fraud itself, and it therefore had no occasion to discuss the alleged concealment of the existence of a cause of action. These, as has been previously pointed out, are distinct matters, and although we regard the foregoing distinctions alone as sufficient in themselves to differentiate the *Hobart* decision from the case before us and to render it inapplicable as an authority bearing upon the outcome of this appeal, there are, however, other important differentiating factors which should be mentioned, viz.: (1) In the *Hobart* case the opposite parties were, as the court held, in a confidential relationship; and (2) there were also present certain false affirmative representations upon which the plaintiff had acted. As has been previously pointed out, neither of these elements is present here. We conclude, therefore, that the determinations heretofore made are not in opposition to any statement of law which has been made by the court in the *Hobart* case.

[13] The *Hobart* decision does, however, present within its scope a restatement of certain well-established principles which defendants and respondents are entitled to and do urge on this appeal. These relate to the effect of the complete failure of the plaintiffs to have exercised any diligence

whatsoever—or to have made any investigation or inquiry into matters which, if pursued, would have led them to the discovery of the existence of their cause of action, for a period of over nine years—upon their present attempt to litigate a stale and barred cause of action.

Bearing upon these established failures is the following statement of the court in the *Hobart* case, 159 P.2d at page 972: “* * * plaintiff must *affirmatively* excuse his failure to discover the fraud within three years after it took place, by establishing facts showing he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry. [Citing authorities.]” (Italics ours.) It is to be noted that identically the same requirements are exacted of the pleader in alleging a discovery of fraudulent concealment as are required in pleading the discovery of fraud. *Kimball v. Pacific Gas & Elec. Co.*, supra, 220 Cal. at page 215, 30 P.2d 39. The court then further states (159 P.2d at page 972): “The statute commences to run only after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. Section 19 of the Civil Code provides: ‘Every person who has actual notice of circumstances *sufficient to put a prudent man upon inquiry*, as to a particular fact, has constructive notice of the fact itself *in all cases in which, by prosecuting such inquiry, he might have learned such fact.*’” (Last italics ours.)

[14] The Supreme Court in that case, after next pointing out that many California cases had held that the “means of knowledge are equivalent to knowledge” (citing fifteen cases), added the following important qualification: “This is true, however, only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious.” 159 P.2d at page 973.

This last-above-quoted qualification states a broader and more definite limitation (in favor of plaintiffs in the instant case) upon the earlier recognized obligation resting upon a latent discoverer of fraud—which previously required him to initially affirmatively show, in his effort to avoid the bar of a statute of limitations, that he had himself exercised such degree of diligence and had pursued such means of investigation and inquiry as a reasonably prudent person would have exercised or done under similar

circumstances—than had ever been previously stated by the court in its many decisions upon the nature and extent of the duty resting upon a party to make diligent inquiry and investigation of the available means leading to the discovery of fraud. It will be further noted that this recent declaration of the law which now obtains in this respect has been made generally and without regard to or dependency upon any qualifying facts in the case.

The Hobart decision holds then that the rule is that a plaintiff is now required to make an inquiry or investigation only where he "is aware of facts which would make a reasonably prudent person suspicious" that he may have been defrauded. We are of the opinion, nevertheless, that the facts here pleaded by the present plaintiffs fall squarely within the above-stated category, and of themselves show that an active duty rested upon them to diligently inquire and investigate concerning the disposition of their money, and that they were negligent in failing to do so.

[15, 16] A "diligent inquiry" was early defined in this state as one involving the exercise of "ordinary or reasonable diligence [in making inquiry]—such as men of business usually exercise when their interest depends upon obtaining correct information." *Garver v. Downie*, 33 Cal. 176, 182. This is in consonance with the classic and more extended definition of Judge Story which defines "ordinary diligence" as that "which men of common prudence generally exercise about their own affairs in the age and country in which they live." *Hanes v. Shapiro & Smith*, 168 N.C. 24, 84 S.E. 33, 36.

[17] We now examine the facts and state the implications that flow therefrom which, to us, plainly show that a duty rested upon plaintiffs to investigate and make inquiry concerning the dispositions made by defendants of their \$12,000, as follows:

Plaintiffs, upon a mere request, had advanced \$12,000 for the further cost of construction of buildings which already had cost \$80,000. In these buildings they presently had an investment of their own in the sum of \$92,000. These buildings must have been erected before their very eyes, for they not only had previously owned the property but very shortly thereafter reacquired it. The buildings had been under course of construction since about June 7, 1928. It is reasonably certain that buildings of such considerable cost were erected under the su-

pervision of an architect; and certainly there also must have been available to plaintiffs for inquiry some of the many artisans and material men who had been concerned with their construction. There was also available, as a primary and most logical source of inquiry, Louis A. Goldstein, the original owner and builder, who is nowhere charged by plaintiffs with participating in any fraud, concealment or collusion with the defendants. Goldstein, of course, knew how much money had been spent on the buildings, and also knew how much more would be reasonably required to complete them. Then also always available for inquiry were the defendants themselves. To no one of these various and presumptively available persons is it alleged that plaintiffs ever addressed a single inquiry or made a single demand until more than nine full years had elapsed; and, as has been shown, no act or statement of any person deterred or impeded them from so doing. Such neglect on their part, under the existing circumstances, amounts to nothing short of gross and inexcusable negligence—i.e., the neglect of an obvious duty which common prudence imposed upon them to discharge in their own self-interest. We believe these circumstances are on their face sufficient to satisfy the hereinbefore stated requirements of the Hobart case—for negligence such as this is the antithesis of duty, and without a duty there can be no negligence.

In *Simpson v. Dalziel*, 135 Cal. 599, 67 P. 1080, the court held that it was inexcusable negligence on the part of a client not to have used the means of knowledge within his power to ascertain the amount of money paid to his attorney upon the settlement of his lawsuit, and to inform himself as to how his said attorney had disposed of the money. The court, among other things, said (135 Cal. at page 603, 67 P. at page 1081) there "was no reason why he should not have inquired of his attorney whether he had secured a settlement, and, if so, for what amount. Natural curiosity, as well as business prudence, would have compelled him to make the inquiry, and his failure to make it was inexcusable negligence * * *."

Likewise in *Purdon v. Seligman*, 78 Mich. 132, 43 N.W. 1045, a case cited with frequency with respect to the effect of this type of negligence, the court, in discussing a similar failure of a plaintiff to make any inquiry, said (78 Mich. at

page 134, 43 N.W. at page 1045): "He [plaintiff] entirely neglected to search where the only information was to be found, and defendant threw no obstacle in the way of his doing so. How this inaction could, under such circumstances, amount to a concealment of anything it is hard to see. Plaintiff did not, so far as appears, even complain to defendant, or ask information. Had he done so, and had defendant then tried to put him off his guard, the case might possibly have been different. But the statute was not meant to help parties who take no pains to see what is before their eyes."

[18] Also at all times available to plaintiffs were the very means by virtue of which they now claim that they ultimately discovered that defendants had misused their money, to wit, either by bringing an action, as they ultimately did, for an accounting, or one for money had and received. In either of said actions they would be entitled to avail themselves of their right to take depositions and to the issuance of a subpoena duces tecum—both of which are powerful weapons of discovery; and if concealed fraud was then thereby discovered plaintiffs would have the right to set it up by appropriately pleading the same by way of amendment. Indeed, we are wholly at a loss to understand why plaintiffs failed to pursue that course in that then pending action, which was then at issue, to which they specifically refer in section VII of their complaint. It plainly appears that the so-called fraud of which they now complain was *intrinsic* to and within the issues of that very action; and it was their duty as well as right to exhibit and expose it to the court in that action, and, if necessary, to therein request the leave of the court to amend their pleading so as to tender the issue of fraud, if it existed and was then known to them for the first time. Instead of so doing, plaintiffs dismissed their said action, and procrastinated another fifteen months before bringing the present one.

Under all the existing circumstances, there was no abuse of discretion by the trial court in granting defendants' motion for judgment on the pleadings.

[19, 20] The Presiding Justice in his dissenting opinion stresses the very limited amount of time which was accorded plaintiffs' counsel by the trial court in which to amend plaintiffs' complaint. Mention is not made therein, however, of the fact

that this limitation was imposed at a time when a jury, which had just been impaneled at plaintiffs' request, was being held in attendance outside the courtroom awaiting the determination of defendants' motion for judgment on the pleadings. There can be but little doubt that it was this circumstance, together with the fact that plaintiffs' counsel, after being interrogated, had been unable to suggest or state orally any further fact which he desired to embody in his pleading, that caused the trial court to impose what concededly would otherwise have been an arbitrarily limited amount of time for the given purpose. In the absence of some representation to the contrary by plaintiffs' counsel (and there was none), the trial court had the frequently judicially recognized right to presume that the pleader had stated his side of the controversy as strongly and as favorably as all the facts known to him would permit. 21 Cal.Jur., sec. 29, p. 51; *Vilardo v. County of Sacramento*, 54 Cal.App.2d 413, 417, 129 P.2d 165. After the long period afforded for reflection which ensued between the taking of the appeal and the oral argument thereof, counsel has still been unable to state in his briefs or at the hearing any additional fact or facts that he might have pleaded had the trial court afforded him further time. It is therefore very difficult to perceive just how an application of what the dissenting opinion terms the modern rules of pleading could have in any wise aided him in this respect.

The judgment is affirmed.

WARD, J., concurs.

PETERS, Presiding Justice (dissenting).

I dissent.

The recent cases of *Wennerholm v. Stanford Univ. Sch. of Med.*, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; *Kimball v. Pacific Gas & Electric Co.*, 220 Cal. 203, 30 P.2d 39; *Pashley v. Pacific Elec. Ry. Co.*, 25 Cal.2d 226, 153 P.2d 325, and *Hobart v. Hobart Estate Co.*, Cal., 159 P.2d 958, have liberalized the old rules of pleading and freed the law from the straightjacket of long out-moded and technical authorities under which slight omissions in a pleading were held sufficient to justify a trial court in sustaining

a demurrer without leave to amend or in granting a judgment on the pleadings. The majority opinion in the present case, while giving lip service to some of these authorities, in fact reverts to the old rules, and, in my opinion, is contrary to the fundamental spirit of those authorities. Under the old rules the courts scrutinized pleadings carefully and attempted to find defects that could be held to be fatal to the statement of a cause of action. That is exactly what is done by the majority in the present case. Under the rules announced in the above cited cases, however, the courts now attempt, if possible, to spell out a cause of action where the facts stated disclose that justice so requires, even though details are lacking. The fundamental thought behind the modern rules is that a law suit is not a game, where the spoils of victory go to the clever and technical regardless of the merits, but a method devised by society to settle peaceably and justly disputes between litigants. The rules of the contest are not an end in themselves. Unless the rules tend to accomplish justice the rules should be discarded. It must not be forgotten that behind each lawyer is a client, and that it is the client's rights that are involved, not those of the lawyer. For that reason the modern rule is and should be that if a complaint substantially hints at a cause of action it is reversible error to sustain a demurrer without leave to amend or to grant a judgment on the pleadings. If the modern rule be followed in the instant case there is no doubt at all in my mind that the trial court committed error in granting judgment on the pleadings.

Although the complaint is inartfully drawn, and is incomplete in some details, a cause of action has in fact been substantially disclosed. This was an original complaint. General and special demurrers were interposed by the defendants. These demurrers were overruled. The majority opinion now holds that the trial judge who overruled these demurrers committed error, even as to the overruling of the special demurrer, and this in a case where the defendants are not appealing and cannot, of course, complain of any ruling adverse to them.

After answers were filed and at the commencement of the trial the defendants moved for judgment on the pleadings. It must not be forgotten that up to this point plaintiffs' counsel was entitled to believe

that the complaint was sufficient. Over two years before the commencement of the trial another department of the same court had so ruled. See comments in *MacIsaac v. Pozzo*, Cal., 161 P.2d 449. After defendants' counsel had challenged the sufficiency of the complaint, and after the trial court had indicated that it thought the complaint insufficient, plaintiffs' counsel asked leave to amend. He was somewhat vague as to what further facts could be alleged but it is quite obvious that many, if not all, of the deficiencies of the pleading that are pointed out at length in the majority opinion could have been remedied by amendment. The trial court suggested that the amendments be prepared during a ten-minute recess. Counsel requested further time, and suggested a week's continuance, and, when this was denied, asked for a two-day continuance. The court granted a fifteen-minute continuance, and several amendments were then drafted. It is quite clear that this time was totally inadequate to have permitted counsel to have considered sufficiently the many objections raised by defendants, and discussed at great length in the majority opinion. A mere reading of that opinion demonstrates how complex the problem is. While it is true that a jury had been then impanelled, there were no legal or practical reasons why the trial court could not have granted a reasonable continuance to plaintiffs to permit their counsel to maturely study the problems involved. This it did not do.

The majority opinion holds that no cause of action for fraud is pleaded. With this conclusion I disagree. The pleading is entitled: "Complaint for Damages for Fraud." The complaint alleges that plaintiffs in 1928 conveyed certain parcels of real property owned by them to the Goldsteins pursuant to a plan whereby the Goldsteins were to erect certain apartments thereon, to be financed by loans from the defendant Western Loan and Building Company secured by first mortgages, and that plaintiffs were to have second mortgages. It is alleged that this plan was carried out, and that the Goldsteins executed and delivered to Western Loan and Building Company two notes and first mortgages, one for \$45,000, and one for \$35,000; that the Goldsteins started construction of the buildings; that Western Loan and Building Company advanced some of the moneys; that prior

to completion the Goldsteins abandoned the project and defaulted on the various loans made by them; that defendants then requested of plaintiffs \$12,000 "to be applied on account of certain work, labor and material required for the completion of the aforesaid buildings" said sum to be used by defendants "for the cost of the completion of such structures"; that that sum was deposited with defendants and the buildings were completed under the supervision of defendants.

At this point it should be noted that there is sufficiently pleaded a transaction whereby money was deposited with defendants at their request to be used for a specific purpose, and that they represented it would be used for that purpose. There can be no doubt but that when defendants received the \$12,000 they were obligated to use the money for that purpose. There can be no doubt at all that the deposit was in the nature of a trust fund, and that a misuse of the fund constituted a breach of trust.

The complaint then alleges the foreclosure of plaintiffs' liens and the acquisition of title by plaintiffs to the property subject to the defendants' liens; that from time to time plaintiffs demanded an accounting from defendants and from time to time defendants promised to account but failed to do so; that in June, 1940, plaintiffs commenced an action for an accounting, and defendants on February 1, 1941, rendered an accounting purporting to show that the \$12,000 had been properly expended; that these statements were false and untrue and known to the defendants to be so, and were furnished by defendants with intent to conceal the fact that the \$12,000 had not been expended in the construction of the buildings; that the true fact is that defendants used the money to finance other buildings being constructed for the Goldsteins and charged such advances to plaintiffs' buildings; that plaintiffs prior to February 1, 1941, believed the money had been used on plaintiffs' buildings; that the true facts were discovered shortly prior to the filing of the action.

The test that must be applied in determining the sufficiency of this pleading has recently been stated as follows: "In considering whether the judgment on the pleadings was properly granted, it is but necessary to determine the sufficiency of the complaint upon the same principle as

though it had been attacked by general demurrer. In other words, it is only where there is an entire absence of some essential allegation that a motion for judgment on the pleadings may be properly granted." *Rannard v. Lockheed Aircraft Corporation*, 157 P.2d 1, 2. It is likewise error to grant a motion for judgment on the pleadings without affording the pleader a reasonable opportunity to amend. As was said in *MacIsaac v. Pozzo*, 161 P.2d 449, 452: "* * * when the facts stated indicate that the party probably has a good cause of action or defense, but that it has been pleaded imperfectly or defectively, and the defects have not been called to his attention by demurrer or by a notice of motion for judgment on the pleadings, the court should not grant the motion without first giving the party an opportunity to elect whether he will stand on his pleadings or amend them. The granting of the motion without leave to amend would in many cases be an absolute denial of justice, and is directly opposed to the policy of the law that cases should be tried and decided on the merits." This case also held that the same tests as are applied in determining whether the trial court abused its discretion in sustaining a demurrer without leave to amend should be applied to the granting of a judgment on the pleadings.

Tested by these standards, in my opinion the trial court committed error in granting the judgment on the pleadings without giving the plaintiff an adequate opportunity to amend. Under the rule of the above two cases all of the grounds of special demurrer discussed at such great length by the majority, must be eliminated from consideration. Moreover, even as to essential allegations it is not necessary that they appear clearly and without ambiguity. The true test, to use the words of the Chief Justice in the *MacIsaac* case, *supra* (161 P.2d at page 452), is to ascertain if "the facts stated indicate that the party probably has a good cause of action" even though it is pleaded "imperfectly or defectively." Can there be any doubt but that this complaint indicates that plaintiff "probably has a good cause of action" for fraud? From the allegations of the complaint it can be ascertained that the \$12,000 was originally secured as a result of an express representation that it was needed to finish construction of the buildings. Are the allegations susceptible of any other reasonable interpretation but that the money was

secured with intent to violate this express representation? Is that not substantially hinting at a cause of action for fraud? I think the answers to these questions are obvious.

Had the action been brought within three years of the time the money was advanced there can be but little doubt that under the facts alleged, and those necessarily inferred, a cause of action for fraud would have been stated. A defendant that secures money on the express promise to use it for a specific purpose, and then uses it for other purposes, is guilty of a fraudulent breach of trust. Although silence is not ordinarily the equivalent of a representation, it may amount to a representation where there is a duty to speak. Here, under the facts pleaded, the defendants were under a duty to speak. They had secured the money upon their representation that the money was necessary to complete the buildings. They had charge of the trust fund. Their failure to speak under the circumstances amounted to a representation that the money had been properly expended. Certainly plaintiffs were not required at their peril to assume that they were dealing with rogues. They were entitled to believe that they were dealing with a reputable concern. Under the circumstances, to say the least, the allegations indicate that plaintiffs "probably" have a "good cause of action" for fraud against defendants. This is so even though the complaint fails to use the word "fraud" in its allegations. This failure is several times commented upon in the majority opinion, and apparently some weight given to it. It is too elementary to require citation of authority that the nature of the cause of action is determined by the facts pleaded, not by how they are characterized.

Plaintiffs did not discover the fraud until some twelve years after it was consummated. Have they alleged sufficient facts to excuse their failure to sooner discover the fraud?

This very problem has so recently received the attention of the Supreme Court in *Hobart v. Hobart Estate Co.*, 159 P.2d 958, that it would be needless repetition to do more than quote from that case. At page 972 of 159 P.2d, the court stated:

"Defendants assert that in addition to these requirements plaintiff must show that he made a diligent inquiry to discover

whether or not he had been defrauded, and they argue that plaintiff failed to prove that earlier inquiry would not have revealed the falsity of the alleged representations. It is not in every case, however, that a person is barred after three years by failure to pursue an available means of discovering possible fraud. The statute commences to run only after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. Section 19 of the Civil Code provides: 'Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.' (Italics added.) Under this section it was held in *Tarke v. Bingham*, 123 Cal. 163, 55 P. 759, that the plaintiff was not barred by subdivision 4 of section 338 of the Code of Civil Procedure, since nothing had occurred 'to excite his suspicion, or to put him upon inquiry.' 123 Cal. at page 166, 55 P. [759]. The court said: 'Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, "a prudent man" would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. *The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission.*' (Italics added.) Many other decisions have adopted this view. [Citing cases.] In many cases it has been said that means of knowledge are equivalent to knowledge. [Citing cases.] This is true, however, only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious. In the *Lady Washington* case [*Lady Washington Consol. Co. v. Wood*] the court said (113 Cal. [482], at page 487, 45 P. [809]) that 'as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts.' (Italics added.)

"The reason for the rule is well stated in *Victor Oil Co. v. Drum*, supra 184 Cal.

[226] at page 241, 193 P. [243]: 'The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part.' It follows that plaintiff is not barred because the means of discovery were available at an earlier date *provided* he has shown that he was not put on inquiry by any circumstances known to him or his agents at any time prior to the commencement of the three-year period ending June, 1941."

Certainly plaintiffs have pleaded no facts to show that they were put on inquiry prior to 1941. The plaintiffs have alleged not only a failure on the part of defendants to speak when they were under a duty to speak, but have alleged a fraudulent concealment of the cause of action

when they were compelled to speak by the filing of the accounting suit. They have properly pleaded such fraudulent concealment within the rules laid down in *Kimball v. Pacific Gas & Electric Co.*, 220 Cal. 203, 30 P.2d 39, and *Pashley v. Pacific Elec. Ry. Co.*, 25 Cal.2d 226, 153 P.2d 325.

To further elaborate my views would unduly extend this dissent. It is sufficient to state that, tested by the standards laid down in the *Wennerholm v. Stanford Univ. Sch. of Med.*, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358, case, the *Kimball*, *Hobart* and *Pashley* cases, *supra*, and the cases of *Rannard v. Lockheed Aircraft Corporation, Cal.*, 157 P.2d 1, and *MacIsaac v. Pozzo, Cal.*, 161 P.2d 149, it was error of a most serious and prejudicial nature to have granted the motion for judgment on the pleadings without affording plaintiff a more adequate opportunity to amend. I believe the judgment should be reversed.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

27 Cal.2d 521

DeYOUNG v. DeYOUNG.

L. A. 18924.

Supreme Court of California, in Bank.

Jan. 29, 1946.

1. Divorce ☞327

In action for separate maintenance, plaintiff had burden of sustaining her claim that defendant, who relied upon Mexican divorce, had not established any bona fide domicile in Mexico.

2. Domicile ☞4(2)

Generally acquisition of new domicile requires actual change of residence accompanied by intention to remain either permanently or for an indefinite time without any fixed or certain purpose to return to former place of abode.

3. Divorce ☞62(2)

Merely abiding in a place for a definite time for a transient purpose, such as obtaining a divorce, unaccompanied by any intention to remain permanently or indefinitely, is insufficient to constitute a change of domicile.

4. Divorce ☞327

In action for separate maintenance, where defendant set up a Mexican divorce, evidence concerning defendant's poor health and that he went to Mexico to improve his health with understanding that business opportunities were available there, established actual change of residence from Michigan to Mexico.

5. Appeal and error ☞1011(1)

Where defendant set up Mexican divorce to defeat action for separate maintenance, evidence tending to indicate that defendant did not go to Mexico with bona fide intention of making his home there, merely created a conflict in evidence and, in that case, trial court's findings could not be disturbed.

6. Divorce ☞327

In action for separate maintenance against defendant who claimed to have obtained Mexican divorce, where plaintiff relied upon presumption that Mexican law concerning notice of divorce proceedings was the same as that of California, defendant's testimony that he gave plaintiff's name and address to his attorney, and introduction of duly authenticated copy of Mexican decree reciting publication of

summons and compliance with all legal requirements, supported finding that proper notice of divorce proceeding had been given plaintiff. Code Civ.Proc. §§ 412, 413.

7. Appeal and error ☞1011(1)

In action for separate maintenance against defendant who claimed to have obtained Mexican divorce, evidence merely tending to impeach defendant's testimony that he had given plaintiff's address to his counsel did no more than create a conflict in evidence, and probative value thereof was for trial court.

8. Appeal and error ☞989

The power of appellate court ends with respect to facts when it determines that there is substantial evidence which supports trial court's findings.

9. Divorce ☞327

In action for separate maintenance against defendant who set up a Mexican divorce, Mexican judgment could not be successfully impeached by reliance upon California residence requirements and assumption that law of Mexico was the same as that of California, since that claim would at most show an error in exercise of jurisdiction. Civ.Code, § 128.

10. Divorce ☞62(2)

The codal provision stating residence requirements for plaintiff in divorce action does not impose any limitation upon jurisdiction of superior court. Civ.Code, § 128.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action for separate maintenance by Helen M. DeYoung against Clarence DeYoung. From a judgment denying any relief, the plaintiff appeals.

Judgment affirmed.

Prior opinion, 159 P.2d 102.

Victor A. Gillespie and Lester E. Hardy, both of Los Angeles, for appellant.

Otto A. Gerth, of Los Angeles, for respondent.

SPENCE, Justice.

This is an appeal by the plaintiff, Helen M. DeYoung, from an adverse judgment in an action for separate maintenance. Defendant, Clarence DeYoung, successfully defended upon the ground that the marital

union between himself and plaintiff had been dissolved by a judgment and decree of divorce rendered by the Civil Court of Bravos District, State of Chihuahua, located at Jaurez, Mexico, on June 5, 1936.

Plaintiff contends that the findings of the trial court to the effect (1) that defendant acquired a bona fide domicile in Mexico and (2) that "due and proper notice" of the divorce proceedings was given to her, are not supported by substantial evidence. After a review of the record, it appears that there is substantial evidence to support said findings and that the judgment should be affirmed.

Plaintiff and defendant intermarried in 1925 and lived together until June, 1931, principally in Grand Rapids, Michigan, where defendant engaged in the garage business. At that time plaintiff, with her daughter by a previous marriage, left defendant and returned to her former home in Stamford, Connecticut. The parties never resumed marital relations although they continued to communicate with each other by mail until April, 1936. Plaintiff testified that defendant became ill in 1931 and that the separation took place as the result of her suggestion that she return to her former home for the summer so that defendant could get on his feet again. According to defendant, his wife told him at the time of the separation that she did not want anything more to do with him. Defendant's health continued to be "up and down" during the years 1931 to 1936. In the spring of 1936, defendant sold his garage business. According to his testimony, he then left Grand Rapids for the reason that he desired to go to a warmer and milder climate, more conducive to his health. He arrived in Juarez, Mexico, about April 1, 1936, and on April 25, 1936, filed an action to obtain a divorce from the plaintiff herein. Three days later he registered as a resident of Juarez. Mrs. DeYoung did not appear in the action and defendant was granted a decree of divorce on June 5, 1936. Except for a short visit to Los Angeles in July, 1936, defendant remained in Juarez until December, 1936, when he went to Los Angeles where he has since resided. In February, 1937, he married Mrs. Lelia Marshall, his former bookkeeper.

[1] No evidence was introduced regarding the law of the State of Chihuahua, Mexico, but for the purpose of the discussion of plaintiff's first claim of insufficiency

of evidence, we may assume, without deciding, that regardless of whether the law of the State of Chihuahua did or did not make domicile a condition to its court's jurisdiction, the decree of divorce obtained there would be subject to collateral attack in this state if defendant herein had no bona fide domicile there. See *Estate of McNutt*, 36 Cal.App.2d 542, 98 P.2d 253; *Stewart v. Stewart*, 32 Cal.App.2d 148, 89 P.2d 404; *DuQuesnay v. Henderson*, 24 Cal.App.2d 11, 74 P.2d 294; 105 A.L.R. 817, 822; 143 A.L.R. 1294, 1313 and cases there cited. But upon this collateral attack, made upon the Mexican decree by plaintiff herein, the burden was upon plaintiff to sustain her claim that no bona fide domicile in Chihuahua had been established by defendant, *Cardinale v. Cardinale*, 8 Cal.2d 762, 68 P.2d 351; *Collins v. Maude*, 144 Cal. 289, 293, 77 P. 945, and the trial court concluded that plaintiff had failed to sustain that burden.

[2,3] The acquisition of a new domicile is generally understood to require an actual change of residence accompanied by the intention to remain either permanently or for an indefinite time without any fixed or certain purpose to return to the former place of abode. See cases collected in 106 A.L.R. 6, 14; 28 C.J.S., *Domicile*, § 1; 17 Am.Jur., *Divorce and Separation*, § 250, *Domicile*, § 2; Rest., *Conflict of Laws*, § 12, p. 24. Merely abiding in a place for a definite time for a transient purpose such as obtaining a divorce, unaccompanied by any intention to remain permanently or indefinitely, is not sufficient. See 106 A. L.R. 6, 15; 9 R.C.L. 452; Rest., *Conflict of Laws*, § 22, p. 46.

[4,5] There was abundant evidence in the record here to show that defendant herein actually changed his residence to Juarez; that his change of residence to Juarez was accompanied by the intention to remain in Juarez either permanently or for an indefinite time; and that he had no intention of returning to Grand Rapids and did not return there. Defendant was admittedly in poor health from 1931 to 1936 and admittedly had a siege of influenza in 1936. He testified that he was told that Juarez had a warmer climate and that he went there for the benefit of his health and not for the purpose of getting a divorce. He further testified that he was advised that there were business opportunities in his line in Juarez because of the numerous tourists going through Mexico; that he

went there and worked as a service station operator while looking for a business of his own. After obtaining his divorce in June, 1936, he remained continuously in Juarez for approximately six months until December of that year, except for a short trip to Los Angeles in July. Facts relied upon by plaintiff, such as defendant's failure to mention in letters written to her, in the spring of 1936, anything about a contemplated trip to Mexico or a divorce, which might tend to indicate that defendant did not go to Juarez with a bona fide intention of making that city his home, merely tended to create a conflict in the evidence and this being so, the finding of the trial court cannot be disturbed. *Cardinale v. Cardinale*, 8 Cal.2d 762, 766, 68 P.2d 351; *Collins v. Maude*, 144 Cal. 289, 77 P. 945; *Estate of James*, 99 Cal. 374, 33 P. 1122, 37 Am.St.Rep. 60.

[6] Plaintiff's next contention is that the evidence does not support the finding that "due and proper notice" of the divorce proceedings was given her. In the absence of any evidence of the Mexican law, plaintiff relies upon the presumption that the law there is the same as that of California. See *Wickersham v. Johnston*, 104 Cal. 407, 38 P. 89, 43 Am.St.Rep. 118; *Perkins v. Benguet Cons. Min. Co.*, 55 Cal.App.2d 720, 768, 769, 132 P.2d 70. Sections 412 and 413 of the Code of Civil Procedure require the publication of summons and the mailing of the summons and complaint to the residence of a nonresident defendant whose address is known. Defendant herein testified that he gave plaintiff's name and address to the attorney who handled the Mexican divorce proceeding; and the Chihuahua decree, a duly authenticated copy of which was introduced, recites that publication of summons had been made and that "all the legal requirements have been complied with." This evidence was ample to support the trial court's finding that "due and proper notice" had been given. *Collins v. Maude*, 144 Cal. 289, 77 P. 945; *Plante v. Plante*, 54 Cal.App.2d 318, 128 P.2d 787; *Galloway v. Galloway*, 116 Cal.App. 478, 2 P.2d 842.

[7,8] The present claim of plaintiff regarding notice was not mentioned in the opening brief on appeal and appears only in a supplemental brief now on file. It was apparently not urged in the trial court as plaintiff offered no testimony to show that she had failed to receive a copy of the complaint and summons in 1936, advising

her of the pendency of the divorce action. The only reference to notice of any kind, found in the testimony offered by plaintiff, is to the effect that she first obtained knowledge in 1937 that defendant had secured a divorce. Plaintiff places much emphasis upon the letters written by defendant in the spring of 1936, claiming that these letters tend to impeach defendant's testimony that he gave her address to his counsel in the Mexican divorce proceeding. Such letters do not have the persuasive force attributed to them by plaintiff but even if it be assumed that the evidence offered by plaintiff created a conflict and would have supported a contrary finding on the issue of notice, the probative value of the evidence was a matter for the determination of the trial court. The power of an appellate court ends with respect to the facts when it determines that there is substantial evidence which supports the trial court's findings. *Viner v. Untrecht*, 26 Cal. 2d 261, 267, 158 P.2d 3; *Stromerson v. Averill*, 22 Cal.2d 808, 141 P.2d 732; *Watson v. Poore*, 18 Cal.2d 302, 115 P.2d 478.

[9,10] In a brief filed after oral argument in this court, plaintiff advances a further contention based upon the proposition already alluded to that because there is no evidence concerning the law of the State of Chihuahua, Mexico, it must be assumed that such law was the same as that of California. Upon the basis of such assumption plaintiff seeks to inject into the case the residence requirements enunciated in section 128 of the California Civil Code. That section requires the plaintiff in a divorce action to have been a resident of the state for more than one year and of the county in which the complaint was filed for more than ninety days immediately preceding the date of the filing of the action. A sufficient answer to this contention is that section 128 of the Civil Code does not impose any limitation upon the jurisdiction of the superior court. *Bullard v. Bullard*, 189 Cal. 502, 506, 209 P. 361; *Estate of McNeil*, 155 Cal. 333, 341, 100 P. 1086. The attack plaintiff makes upon the Mexican judgment is collateral, and such attack cannot be successfully made upon grounds which would amount, at most, to a showing of error in the exercise of jurisdiction.

The foregoing discussion disposes of all the contentions of plaintiff and such disposition makes it unnecessary to consider a further contention of defendant that plaintiff is estopped from prosecuting her pres-

ent action because of acquiescence in the divorce decree granted in Mexico, for five years after obtaining knowledge of its entry.

The judgment is affirmed.

GIBSON, C. J., SHENK and EDMONDS, JJ., concurred.

SCHAUER, Justice.

I concur in the judgment and generally in the propositions of law discussed in Mr. Justice Spence's opinion. Such concurrence in the opinion, however, is subject to the reservation that there is intended no implication that a foreign divorce decree, although fully valid insofar as the determination of marital status is concerned, necessarily constitutes a defense to an action for support.

In a divorce action in a foreign state upon constructive service the court there has authority to adjudicate status (in rem) of a person residing in that state but has not jurisdiction to adjudicate away (in personam) any of the then vested property rights of the absent spouse who does not reside in such state, who is not personally served with process in that state and who does not appear in the action. The personal rights of the spouses in property not within the jurisdiction of the acting court remain subject to litigation in the proper forum. It seems to me that the right of a wife, or in a proper case the husband, to support from the other spouse as of the date of the divorce is a property right which can be adjudicated only by a court having jurisdiction in personam.

The above-stated view does not necessarily conflict with the well-established proposition that a court having jurisdiction over a domiciliary may adjudicate his marital status in rem and that (assuming due process) as an incident of the change of status any rights to future accruing support *dependent upon a continuing marital status* no longer accrue because the status no longer exists. But it is, of course, a familiar principle that alimony decreed as of the date of a divorce may continue into the future when the parties have attained complete termination of the marital status. And I am of the view that rights to support in the form of alimony *as of the date of the divorce* (which alimony may continue into the single status), at least where there is no adjudication of fault (see *Herrick v. Herrick*, 1933, 55 Nev. 59, 64, 25

P.2d 378), may well be subject to judicial determination in a subsequent action in a proper forum having personal jurisdiction over both parties. Such an action, being based on the marital status as it existed prior to the divorce, would have to be instituted before the statute of limitations or laches barred it. The statute would normally start to run as of the date of the decree but would, of course, be tolled by absence of the party defendant from the state.

It is to be noted that the Mexican court in Mr. De Young's action recognized the distinction between its powers in rem and in personam and expressly provided in its decree that "As there are no children nor properties of the marriage within the jurisdiction of this Court, nothing is to be resolved in this decree regarding these matters." Here, however, the action before us (commenced November 30, 1942) does not seek alimony based on the former marital status. It is for separate maintenance and plaintiff relies upon the allegation "That she is the wife of Clarence De Young." The trial court found, upon sufficient evidence "that since June 5, 1936, the parties hereto were not husband and wife and bore no marital relation or obligation toward each other, and that there was and is no community property" and further that "during the month of October, 1937, the plaintiff herein, Helen M. De Young, learned fully that the defendant, Clarence De Young, had obtained a final divorce from her prior thereto." Separate maintenance differs from alimony in that it presupposes a continuing marital status. The right to it cannot be established without proof that such status is existent as of the time of trial. Proof of prior dissolution of the marriage is, therefore, a complete defense to such an action.

Even if we should construe the complaint as setting up a cause of action for alimony as of the date of the divorce decree we could not disturb the judgment. The trial court herein found (and the sufficiency of the evidence in this respect is not challenged) that "since June 1931 to the present time the parties hereto have lived separate and apart from each other and during all of said time and up to the time that this defendant was divorced from the plaintiff * * * the plaintiff deserted and abandoned the defendant against his will and wish and without his consent and lived separate and apart from him" and that

"during the entire course of the marriage relationship of said parties hereto the plaintiff was guilty of extreme cruelty practiced in and upon and toward this defendant" in many particulars, all as specifically alleged in defendant's affirmative defense. It is also to be remembered that the present action was not commenced until November 30, 1942, although (according to the court's finding) plaintiff had acquired full knowledge, in October, 1937, that defendant had obtained a divorce prior thereto. In the light of those findings plaintiff is not upon any view of the law or theory of action entitled to recover.

CARTER and TRAYNOR, JJ., concurred.



27 Cal.2d 368

HAGGE et al. v. DREW et al.
L. A. 19164.

Supreme Court of California, in Bank.
Dec. 14, 1945.

1. Vendor and purchaser ⇨39

The Real Estate Brokers Act regulating the sale of subdivided lands by brokers did not apply to owner's sale of land to one who was to subdivide and sell it to the public, but would apply only to sales by such subdivider. Gen.Laws Supp.1935, Act 112, §§ 20a, 20j, 20l.

2. Vendor and purchaser ⇨49

An agreement to convey realty subject to easements, restrictions, reservations, and conditions of record, if any, did not import that vendor had a title clear of all encumbrances except easements, etc., of record, but that vendor would convey at appointed time subject to such restrictions of record.

3. Bankruptcy ⇨268

Where sale of land to defendant was confirmed on January 29, 1942, on payment of \$20,000 cash and note secured by trust deed for balance, and down payment was made and all necessary papers were executed by March 4, 1942, although deeds and trust deed were not recorded until March 13, 1942, court was justified in treating defendant who had contracted to

sell the land to another as the owner for all practical purposes on March 7, 1942.

4. Escrows ⇨9

Where all the conditions of the escrow have been performed and the grantee is entitled to possession of the deed, title may be deemed to have passed. Civ.Code, § 1057.

5. Vendor and purchaser ⇨134(1)

Where vendor had agreed to convey subject to restrictions, reservations, and conditions of record and there was no representation as to existence or nonexistence of trust deed except statement in contract that vendor was owner in fee simple, finding that vendor was owner in fee simple was sustained by the evidence though trust deed was outstanding in view of proof of vendor's unrestricted power to dispose of property and pass title to purchaser.

6. Estates ⇨5

A "fee-simple title" is one that is inheritable and that the holder has the power to convey. Civ.Code, § 762.

See Words and Phrases, Permanent Edition, for all other definitions of "Fee-Simple Title".

7. Mortgages ⇨137, 138

In California the title theory is adhered to with respect to trust deeds and the lien theory with respect to mortgages, but for practical purposes the trustee is the owner of the property. Civ.Code, § 762.

8. Vendor and purchaser ⇨35

Where purchaser admitted that there was a trust deed on the property requiring its subdivision and improvement prior to payment of debt secured thereby and court found that in course of transaction purchaser knew of its terms and trust deed was of record a few days after contract of purchase, finding that there was no fraud by vendor in failing to disclose contents of trust deed was justified.

9. Trusts ⇨72

Where alleged fraud of obtaining money from plaintiffs and acquiring realty therewith did not exist, no resulting trust could be claimed.

10. Trusts ⇨72

That vendors used purchasers' down payment on property to meet vendors' down payment to another on such property did not form the basis of a resulting trust in favor of purchasers.

11. Trusts ⇨89(1)

Finding that vendors had performed their part of contract of sale relating to bonds for payment of improvements as required by trust deed was sustained by the evidence.

12. Vendor and purchaser ⇨37(7), 43(1)

Where vendor made no representations about value of property, or price paid for it, and no fiduciary relation to purchaser existed, and vendor acquired property from bankruptcy trustee and purchaser knew of bankruptcy proceedings that resulted in trustee's sale, vendor's failure to disclose price at which property was purchased and sale shortly thereafter at nearly double the price paid did not constitute actionable fraud, particularly where vendor's purchaser ratified the purchase after knowledge of all the facts.

13. Contracts ⇨123(1)

That vendor sold property to a subdivider for nearly double price paid for it shortly before, and that subdivider was financing development through the Federal Housing Administration and obtained priorities from the O.P.A., did not render sale contrary to public policy as tending to frustrate Federal Housing statutes. 12 U.S.C.A. § 1701 et seq.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by H. H. Hagge and others against John Drew and others to quiet title to real property and to establish a trust therein. From a judgment for defendants, and from an order denying motion of named plaintiff to vacate judgment, and from an order denying motion for a new trial, the plaintiffs appeal.

Appeal from order denying motion for a new trial dismissed and order denying motion to vacate judgment and the judgment affirmed.

Prior opinion 157 P.2d 408.

Buel R. Wood and Robert T. Linney, both of Los Angeles, for appellants.

Samuel DeGroot and Aaron Sapiro, both of Los Angeles, for respondents.

CARTER, Justice.

The complaint in this action contains two counts, the first seeks to quiet title to real property and the second to establish a

trust in the same property. Plaintiffs were unsuccessful in establishing either count and defendants' title was quieted against them.

The complaint alleged and the court found that prior to November, 1941, plaintiff H. H. Hagge was engaged in the business of subdividing real property and building houses thereon for sale, and that in connection with that business, he established connections with a bank in which Harold Humber and Harry Holmes were officers. The property involved in the instant case concerning which Hagge made agreements in the operation of his subdivision enterprises, is situated in Los Angeles County. Defendant John Drew first became acquainted with that property in November, 1941. The property had been formerly owned by the F. W. Newport Corporation Ltd., but was then in the custody of H. F. Metcalf, trustee in bankruptcy, for the assets of said corporation which had become bankrupt. The Security First National Bank of Los Angeles had asserted a claim against the property by reason of a trust indenture. Metcalf had been endeavoring for some time to sell the property and a Mr. Charlesworth brought it to Drew's attention. In December, 1941, Drew employed Charlesworth to purchase the property for him and the latter acted as his agent in the subsequent transactions. Charlesworth contacted plaintiff Hagge in December, 1941, as a prospective purchaser of the property from Drew, and Hagge made a proposal apparently accompanied by a deposit. However, the deposit was returned and the deal was not consummated. In a writing dated January 16, 1942, Hagge offered to buy the property from Drew. By contract of sale dated March 7, 1942, Hagge agreed to purchase the property from Drew for \$174,270, payable \$10,000 down and the balance to be represented by a promissory note payable in one year with interest payable quarterly. In the contract Hagge agreed to subdivide the property. The offer dated January 16, 1942, was made a part of the contract insofar as consistent with it. An escrow was to be opened in connection with the transaction. Hagge made the down payment.

Charlesworth, as agent for Drew, submitted to Metcalf, the trustee in bankruptcy, a written bid to buy the property for \$87,135—\$20,000 cash and the balance

represented by a promissory note to be secured by a trust deed on the property. Pursuant to a petition therefor, the bankruptcy court confirmed the sale of the property to Drew on January 29, 1942. Deeds dated in February, 1942, conveying the property to Drew from Metcalf and Security First National Bank were executed. Drew executed the note and trust deed. The deeds and trust deed were not recorded until March 13, 1942. The trust deed recites that it is contemplated that the property will be subdivided and trustor agrees to subdivide a designated parcel thereof.

The escrow instructions were dated April 8, 1942, but were put into effect on April 17, 1942. The instructions were re-drafted and reexecuted on April 20, 1942. In August, 1942, one parcel of the property was released to Hagge from the trust deed and contract of sale, and he subdivided it, erected homes thereon and sold them. The court found that no fiduciary relation existed between Drew and Hagge; that Drew had performed all of his obligations under the contract of sale; that Hagge paid Drew \$46,350 on the unpaid balance payable under the contract and promissory note but failed to pay the remainder, and defaulted in other respects under the contract, and that his rights were terminated by Drew pursuant to the forfeiture clause therein.

This action does not purport to be one for damages for breach of contract. In their prayer plaintiffs ask for the cancellation of the contract of sale and that they be declared the owners of the property subject to the trust deed held by Metcalf and Security First National Bank in which Drew is the trustor. Hagge contends that the court erred in denying his motion under section 663 of the Code of Civil Procedure to vacate the judgment and enter a different one. The attack seems to be with reference to the last clause in a finding of the court reading: "It is not true that the plaintiffs requested the defendants to subdivide said Parcel No. 4, but the defendants refused and to avoid a serious loss to themselves and to prevent a default under the terms of said deed of trust, the plaintiffs subdivided said Parcel No. 4 and caused 206 lots to be released from said trust deed lien, according to the manner set out in said trust deed; it is true that the plaintiffs by virtue of their obligations with the defendants as con-

tained in the agreement dated March 7, 1942, did subdivide said Parcel No. 4 and cause 206 lots to be released from said deed of trust and in accordance with the agreement dated March 7, 1942." Plaintiffs appear to argue that because it was found that they subdivided a parcel of the property involved in accordance with the contract of sale and caused to be released to them 206 lots, the contract of sale was void for a lack of compliance with the Real Estate Brokers Act. Stats.1919, p. 1252, as amended by Stats.1935, p. 366, § 20a, Deering's Gen.Laws, Supp.1935, Act 112; now § 11010 of the Business & Professions Code, St.1943, p. 862. The provision reads: "Prior to the time when subdivided lands shall be offered for sale or lease, the owner, his agent or subdivider shall notify the Real Estate Commission in writing of his intention to sell such offering. Such notice of intention shall contain the following information: the name and address of the owner; name and address of subdivider; legal description and area of land; a true statement of the condition of the title to the land; particularly including all encumbrances thereon, the terms and conditions on which it is intended to dispose of such land, together with copies of any contracts intended to be used and such other information as the owner, his agent, or subdivider, may desire to present." Reference is also made to the definition of a subdivision and subdivided lands reading: "* * * the words 'subdivided lands' and 'subdivision' are hereby defined as land or lands divided or proposed to be divided for the purpose of sale or lease, whether immediate or future, into five or more lots or parcels." Stats. 1919, p. 1252, as amended Stats.1935, p. 366, § 20j, Deering's Gen. Laws, Supp. 1935, Act 112; now Bus. & Prof. Code, § 11000, St.1943, p. 862. And to the provision making the violation of the act a crime. Stats.1919, p. 1252, as amended Stats.1935, pp. 366, 1477, § 20l, Deering's Gen.Laws, Supp.1935, Act 112, now Bus. & Prof. Code, § 11020, St.1943, p. 864.

[1] Assuming that a violation of that statute would render a transaction void, we do not believe it has any application to the instant case. The findings state that plaintiffs did subdivide the property pursuant to the contract and had 206 lots released. That speaks of a subdividing by plaintiffs not defendants. The contract was not a sale or offer to sell subdivided

lands and the finding does not so interpret it. It was a sale of land which lent itself to subdivision but the subdividing was to be done by the plaintiffs and by them offered for sale. Prior to that sale by them the notice of intention required by section 20a should be given. The sale of the land under the contract of sale was of unsubdivided parcels. Under the contract the lands were not proposed to be subdivided for sale, that is, for the sale under the contract. They were proposed to be subdivided after the contract of sale and then sold as subdivided lands by plaintiffs. We take it that the statutory provisions quoted do not apply to a contract of sale by the owner to a subdivider who is to subdivide the property and sell it to the public. Moreover, the evidence shows that the land was treated as acreage and deeded to Hagge in that fashion. The reference to it as consisting of 206 lots was merely a form of expression describing a certain quantity of land.

Plaintiffs refer to the trust deed given by defendants to the trustee in bankruptcy for the balance of the purchase price requiring defendants to subdivide the property, and hence within the terms of the statute. But defendants did not purport to subdivide it themselves. They immediately made the contract of sale with plaintiffs under which the latter were to subdivide it. Even though they may have assumed the duty to subdivide, they did not do so.

[2] Plaintiffs contend that the following finding lacks evidentiary support: "It is true that the defendants were the owners in fee simple of said property as of March 7, 1942. It is not true that the defendants agreed with plaintiffs in accordance with the agreement dated March 7, 1942, that said real property was subject only to easements, restrictions, reservations and conditions of record, if any." In that connection they point to two paragraphs in the contract of sale reading: "1. That First Party (defendants) agrees and covenants that he is the owner in Fee Simple of that certain Real Property situated in Los Angeles County. * * *" And "III. That First Party agrees to convey said Real Property subject to easements, restrictions, reservations and conditions of record, if any. * * *" Paragraph III does not import that at the time the contract was made, March 7, 1942, defendants had a title clear of all encum-

brances except easements, restrictions, reservations and conditions of record. Defendants merely agreed to convey the property when it came time to do so, subject to such restrictions of record. Elsewhere in the agreement defendant agreed to execute deeds to the property free from encumbrances, as and when plaintiffs have made requests therefor and were ready and able to pay for the property released at the rate of \$275 (later reduced to \$225) per lot.

[3] In regard to the argument that defendants were not the owners in fee simple of the property on March 7, 1942, the date of the contract of sale, the facts are as follows: The sale from the trustee in bankruptcy to defendants was confirmed on January 29, 1942. The terms of the sale required defendants to pay \$20,000 cash and give a note and trust deed for the balance of \$67,135. Deeds from the trustee in bankruptcy and Security First National Bank were dated in February, 1942. The note and trust deed were dated February 15, 1942, and executed by defendants on March 4, 1942. While those deeds and the trust deed were not recorded until March 13, 1942, six days after the date of the contract of sale, Charlesworth, Drew's agent, testified that the down payment of \$20,000, less the \$500 deposit previously paid, was made on March 2d or 3d, 1942. The deeds, trust deed and money were deposited in escrow. The deeds were recorded only a short time thereafter, indicating an intent to close the transaction prior to the date of the contract of sale. Under these circumstances the trial court was justified in concluding that for all practical purposes defendants were the owners of the property on the date of the contract of sale. Plaintiffs refer to testimony of Drew that he did not have possession of the deed prior to March 13th, but the matter was being handled by his agent, Charlesworth, and through the escrow. Plaintiffs also point to evidence that they paid \$10,000 under the contract of sale on March 2, 1942, and that that money was used by Drew to make part of his \$20,000 payment to his vendor, but that was all part of the same transaction, and we fail to see what difference it makes that Drew used the money paid by Hagge to consummate the transaction. Hagge was meeting an obligation to Drew pursuant to his offer to Drew to buy the property which culminated in the contract of sale where the

obligation was set forth in detail. Drew was using his own money, not Hagge's, although it came from Hagge. Drew did not obtain that money from Hagge by fraud. As to being the owners, there is no evidence of any representation that Drew was the owner or that there were no encumbrances against the property, and the statement that he was owner in the contract of sale was made after Hagge had paid the money.

[4] Plaintiffs cite Civil Code section 1057, *In re Chrisman*, D.C., 35 F.Supp. 282, *Holman v. Toten*, 54 Cal.App.2d 309, 128 P.2d 808, and *Libby v. Kipp*, 87 Cal. App. 538, 262 P. 68, for the proposition that the delivery of a deed in escrow does not convey title. But where all of the conditions of the escrow have been performed and the grantee is entitled to possession of the deed, it may be deemed that the title has passed. 10 Cal.Jur. 592. In the instant case defendants had delivered to the escrow their promissory note and trust deed and the \$20,000 required. It is true the trust deed contemplated a subdivision of the property, but clearly the trustee in bankruptcy and Security First National Bank considered the transaction completed insofar as the passage of title was concerned, inasmuch as the trust deed and deeds were recorded with their consent a short time later, on March 13, 1942.

[5-7] It is urged that, assuming title was in defendants at the time of the contract of sale insofar as a conveyance by the owner was concerned, yet the finding of ownership in fee simple is against the evidence for the interest of defendants in the property was subject to the trust deed they had given to the trustee in bankruptcy; that a person who holds property on which there is a trust deed outstanding is not the owner in fee simple and that plaintiffs did not know of the trust deed when the contract of sale was made and were thereby defrauded. The evidence supports the conclusion that no representations were made by defendants or their agents in regard to the existence or lack of existence of a trust deed against the property, that is, nothing was said about the matter except to the extent, that the statement in the contract, that defendants were the owners in fee simple, could be considered as such. There existed no fiduciary relation between plaintiffs and defendants. They were dealing at arm's

length. For all practical purposes defendants may have been considered, as found by the court, to be the owners in fee simple of the property even though the trust deed was outstanding. "Every estate of inheritance is a fee, and every such estate, when not defeasible or conditional, is a fee simple or an absolute fee." (Civ. Code, § 762.) A fee simple title is one that is inheritable and the holder has the power to transfer. See *In re Barlow v. Security T. & S. Bank*, 197 Cal. 263, 240 P. 19. While it is true that in California the title theory is adhered to with respect to trust deeds and the lien theory with regard to mortgages, yet for practical purposes the trustor is the owner of the property. See *Bank of Italy etc. Assn. v. Bentley*, 217 Cal. 644, 20 P.2d 940. In the instant case defendants were the owners of the property having unrestricted power to dispose of it and to pass title to plaintiffs. Indeed, the defendants, pursuant to the contract of sale, did transfer a portion of it to plaintiffs and the latter subdivided it, erected houses thereon and sold them.

Plaintiffs attack the second clause of the following finding as lacking evidentiary support: "It is not true that the plaintiffs obligated themselves, in good faith and without knowledge on their part of the true state of affairs, to pay the total sum of \$174,270.00 for said property; It is not true that in the event the plaintiffs paid the full consideration for said property as contained in the agreement dated March 7, 1942, that they would not secure any right, title or interest in said property without the additional expenditure of large sums sufficient to subdivide said property and cause same to be released by lots from said trust deed lien (plaintiffs complaint exhibit "B") by previous subdividing and improving prior to the payment of the debt secured by said deed of trust." They assert that, under the trust deed, defendants were required not only to pay the note secured by the trust deed but also subdivide the property before it could be released from the trust deed, while under their contract they were entitled to a clear title when they had paid the balance of the purchase price represented by the note they gave defendants. It is not clear what conclusion they draw from that argument, but it would appear to be that the defendants breached their contract by reason of their inability to give them a clear title until the property was subdivided.

[8] It should first be observed that Hagge admitted that he knew at all times that there was a trust deed on the property, and the court found that during the course of the transaction he knew of the terms of it. It was on record for him to read a few days after March 7, 1942, the date of the contract. No misrepresentations were made in regard to the existence of the trust deed or its contents. Plaintiffs point to no rule of law which imposed a duty on defendants to disclose the contents of the trust deed. Hence, the trial court was justified in concluding that there was no fraud.

On the matter of breach of contract it appears that the trust deed, after relating the usual obligations and duties, states that it is "contemplated" that the property will be subdivided prior to the "payment of the debt"; that bonds must be posted to secure the payment of expenses involved in the subdivision; that if there is no default in the trust deed, partial reconveyances shall be executed by the trustee upon the payment of the debt at the rate of \$150 per lot for the acreage released; that all release payments received shall be applied on the next installment of principal of the debt and all payments made on principal may be applied upon releases desired to be made by the trustor; that trustor will subdivide Parcel No. 4 of the property within six months after the date of the trust deed and "Should said improvements on said Parcel 4 be completed and paid for in such manner and within said time, then Beneficiary at his option may declare all obligations secured hereby immediately due and payable without notice to Trustor, his successors or assigns"; and in the event Parcel 4 is not subdivided then the trustor may not have a release of any of the property. Most of those provisions are plainly aimed at the giving of permission by the beneficiary to a release of property and the assurance that the debt will be paid and the property remain security when partial releases occur.

The contract of sale follows substantially the same pattern. The purchase price is stated to be \$174,270 of which \$10,000 was the down payment. The balance was represented by a promissory note payable in one year. Its payment is "secured" by the contract and the note shall "constitute a lien upon all the real property herein described until released by conveyance by payee." Defendants, vendors, consent to the subdivision of the property subject to their approval; that "as further consideration"

plaintiffs agree to "immediately" proceed with the subdivision of the property, commencing with the same parcel referred to in the trust deed and proceeding thereafter with the balance of the property. That as "*further consideration*" and within six months, plaintiffs must subdivide and pay for all improvements on the property; that plaintiffs agree "to subdivide and improve the aforementioned property and to pay all balances due on said property within a period of twelve months * * *"; that requests for release of the property and conveyances of portions may be made and granted; that upon release of various parcels, defendants will convey the portions released to plaintiffs, upon payment of the price thereof. Moreover, the evidence supports a conclusion that in the conduct of the parties they treated the contract as calling for the subdivision of the property. Plaintiffs immediately took steps toward subdividing it, agreed to escrow terms following the provisions of the contract, obtained a release of parcel 4, subdivided it, and erected houses thereon and sold them. Plaintiffs at no time offered to pay the balance due under the contract and obtain a deed to it. On the contrary their every activity was aimed toward the development of the property as outlined in the contract. The only parcel (parcel 4) to which the trust deed referred as required to be subdivided, was subdivided and sold by plaintiffs, and although there is evidence to the contrary, it could be found that they did so pursuant to their contractual obligation rather than to prevent a foreclosure under the trust deed. The conveyance of the property under the contract from defendants to plaintiffs was to be made when a release was made from the contract of property subdivided by plaintiffs, indicating that the latter were to subdivide the property before conveyance.

Plaintiffs complain of a finding reading: "It is not true that when the said Harry Humber and Harold Holmes represented and stated to plaintiffs that the defendants were the owners in fee of said property, plaintiffs believed same and in reliance thereon executed various documents including the agreement dated March 7, 1942; it is not true that on or about April 20, 1942, or at any other time at all, any false or untrue statements were made by the defendants or either of them for the purpose of cheating or defrauding the plaintiffs or gaining for the defendants title to said property or for any other purpose or at all;

it is not true that the defendants did not part with anything of value in obtaining title to the property." They state that Charlesworth, defendants' agent, never discussed the title with plaintiffs or mentioned the trust deed; that defendants are not charged with orally making any misrepresentations to the plaintiffs. They appear to be again discussing the reference to ownership in fee simple of the property in the contract of sale, and charging that it was fraud because of the existence of the trust deed. We have discussed that matter above and concluded that the trial court was justified in finding no actionable fraud.

Plaintiffs state that Drew made statements concerning his title through Humber and Holmes, but there is no evidence that either of those persons were agents for defendants. The evidence, if indicating anything on the subject, points to those persons as being agents of plaintiffs. There is no showing that defendants caused any representations to be made by Humber or Holmes or were aware of any having been made by them.

[9,10] In connection with the foregoing contention plaintiffs cite and rely upon *Watson v. Poore*, 18 Cal.2d 302, 115 P.2d 478. Insofar as their claim of a resulting trust is based on the reasoning that defendants obtained the money from plaintiffs by fraud and used it to acquire the property, it cannot be sustained, inasmuch as we have heretofore seen, there was no actionable fraud. The mere fact that defendants used plaintiffs' down payment on the property under the contract of sale to meet their obligations to their vendor, Metcalf, the trustee in bankruptcy, does not form a basis for a resulting trust. It was money *that plaintiffs were obligated to pay to defendants under the contract*. Hence, it was not money which was loaned to defendants by plaintiffs to acquire the property, or advanced by defendants to Metcalf as a loan to plaintiffs, and which, prior to the acquisition of the property, plaintiffs had promised to repay. The latter situation is that involved in *Watson v. Poore*, supra, and *Viner v. Utrecht*, 26 Cal.2d 261, 158 P.2d 3, that is, a resulting trust may arise although the payment of the purchase price to the transferor be made by the trustee, where a prior agreement embraced a loan of the purchase price from the trustee to the beneficiary.

Plaintiffs quote from *Crane v. Ferrier-Brock Development Co.*, 164 Cal. 676, 130 P. 429, 430 (citing the case as *Watson v.*

Poore, 160 Cal. 776 and 164 Cal. 776), where a complaint was held to state a cause of action where it alleged that the defendant vendor fraudulently represented to plaintiff vendee that it was the owner in fee of property when *it had no interest whatsoever* and that in reliance thereon plaintiff entered into a contract to buy the property from defendant. It states the rule that "Where the vendor fraudulently induces the vendee to enter into the contract of purchase by representing that he has a good title to the land, when in fact he has none, nor any interest whatever in the land, the vendee, upon discovering the falsity of the representation, may sue to rescind the contract and obtain a return of the money paid thereon." But in the case at bar defendants were not without interest and title in the property when the contract of sale of March 7, 1942, was made, as has heretofore been pointed out. Moreover, plaintiffs knew of the trust deed at all times. Likewise, the case of *Mattern v. Canavan*, 3 Cal.App. 493, 86 P. 618, is based on fraud.

[11] Plaintiffs assert that the following finding lacks evidentiary support: "It is not true that the defendants have not parted with anything of value for said property and have wholly defaulted under said deed of trust; it is not true that the defendants have failed and refused to comply with any of the terms and conditions of said agreement dated March 7, 1942; it is not true that the defendants have failed and refused to execute any of the joint bonds with plaintiffs as provided in the deed of trust; it is not true that plaintiffs have been forced to and have at great expense secured said bonds and have posted them in accordance with the said deed of trust." Their attack appears to be aimed chiefly at the last two clauses in the finding. While it may be true that technically defendants did fail to execute a joint bond as required by the trust deed, it is not altogether clear that they were required to under the contract. The trust deed calls for a corporate surety bond or cash to be furnished by defendants to secure the payment for improvements and utilities placed on the property. The contract of sale provides that *plaintiffs* agree to pay for all such improvements and "will deposit for delivery through escrow to (defendants) * * * a good and sufficient bond satisfactory to the City of Los Angeles, and a Joint Bond with (defendants) * * * executed in favor of H. F. Metcalf, Trustee, and the Security First

National Bank, conditioned for the performance of said agreement as above set forth, or, in lieu of said bond, a sum of cash acceptable to * * * (defendants)." Reference is there made to a joint bond in which defendants would participate but later in the contract *plaintiffs* agree "to deposit with said owner (defendants) cash or a corporate surety bond as above referred to in such amount and sum as shall be satisfactory and acceptable to said owner and or City of Los Angeles, Trustee, and Security First National Bank, conditioned for the installation of such improvements on the property so to be sub-divided and the payment of all costs and expenses thereof." Thus, in any event plaintiffs were obligated to furnish the bonds. It is true that defendants were unable to obtain a bond and that plaintiffs put up \$5,000 cash in August, 1942, in lieu of one bond to the Security First National Bank. However, Drew supplied a financial statement to his agent, Charlesworth, and the latter endeavored to obtain a bond for him, and the furnishing of cash by plaintiffs in lieu of one bond was contemplated by the agreement. In any event the credits and balances were adjusted between the parties at the close of the escrow in September, 1942. We do not believe plaintiffs are justified in complaining of lack of performance by defendants. The essence of the finding of the court under discussion is that there was performance by defendants under the contract of sale.

[12] It is suggested that there was actionable fraud arising from an asserted concealment by defendants or nondisclosure to plaintiffs of the price the former paid for the property to the trustee in bankruptcy and their sale a short time after to plaintiffs for nearly double the price. The rule involved is stated as follows: "(1) There is no privilege of non-disclosure, by a party who * * * (b) knows that the other party is acting under a mistake as to undisclosed material facts, and the mistake if mutual would render voidable a transaction caused by relying thereon, * * *." Rest.Cont., § 472. And also "A party entering into a bargain is not bound to tell everything he knows to the other party, even if he is aware that the other is ignorant of the facts; and unilateral mistake, of itself, does not make a transaction voidable (see § 503). But if a fact known by one party and not the other is so vital that if the mistake were mutual the contract would be voidable,

and the party knowing the fact also knows that the other does not know it, non-disclosure is not privileged and is fraudulent." Rest.Cont., § 472(1) (b) com. b. See also *Herzog v. Capital Co.*, Cal.Sup. 164 P.2d 8; *Rothstein v. Janss Investment Corp.*, 45 Cal.App.2d 64, 113 P.2d 465; *Clauser v. Taylor*, 44 Cal.App.2d 453, 112 P.2d 661; *Kretzschmar v. Janss Investment Co.*, 126 Cal.App. 698, 14 P.2d 1069; Rest. Torts, §§ 550, 551; Rest. Restitutions, § 8. The facts of this case do not justify the application of that rule. There were no representations by defendants concerning the value of the property or what price they paid for it. As far as appears they were silent on the subject. No fiduciary relation existed between plaintiffs and defendants. They were dealing at arm's length. The property had been held for sale by the trustee in bankruptcy for a long period of time. Public proceedings were had in the federal court when the sale to defendants was confirmed. Hagge was informed of the proceedings by Mr. Newport, the president of the bankrupt corporation to whom the property belonged, and was asked to attend the hearing. The cases above cited have to do with nondisclosure of serious defects in the property sold, a very different situation than nondisclosure of the price paid for property, or its value, or from whom it was acquired. There is no actionable fraud under the circumstances.

It should be noted that a complete answer to the effect of the foregoing contentions on plaintiffs' rights is found in the court's findings reading: "It is true that from and after the time plaintiffs learned of the contents of the deed of trust and the fact that the defendants had purchased the property from H. F. Metcalf, Trustee in Bankruptcy, notwithstanding said knowledge, the plaintiffs went forward under the terms of the agreement of March 7, 1942, and affirmed and ratified said agreement of March 7, 1942, by executing the escrow instructions dated April 20, 1942; it is further true that the plaintiffs further affirmed and ratified the agreement of March 7, 1942, at the time they demanded and accepted the deed of Parcel No. 4 of said property from the defendants; it is further true that the plaintiffs affirmed and ratified the agreement of March 7, 1942, when they went ahead and built 206 homes on the 206 lots; it is further true that the plaintiffs affirmed and ratified the agreement of March 7, 1942, when they

demanding of defendants an extension of the time limit and other terms of the agreement of March 7, 1942." No contention is raised as to the sufficiency of the evidence to support that finding.

[13] Finally, it is suggested that the contract of sale is contrary to public policy because of the large difference between the price paid for the property by defendants and the selling price to the plaintiffs, the reasoning being that homes built on the property are financed through the Federal Housing Administration and priorities for materials are obtained from the Office of Price Administration; that the purchasers thereof will be unable to pay the loans on them because the land is priced too high; that as a result the government will be the loser; and that the transaction thus tended to defeat the purpose of the National Housing Act, 12 U.S.C.A. § 1701 et seq. In that connection the cases of *McAllister v. Drapeau*, 14 Cal.2d 102, 92 P.2d 911, 125 A.L.R. 800; *Woods v. Kern County Mutual Bldg. & Loan Assn.*, 34 Cal.App.2d 468, 93 P.2d 837, and *Richard R. Adams Co. v. Pacific States Savings & Loan Co.*, 34 Cal. App.2d 723, 94 P.2d 370, are cited. Those cases hold that a secret second lien against property was invalid where taken by the holder of a first lien who had accepted bonds of the Home Owners Loan Corporation in settlement of his first lien. No such situation is presented in the instant case. No secret liens are involved. The contract of sale did not necessarily contemplate Federal Housing Administration loans, although apparently plaintiffs intended to and did operate under such an arrangement. We fail to see how the large profit made by defendants so tended to frustrate the purpose of the Federal Housing statutes as to be against public policy. No representations were made to the Federal Housing Administration authorities, and as far as appears, nothing was concealed from them. Defendants had nothing to do with the loans obtained by plaintiffs, and at the time these loans were procured, presumably, the Federal Housing Administration made their independent appraisal unhindered and without any misapprehensions as to the value of the property. To say the contract here involved is against public policy would be to denounce all large profits made on real estate transactions. We know of no authority for such a holding.

The appeal from the order denying a new trial is dismissed. The order denying relief

under sections 663 and 663a of the Code of Civil Procedure and the judgment are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



72 Cal.App.2d 672

**PROVIDENT LAND CORPORATION
v. BARTLETT.**

**BARTLETT v. PROVIDENT LAND
CORPORATION et al.**

Civ. 12765.

District Court of Appeal, First District,
Division 1, California.

Jan. 28, 1946.

Rehearing Denied Feb. 27, 1946.

Hearing Denied March 28, 1946.

1. Attorney and client ☞148(3)

A contract, whereby irrigation district bondholders' protective committee and land corporation, to which committee transferred title to district bonds, employed attorney, pursuant to his written offer estimating legal expenses connected with enforcing bondholders' rights and stating that certain actions were indicated to protect bondholders' interests, was not contract of employment solely to institute and prosecute such actions and did not limit attorney's compensation to agreed share of proceeds of such litigation.

2. Attorney and client ☞148(3)

An attorney, contracting with irrigation district bondholders' protective committee and corporation owning bonds to render legal services for enforcement of bondholders' rights in consideration of one-fourth of all money recovered for committee and corporation, whether by legal action or compromise, was entitled to such share of purchase price of bonds sold to district for less than par value, not merely to percentage of all sums recovered in excess of market value of bonds.

3. Attorney and client ☞144

The rule that ambiguous contract between attorney and client should be con-

strued in client's favor may not be invoked to perpetrate palpable injustice or construe contract beyond parties' express covenants.

4. Appeal and error ⇨1011(1)

The trial court's fact findings, supported by some of conflicting evidence, are conclusive on appeal.

5. Appeal and error ⇨837(2)

On client's appeal from judgment awarding attorney compensation under express employment contract and on quantum meruit for legal services rendered to irrigation district bondholders' protective committee and corporation owning bonds, district court of appeal may consider records of legal proceedings prosecuted by such attorney, as they appear in published reports of district court of appeal and Supreme Court, for purpose of determining whether such litigation contributed to district's ability to refinance and correction of its officers' improper administration of its affairs for bondholders' benefit.

6. Attorney and client ⇨148(3)

An irrigation district bondholders' protective committee and corporation owning district bonds could not escape their contractual obligations to pay attorney agreed share of proceeds of sale of bonds to district for less than par value by selling bonds to corporation's president for smaller percentage of such value pursuant to option given him just before district purchased bonds.

7. Attorney and client ⇨148(3)

Irrigation district bonds, owned by bank as trustee and not deposited with bondholders' protective committee, but placed in special escrow under agreement to pay committee pro-rata share of expenses of litigation carried on by attorney under contract with committee and corporation owning other district bonds and bonds acquired by committee on original owners' default in payment of assessments, were properly included in amount of judgment awarding attorney agreed share of purchase price of bonds sold to district for less than par value, but judgment was excessive as to amount of other bonds, originally deposited with committee, but subsequently withdrawn.

8. Attorney and client ⇨167(4)

Inconsistency between trial court's findings that allegations of both count of cross-complaint for amount due attorney

on express employment contract for legal services rendered and count on quantum meruit for reasonable value thereof were true was not fatal to judgment rendered on both counts with proviso limiting attorney to recovery on contract count, if judgment thereon were fully satisfied.

9. Attorney and client ⇨165

An attorney, relying on and establishing his right to compensation for legal services under express contract, cannot recover at same time in quantum meruit on theory of implied contract.

10. Trial ⇨398

A trial court's findings on theory inconsistent with that of other findings, on which its judgment is based, may be disregarded as surplusage.

11. Pleading ⇨192(5)

A count of attorney's cross-complaint, alleging cause of action against corporation and directors thereof and members of irrigation district bondholders' protective committee, in such capacities and individually, for fraud in sale of bonds to one of individual defendants for smaller percentage of par value thereof than that for which district subsequently purchased bonds, and for restoration to corporation of sum received by such defendant from district for bonds, was insufficient on general demurrer as not presenting any other issues respecting corporation and committee than those presented by other counts.

12. Corporations ⇨306

Corporation officers' commission of fraud on corporation does not give individual creditor of corporation right of action at law against such officers for fraud and deceit, in absence of prejudice to him as such creditor.

13. Corporations ⇨306

A corporation officer or agent is personally liable for damages, caused by his fraud or deceit, to person directly injured thereby.

14. Corporations ⇨306

Corporation directors, as to persons dealing with corporation, are merely corporation's agents, with same liability, and if they assist or participate, knowingly or recklessly without knowledge, in obtaining property by fraud or deceit, are liable to injured person relying on their representations, but all necessary elements of either

common law or statutory fraud must appear, including reliance on false statements and injury therefrom.

15. Corporations $\S$ 306

A cause of action, alleged in attorney's cross-complaint, for fraud in corporation's and irrigation district bondholders' protective committee's sale of bonds to corporation president for less than price paid him therefor by district, was fatally defective as against corporation's directors, where pleading alleged nothing, except mere conclusion of injury, to show resulting damage or prejudice to cross-complainant, contained no allegations as to corporation's or committee's insolvency or inability to respond to judgment sought, affirmatively showed their receipt of amount far exceeding cross-complainant's claim, and alleged nothing to indicate any prejudice to his right or ability to recover in full his agreed share of amount paid by district as compensation for legal services to corporation and committee.

Appeal from Superior Court, San Francisco County; Frank T. Deasy, Judge.

Action by the Provident Land Corporation against Louis Bartlett for a declaration of plaintiff's rights and obligations with respect to a contract for performance of legal services by defendant, who filed a cross-complaint against plaintiff, George H. McKaig and E. O. Kaufmann, individually and as members of the Bondholders' Protective Committee of the Provident Irrigation District, and others, to recover the amount due on the contract and on quantum meruit for services rendered and damages for fraud. From a judgment for cross-defendants on the count of the cross-complaint for fraud, cross-complainant appeals, and from a judgment for cross-complainant against named cross-defendants on the contract and quantum meruit counts, such cross-defendants appeal.

Judgment for cross-complainant modified and affirmed as modified, and judgment for cross-defendants affirmed.

Louis Bartlett, of Berkeley, and Paul A. McCarthy, of San Francisco, for cross-complainant and respondent Bartlett and cross-complainant and appellant Bartlett.

George R. Freeman, of Willows, and L. L. James and James Sykes, both of San Francisco, for cross-defendants and appellants Provident Land Corp., McKaig and

Kaufmann, and for cross-defendants and respondents Provident Land Corp., McKaig and Kaufmann.

Gregory, Hunt, Melvin & Faulkner, of San Francisco, for cross-defendant and respondent Aldenhagen.

OGDEN, Justice pro tem.

The Provident Land Corporation, a corporation, brought an action in declaratory relief against Louis Bartlett, an attorney at law, praying for a declaration of its rights and obligations with respect to a written contract whereby the defendant Bartlett was employed on a contingent fee basis to perform certain legal services for the plaintiff corporation. Bartlett answered and filed a cross-complaint, naming as cross-defendants the plaintiff Provident Land Corporation, and in addition George H. McKaig, W. G. Aldenhagen and E. O. Kaufmann, individually and as members of the board of directors of said corporation; and George H. McKaig and E. O. Kaufmann, individually and as members of the Bondholders' Protective Committee of Provident Irrigation District. The cross-complaint is in three counts, the first being based upon the express contract and the third upon quantum meruit. The second count sounds in fraud, and to this count general demurrers were sustained. Those portions of the judgment in favor of cross-defendants upon this count are the subject of the appeal of cross-complainant Bartlett, which will be discussed later.

By stipulation the complaint for declaratory relief was disregarded, and the trial proceeded upon the issues raised by the first and third causes of action of the cross-complaint. Judgment was rendered in favor of cross-complainant upon both counts, against the cross-defendants Provident Land Corporation, and George H. McKaig and E. O. Kaufmann as members of the Bondholders' Protective Committee of Provident Irrigation District, in the principal sum of \$33,150. From these portions of the judgment those cross-defendants appeal.

Before discussing these appeals separately it will be helpful to summarize the circumstances leading up to this litigation.

In the year 1929 a group of bondholders of Provident Irrigation District formed a committee known as the Bondholders' Protective Committee of Provident Irrigation District. At that time, and up to the time of Bartlett's employment, the district was

in poor financial condition, the landowners were not paying their assessments, and interest due upon the bonds was in default. The committee's agreement with its members provided for the deposit of their bonds with a bank as depository. Legal title to the bonds, together with authority adequate to effect their liquidation, was vested in the committee.

In 1935 Provident Land Corporation, one of the cross-defendants here, was incorporated by the committee and the title of the committee to the bonds so deposited was transferred to the corporation in exchange for one share of stock for each \$1,000 bond and appurtenant coupons. The corporation had no other assets and issued no other shares of stock. With the exception of a small number, all of the bonds controlled by the committee were so transferred to the corporation. During the times with which we here are concerned, the cross-defendants McKaig, Aldenhagen and Kaufmann were the directors of the corporation, McKaig being its president; McKaig was chairman of the committee and Kaufmann was a member thereof. There was one other member of the committee who was not made a party to the action. For convenience, the cross-defendant Provident Land Corporation will herein be referred to as the corporation, the cross-defendants McKaig and Kaufmann, as members of the Bondholders' Protective Committee, will be referred to as the committee, and the Provident Irrigation District will be referred to as the district.

On May 6, 1936, after some negotiations between himself and McKaig, and after an investigation of the affairs of the district, Bartlett made the following offer of his services to the corporation and the committee, which was accepted by them and admittedly constitutes the contract of employment which is the basis of this action:

"Provident Irrigation District
 "Bondholders' Protective Committee
 "Provident Land Corporation
 "% Mr. George H. McKaig
 "Russ Building
 "San Francisco, California.
 "Gentlemen:

"Complying with your request, I subjoin a memorandum concerning the affairs of the district and an estimate of the legal expenses connected with enforcing the rights of the bondholders.

"At the present time there are approximately 7000 acres of land suitable for rice, to which title is in the Estate of Benoit, Moutrey, and the Federal Realty Company. Assessments have been delinquent on this for over three years and the collector of the district should have deeded it to the district in the fall of 1934. Since that time, the land has been cropped by Benoit and Moutrey; it is being cropped by them this year.

"In addition, there are about 1300 acres of land formerly standing in the name of Central National Bank, cropped by Benoit and Moutrey during the same period, and, similarly, in default.

"About 1274 acres of good rice land were deeded by the district to I. G. Zumwalt in September, 1934, on receipt from him of \$26,000.00 in unmatured Provident Irrigation District bonds, and Zumwalt has taken the crop from this land for 1934, 1935, and is cropping it in 1936.

"Other land in the district, which should have been deeded to it is held by Benoit and Clark, and various other holders.

"On February 7, 1936, the district bought \$50,000.00 of its bonds for \$10,000.00 from Benoit, Zumwalt and Capitol National Bank of Sacramento, with funds that should have been applied to the payment of registered coupons. This money should be recovered by the district and properly applied.

"The following litigation is indicated, in order to protect the interests of the bondholders:

"(1) An action to compel the transfer to the district by the collector of all of the land in the district which is subject to such sale. This will include about 2500 acres being planted to rice by Benoit's estate and Moutrey this year. (I have no accurate figure as to the acreage, and this is approximate.) It is expected that about 75,000 bags of rice will be obtained, of which the district's share should be 25,000. After paying \$4.50 per acre for water, making a total of \$11,250.00, the district should have a net recovery of approximately \$13,500.00 if the price be \$1.00 per bag, and approximately \$38,750.00, if the price be \$2.00 per bag. Last year's price was over \$2.00.

"(2) An action to declare Benoit and Moutrey trustees for the district of all of the profits made by them in 1934 and 1935 from the cultivation of land which should

have been turned over to the district in 1934. It is reported that their profits in 1934 were \$25,000.00, and in 1935 were \$60,000.00.

"(3) An action against Benoit and Clark to declare them trustees for the district of the lands occupied by them which should have been deeded by collector's deed to the district in 1934.

"(4) A suit against Benoit to recover \$3,200.00 received by him for the sale to the district of 16 bonds at \$200.00.

"(5) A suit against Zumwalt to recover \$3,400.00 received by him for the sale to the district of 17 bonds at \$200.00.

"(6) A suit against Capitol National Bank to recover \$3,400.00 received by it for the sale to the district of 17 bonds at \$200.00.

"(7) An action against I. G. Zumwalt to collect the balance of the purchase price of 1274 acres of land purchased by him for the district in September, 1934, for \$26,000.00, on account of which he turned in 26 bonds of the district at par, instead of at their market price of 10 or 12. This involves \$22,000.00 and interest.

"(8) An action against I. G. Zumwalt for assessments for two years, 1934 and 1935, amounting to approximately \$9,000.00. A portion of this land is now planted in crops for 1936.

"(9) An action against Benoit and his associates to recover bond interest and bond payments, which, in my opinion, were illegally made under the law as it existed when the first series of bonds were issued.

"In practically all these actions and proceedings, it will be necessary to join the district, its directors and officers as defendants.

"In addition to these actions, there are a number of others which may need to be brought in order to effect the reorganization of the district. We now have a man in Willows ascertaining facts which will determine our procedure in a number of other matters.

"My compensation for this work is to be retainer of \$500.00 payable now, and one-fourth of all money recovered for the Committee and/or Corporation, whether by legal action or by compromise acceptable to the Committee and/or Corporation, and shall be payable upon receipt of the money by them.

"Your committee is to pay all legal, traveling and other expense incident to this employment. It is difficult to forecast these expenses accurately. Copies of the district records which are necessary to the litigation are being obtained at a cost of \$50.00; an investigator should be employed at \$15.00 a day for about 10 days; costs, including traveling expenses, etc., will have to be met. Probably \$1000.00 will cover these items, unless there be a number of appeals.

"Summarizing the costs:

"Retainer of \$500.00 payable now.

"One-fourth of the money recovered with or without litigation.

"Actual necessary expenses, estimated at \$1000.00.

"The procedure suggested is, of course, subject to modification and additions as further investigations may indicate, and included the raising of at least several constitutional questions involved in the facts already known. Some of these causes of action may be consolidated, whenever this will not slow down trials. No suit will be started without your prior approval.

"Very truly yours,
"Louis Bartlett."

Following the acceptance of this offer and pursuant to his employment, Bartlett instituted several legal actions in the interests of the bondholders. He testified that they occupied practically the whole time of himself and office force and required the employment of assistant counsel during the following two and one-half years. One was a proceeding in mandamus to compel the officers of the district to execute a collector's deed and take title to about 5400 acres of land sold to the district for delinquent assessments. Judgment was rendered in the trial court compelling the transfer to the district of 4500 acres of this land. Bartlett took an appeal from that part of the judgment refusing to compel the transfer of the balance of 900 acres. Upon the third hearing thereof in the District Court of Appeal the judgment was reversed in favor of Bartlett's position. Provident Land Corporation v. Provident Irrigation District, Cal.App., 94 P.2d 83. A hearing was granted in the Supreme Court but the appeal was never further prosecuted because of the subsequent purchase of the bonds by the district. Two actions were brought on behalf of the committee to recover to the district the profits from farm-

ing operations upon the same land subsequent to its sale for delinquent assessments. An appeal from a judgment in favor of the defendants was prosecuted by Bartlett. The judgment of the lower court was first affirmed in the District Court of Appeal, and after rehearing was reversed. *McKaig v. Moutrey* (*McKaig v. Clark*), 32 Cal.App. 2d 537, 90 P.2d 108. Three related suits were brought to nullify a purchase by the district of some of its outstanding bonds not in order of preference and to recover to the district the sum of \$10,000, the price paid by the district therefor. An adverse decision was appealed from and reversed by the District Court of Appeal. *Provident Land Corporation v. Zumwalt*, Cal.App., 71 P.2d 825. Hearing was granted by the Supreme Court and the judgment adverse to the bondholders was again reversed. *Provident Land Corporation v. Zumwalt*, 12 Cal. 2d 365, 85 P.2d 116. The \$10,000 was restored to the district and utilized in the repair of its ditches. Suit to prevent the officers of the district from selling or leasing district lands except upon an open and competitive basis and to nullify a lease made to a former director of the district was instituted and prosecuted, but unsuccessfully. Judgment of the trial court in favor of the district officers was affirmed on appeal. *Provident L. Corporation v. Provident I. Dist.*, 22 Cal.App.2d 105, 79 P.2d 392. Several actions were brought to protect the bondholders against the running of the statute of limitations upon bonds and interest coupons. An action to compel the directors of the district to levy assessments and impose an adequate charge for water was brought, but was unsuccessful. An action to recover damages sustained by the district was commenced, but never brought to trial.

During the year 1939 one Charles F. Lambert, who was employed by the district as its fiscal agent, had been working on a plan for the refinancing of the district by means of a loan from the Reconstruction Finance Corporation which would enable it to make a compromise of its bonded indebtedness by the purchase of its bonds for the price of 20 cents on the dollar par value. McKaig, although he knew of this plan and the expectancy of its consummation, did not inform his fellow directors or members of the committee thereof. On September 27, 1939, he proposed to them a different plan of refinancing the district, representing to them that the consummation of his plan

would necessitate considerable effort and expense on his part. This he offered to undertake if given an option to purchase the bonds, together with their appurtenant coupons, controlled by the corporation and committee, at the price of 15 cents on the dollar par value of the bonds. The proposal of McKaig was accepted and he was given such an option. The bonds and coupons were on the following day placed in escrow subject to McKaig's order, upon payment by him of the price of 15 cents on the dollar par value of the bonds. Upon the same day, McKaig instructed the escrow holder to deliver the bonds to his order upon the receipt of 20 cents per dollar par value.

On October 18, 1939, in accordance with Lambert's plan, the district submitted to the Reconstruction Finance Corporation its application for a loan. On December 20, 1939, the loan was granted upon conditions that included, among others, the purchase by the district of its outstanding bonds, together with coupons maturing on and after July 1, 1931, at the price of 20 per cent of the par value of the bonds and the payment of coupons maturing earlier at the rate of \$30 per bond.

The bonds were ultimately, on September 16, 1940, purchased by the district in accordance with the conditions of the loan and at the price therein provided. The corporation and the committee received from McKaig his option price of 15 per cent of the par value of the bonds, and McKaig apparently received the difference between that sum and the price paid therefor by the district.

Appeal of Cross-Defendants.

The portions of the judgment here appealed from are those which adjudge cross-complainant to be entitled to recover from the corporation and the committee the principal sum of \$33,150, together with accrued interest thereon in the sum of \$6,130.88, upon the express contract as stated in the first cause of action, and in the same principal sum, without accrued interest, upon an implied contract for the reasonable value of his services, as stated in the third cause of action.

The principal amount of the judgment was arrived at as being 25 per cent of the purchase price paid by the district for 600 of its bonds, and appurtenant coupons maturing after January 1, 1931, at the price of 20 cents per dollar par value of the bonds,

together with 420 coupons maturing on January 1, 1931, at the price of \$30 each.

We shall first discuss the correctness of the judgment insofar as it permits such recovery upon the express contract.

[1] Cross-defendants' position, that their contract with Bartlett must be construed as one of employment solely for the purpose of instituting and prosecuting the litigation enumerated in the contract, and that his right to receive compensation is limited to the proceeds of that litigation, is not tenable. Nor do we find any uncertainty or ambiguity in the language employed in the agreement which requires us to look further in its interpretation.

The language of the agreement—"Complying with your request, I subjoin a memorandum concerning the affairs of the district and an estimate of the legal expenses connected with enforcing the rights of the bondholders" and "The following litigation is indicated, in order to protect the interests of the bondholders"—clearly shows the scope and purpose of the employment to be, just what is stated, to protect the interests and enforce the rights of the bondholders. (Italics added.)

[2] The rights of the bondholders with which they were concerned, and which they wanted to be protected and enforced, were their rights to receive from the district payment of the debt, principal and interest, represented by their bonds. The bondholders had no other interest in the affairs of the district and no rights to enforce except those which were incidental thereto. To say that Bartlett contracted to protect and enforce these rights is but to say that he contracted to collect from the district payment of its indebtedness to his clients. The litigation he proposed and subsequently undertook was all intended to effect an enrichment of the treasury of the district and thereby better enable it to pay his clients. It was suggested as a means to the end, not as the end itself. Such litigation could benefit or be a recovery to the bondholders only if and when it resulted in the receipt by them of payment by the district on account of its bonded indebtedness. Some of the litigation was not for a monetary recovery, even to the district treasury, but it was all designed to effect an eventual recovery by the bondholders. That recovery could only come from the district by payment of its debt, either in full, or partially as the result of compromise. When the bondholders sold their bonds and appur-

tenant coupons to the district for a price less than the par value thereof they in effect and in fact recovered, by compromise acceptable to them, the indebtedness of the district. *Preston v. Herminghaus*, 211 Cal. 1, 292 P. 953. That this was precisely the recovery contemplated by Bartlett's contract is indicated by its provision that his compensation "shall be payable upon receipt of the money by them,"—referring to the corporation and the committee.

No other reasonable interpretation can be given to the contract. To hold, as cross-defendants contend, that Bartlett could look for compensation only to monetary recoveries directly accruing to his client bondholders in the litigation he suggested, would be to hold that he contracted to undertake this work for a share of a recovery that could not possibly result; in other words, that he contracted to perform those services gratuitously. To say, as cross-defendants do, that, because the bonds had some value before the contract was entered into, that value was not recovered to the bondholders and Bartlett was not entitled to a share thereof, would be to rewrite the agreement. The parties might well have agreed that Bartlett's compensation would be limited to a percentage of all sums recovered over and above the then present market value of the bonds. The answer is that they did not so agree, and their contract expressly provides otherwise. It specifically states "one-fourth of *all* money recovered." (Italics added.)

[3] This is not a case where an ambiguous contract is entered into between an attorney and his client, such as in the cases of *Boardman v. Christin*, 65 Cal.App. 413, 224 P. 97; *Hollingsworth v. Lewis*, 93 Cal. App. 526, 269 P. 709; *Estate of Prather*, 183 Cal. 314, 191 P. 521; and *Bennett v. Potter*, 180 Cal. 736, 183 P. 156, cited by cross-defendants. However, even though it were, the rule of construction in favor of the client is, as held in *Pinto v. Seely*, 22 Cal.App. 318, 135 P. 43, not so inflexible that it may be invoked to perpetrate a palpable injustice, or that it calls for a construction of such a contract beyond the express covenants of the parties. To the same effect is *Preston v. Herminghaus*, *supra*.

Here the trial court determined that the services rendered by Bartlett were of substantial value to the bondholders and that as a result of these services the district was enabled to compromise its indebtedness

by the purchase of its bonds for the price of twenty cents per dollar par valuation. It found that as a result of the litigation prosecuted by him there was recovered to the district title and possession of 6,730 acres of land, title to which had been lost to it by misconduct of its officers; that the district was thereby enabled to sell this land to bona fide purchasers at prices representing its fair value; that the district recovered the sum of \$10,000 which had been wrongfully used by its officers; that the district was thereby enabled to have sufficient funds to compromise and pay all liens against the district and the lands therein and to pay all expenses of the plan of refinancing and reducing its bonded indebtedness, as agreed between the district and the Reconstruction Finance Corporation; and that had it not been for the services performed by Bartlett the district would not have been able to obtain the loan or so purchase its bonds.

[4, 5] Whether Bartlett's services were of value and whether the results of the litigation prosecuted by him contributed to the ability of the district to effect its refinancing were the subject of sharp conflict in the testimony. Cross-defendants urge here, as they did before the trial court, that the results of that litigation in no way affected the ability of the district to consummate the refinancing, except adversely. They accuse Bartlett of hindering, instead of assisting in, the consummation of the negotiations for the purchase of its bonds, in that he insisted upon a settlement of his fee being first made with him. These conflicts were resolved in Bartlett's favor by the trial court. The findings thereon find ample support in the record and are conclusive here. The complete records of the various items of litigation carried on by Bartlett were received in evidence. We are entitled to consider the record of these proceedings as they appear in the published reports of the District Court of Appeal and Supreme Court. It is therein disclosed, as well as in the transcript before us, that that litigation did, in fact, result in substantial benefit to the financial position of the district and the correction, to the benefit of its bondholders, of instances of improper administration of its affairs by its officers. That there was a direct causal connection between the services performed by Bartlett and the ultimate ability of the district to compromise its indebtedness to its bondholders is apparent, and the determination of the trial court to that effect cannot here be disturbed.

[6] Cross-defendants did not at the trial, nor do they here, dispute the fact that Bartlett, if entitled to a percentage of the proceeds of the sale, is entitled to recover upon the basis of 20 cents per dollar par value of the bonds. By an amendment to his first cause of action Bartlett alleged that the option given to and exercised by McKaig to purchase the bonds and coupons for 15 per cent of the par value of the bonds was fraudulent and a mere pretense for the purpose of depriving him, Bartlett, of his full compensation. The trial court found these allegations to be true. There was no direct evidence that in giving the option to McKaig the other directors did so with actual knowledge of the pending consummation of the negotiations by the district to enable it to pay a price of 20 cents upon the dollar. There is ample evidence, however, that McKaig so knew and expected that to be the purchase price to be paid by the district. Whether the purported purchase by McKaig at the lesser price was a fraud upon the corporation and the bondholders he represented is immaterial to this discussion. The corporation or the committee could not, by the device of selling the bonds to McKaig escape their full contractual obligation to Bartlett. *Preston v. Herminghaus*, supra. Whether all of the officers thereof acted in good or bad faith is immaterial insofar as the rights of Bartlett are concerned. The option was given to McKaig upon the very eve of the purchase by the district of the bonds for 20 cents per dollar par value, and the circumstances under which it was given amply justified the trial court in ignoring the lesser price of the purported sale to McKaig.

[7] Cross-defendants do, however, urge that the judgment is excessive as being based in part upon the sale of bonds which were not owned by, or under the control of, either the corporation or the committee. They concede that 511 bonds were owned or controlled by them. The judgment is computed upon the basis of 600 bonds.

The evidence with respect to the ownership or control by cross-defendants of the disputed number of bonds (which the testimony indicated to be 90 but which the findings indicate to be 89) is not free from ambiguity, and counsel in their briefs have not assisted in its clarification. Examination of the testimony of McKaig, however, reveals the following with respect thereto:

Sixty-one bonds were owned by the Security Bank of Los Angeles as trustee. By reason of their trust character they were not deposited with the committee but were placed in a special escrow under an agreement to pay to the committee a pro rata share of litigation expenses (apparently expenses of the litigation carried on by Bartlett). These bonds were included in the actions brought by Bartlett to stay the running of the statute of limitations. Immediately prior to their deposit in escrow for sale to the district, they were purportedly purchased by McKaig at the price of 15 cents per dollar par value.

Four bonds had been acquired by the committee as the result of default by the original owners in paying assessments levied thereon. In October, 1939, these bonds were purportedly sold to McKaig by the committee for the price of 15 cents per dollar par value.

Twenty-five bonds were bought at the same price by McKaig from various other owners in order to acquire the necessary percentage of outstanding bonds to meet the requirements of the deposit agreement with the district. These bonds had been originally deposited with the committee, but by consent had been withdrawn in 1936.

As to these last-mentioned 25 bonds, we are unable to find any justification for their inclusion in the computation of the amount of the judgment. With respect to the other 65 bonds in dispute, however, we are of the opinion that they were properly included.

We conclude, therefore, that the trial court properly rendered judgment in favor of cross-complaint upon the first cause of action, but that the amount thereof should be reduced in an amount equal to 25 per cent of the purchase price of the 25 bonds above referred to, to wit, the sum of \$1,250.

[8-10] There remains but one other point to be determined upon this appeal. The trial court found the allegations of both the first and third causes of action to be true and rendered judgment upon both counts with the proviso that recovery be "limited to recovery upon said first cause of action if the judgment thereon is fully satisfied." Conceding such findings to be inconsistent, the inconsistency is not fatal. Cross-complainant, having relied upon and established his right to compensation under an express contract, cannot at the same time recover in quantum meruit upon the theory of an implied contract. The court

having made specific findings as to the express contract and its performance, there can be no doubt but that its judgment was based thereon. It is the established rule that the findings upon the inconsistent theory may be disregarded as surplusage. *Baird v. Ocequeda*, 8 Cal.2d 700, 67 P.2d 1055; *Hirschberg v. Rose*, 136 Cal.App. 653, 29 P.2d 785; *Niles v. Louis H. Rapoport & Sons*, 53 Cal.App.2d 644, 128 P.2d 50. In order that there may be no question as to the meaning of the judgment here, however, we are of the opinion that it should be modified by striking therefrom all reference to the recovery of judgment upon the third cause of action.

As so modified, to wit, by reducing the principal amount thereof to the sum of \$31,900; by reducing, accordingly the amount of accrued interest allowed to the date of the judgment to the sum of \$5,900.-37; and by striking therefrom all reference to judgment upon the third cause of action, those portions of the judgment in favor of cross-complainant are affirmed.

Appeal of Cross-Complainant

[11] This is an appeal from those portions of the judgment which are in favor of cross-defendants upon the so-called second cause of action. Those portions of the judgment follow the sustaining of general demurrers to this cause of action and the failure to amend. Before final judgment herein was entered, cross-complainant filed appeals from purported judgments of dismissal upon this cause of action. This court, in *Provident Land Corporation v. Bartlett*, 53 Cal.App.2d 383, 127 P.2d 928, dismissed these appeals as premature. After the present appeal was taken, upon oral motion to dismiss it was found necessary to cause a modification of the judgment so as to finally dispose of the issues here involved. The judgment now disposes of all such issues, and this appeal is properly before us.

The so-called second cause of action is directed against the corporation; McKaig, individually, as a member of the committee, and as a director of the corporation; Kaufmann, individually, as a member of the committee, and as a director of the corporation; and Aldenhagen, individually, and as a director of the corporation. Its apparent purpose is to secure a judgment against McKaig, Kaufmann and Aldenhagen in their individual capacities. It incorporates by reference all of the charging allegations

of the first cause of action as to the execution and performance of the express contract of employment; adds a detailed recital of the circumstances of the sale of the bonds to McKaig at the price of 15 per cent of their par value at a time when, it is alleged, the cross-defendants knew, or should have known, that the bonds could be redeemed at 20 per cent of their par value; and alleges this purported sale to be a fraud perpetrated by the individual cross-defendants upon the corporation, the bondholders and cross-complainant. In addition to the same prayer for monetary judgment as in the other causes of action, it is prayed that the sale of the bonds to McKaig be annulled and that he be required to restore to the corporation all sums received by him from their subsequent sale to the district. Except for bringing in as cross-defendants McKaig, Kaufmann and Aldenhagen in their individual capacities and seeking to recover judgment against them as individuals, and except for seeking to require McKaig to restore his profits to the corporation, there is no distinction in the theory of this cause of action and that of the first cause of action upon which cross-complainant recovered judgment. That judgment gave cross-complainant the identical relief sought in this cause of action from the corporation and the committee. As to those cross-defendants it was but repetition and surplusage. As previously pointed out, in the first cause of action the fraudulent nature of the purported sale to McKaig was alleged, and the trial court found such averment to be true. Bartlett's compensation was computed upon the basis of a recovery from the district by the corporation and committee of 20 cents per dollar par value of the bonds, and such computation included the profit of \$12,600 received by McKaig from the payment of coupons maturing prior to July 1, 1931. Therefore, as to the corporation and the committee, the allegations of the second cause of action presented no new issues nor did they extend the limits of possible recovery from those cross-defendants.

This narrows the question to whether a cause of action is stated against McKaig, Kaufmann and Aldenhagen as individuals.

[12] Bartlett occupied the position solely of a creditor of the corporation and the committee. He was neither a bondholder nor a stockholder. He could not be injured or defrauded by the alleged misconduct upon the part of the three individual cross-

defendants unless that misconduct prejudiced his position as such creditor. Unless it so prejudiced him, he cannot complain of any wrong perpetrated upon the corporation or the stockholders thereof. The mere fact that officers commit a fraud on the corporation does not necessarily give an individual creditor an action at law against them for fraud and deceit. 19 C.J.S., Corporations, § 850, p. 282.

[13,14] The rule is stated in 3 Fletcher, *Cyclopedia of Corporations*, page 567, as follows: "A corporate officer or agent is personally liable for damages caused by his fraud or deceit, to the person directly injured thereby. As to the third persons dealing with a corporation, the directors are merely agents of the corporation, their liability being the same, and if they assist or participate knowingly or recklessly without knowledge, in obtaining property by fraud or deceit, they are liable to an injured person who relies upon their representations. * * * However, if recovery is sought on the ground of fraud, all the necessary elements going to make up fraud at common law or under a statute defining fraud, must appear, including reliance on the false statement and injury therefrom."

[15] In his pleading cross-complainant alleges nothing, except his mere conclusion of injury, to show any damage or prejudice to him resulting from the cross-defendants' conduct. No allegations as to insolvency of the corporation or committee, or as to their inability to respond to the judgment sought, are made. The pleading affirmatively shows the receipt by the corporation and the committee of a sum equal to 15 per cent of the par value of the bonds, an amount far in excess of the claim of cross-complainant. No circumstance is alleged to indicate any prejudice to his right or ability to recover in full by reason of the fraudulent profit made by McKaig. The so-called second cause of action being fatally defective in this respect, the demurrers thereto were properly sustained. During the course of the trial, cross-complainant was refused permission to file a similar pleading. The proposed pleading was equally as defective, in the same respect, as the original to which demurrers had been sustained, and its filing was properly refused.

The findings and judgment are modified by reducing the principal amount thereof to the sum of \$31,900; by reducing the amount allowed as interest thereon to \$5,-

900.37; and by striking therefrom all reference to the third cause of action. As so modified, those portions of the judgment are affirmed; and the portions of the judgment in favor of cross-defendants on the second cause of action are affirmed. Cross-complainant is entitled to recover his costs incurred on the appeal of cross-defendants; cross-defendants to recover their costs on the appeal of cross-complainant.

PETERS, P. J., and WARD, J., concur.

Severino Jack Pongetti was convicted of burglary in the first and second degree and of assault with a deadly weapon, and he appeals.

Affirmed.

George W. Norris, of Oakland, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Ralph E. Hoyt, Dist. Atty., and Richard H. Chamberlain, Asst. Dist. Atty., both of Oakland, for respondent.

NOURSE, Presiding Justice.

The defendant was tried to a jury and convicted on six counts of an information—the first count for burglary, second degree; the second for burglary, first degree; the third for burglary, first degree, which was reduced to second degree by the court; the fourth count for assault with a deadly weapon, the fifth count for assault with a deadly weapon; and the sixth for the violation of Section 2, Deadly Weapons Control Act as amended in 1931, Stats. 1931, page 2316.

The information also charged a prior conviction of burglary and the serving of a prison term thereon in California. The defendant also admitted that in 1928 he had been convicted in the State of Connecticut for auto theft, and in 1930 for a similar offense in the same state. A motion for a new trial, addressed to the third count alone was made and denied. The appeal is from the judgment and from the order denying a new trial.

The appellant does not attack the sufficiency of the evidence on any of the six counts. Briefly it appears that, with the aid of a confederate who pleaded guilty, appellant broke into a tavern on July 9, 1944, and took about \$2800 in currency and checks and a .32 automatic pistol. On August 12, 1944, the same pair broke into another tavern and took about \$1500 and a .38 caliber revolver. In both instances the safe on the premises was drilled and broken open. On December 3, 1944, the same pair sawed their way through the roof of another tavern but were frightened away when they inadvertently set off the burglar alarm. They were seen running from the premises, one carrying a heavy grip. A bystander noted the car in which they made their escape and a short time thereafter two police officers stopped them in a distant part of the city. Both men were ordered



72 Cal.App.2d 749

PEOPLE v. PONGETTI.

Cr. 2365.

District Court of Appeal, First District,
Division 2, California.

Jan. 30, 1946.

1. Criminal law ¶1122(5)

Where no request was made to have instructions submitting question of voluntariness of confessions included in record, appeal was limited to consideration of question whether trial court erred in overruling objection to admission of confessions. Rules of Appeal of the District Court of Appeal, First District, rules 33a, 33b.

2. Criminal law ¶531(3)

Objection to admissibility of confessions on ground that there was no evidence "except the testimony of this inspector" that confessions were voluntary went more to weight of the evidence than to its admissibility, since testimony of one witness is sufficient when not controverted.

3. Criminal law ¶518

A confession was not rendered involuntary by failure initially to apprise accused of his right to counsel, of his right to remain silent if he desired, and that his statements might be used against him.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

from their car and searched. When one of the officers attempted to handcuff the men, Pongetti drew a gun from under his belt and threatened to shoot them. One of the officers shot and seriously wounded Pongetti and the other was arrested without resistance. A suit case containing burglar tools and three revolvers was found in the back of the car. One of the revolvers was that taken in the burglary charged in the second count. The gun used by appellant at the time of his arrest was the one taken in the burglary charged in the first count. In the trunk of the car was found approximately \$2300.

[1,2] After the arrest appellant was taken to the county hospital for treatment. He was there visited by police officers who on three separate days took a confession of his guilt on all the charges in the information. Before evidence of these confessions was offered testimony was given that the confessions were made freely and voluntarily and without threats or offer of reward. The only objection made at the time was that there was no evidence "except the testimony of this inspector" that the confessions were free and voluntary and that some other evidence was necessary to show that they were admissible. The objection was overruled. Whether the question was submitted to the jury under appropriate instructions does not appear since the appeal was taken under rule 33a of the Rules on Appeal and no request to have the instructions included in the record was made under Rule 33b. This limits the question on appeal to the one consideration — whether the trial court erred in overruling the objection. And it should be made clear that such objection goes more to the weight of the evidence than to its admissibility since the testimony of one witness (the police inspector) is sufficient when not controverted. The settled rule has been clearly stated in *People v. Lehew*, 209 Cal. 336, 341, 287 P. 337, 339, where the Supreme Court said:

"Whether a confession is free and voluntary is a preliminary question addressed to the trial court and a considerable measure of discretion must be allowed that court in determining it. *People v. Connelly*, 195 Cal. 584, 598, 234 P. 374; *People v. Castello*, 194 Cal. 595, 599, 229 P. 855; *People v. Siemsen*, 153 Cal. 387, 394, 95 P. 863, 866; *People v. Wilson*, 79 Cal.App. 709, 713, 250 P. 879. * * * The mere fact that the

confession was made to a police or other officer of the law while the accused was under arrest does not necessarily render the confession involuntary and inadmissible. So also, the mere fact that a confession is made in answer to questions will not authorize its rejection, though the fact of its having been so obtained may be an important element in determining whether the answers were voluntary. *People v. Hoge*, 25 Cal.App. 456, 458, 143 P. 1072; *People v. Quan Gim Gow*, 23 Cal.App. 507, 512, 138 P. 918. A reviewing court cannot say that the trial court committed error in admitting a confession of guilt, unless such error appears as a matter of law from the record presented. The trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary, and, where the evidence is conflicting on the subject, it must be assumed that the testimony concerning a defendant's admissions was properly admitted. *People v. Castello*, supra, at page 600 of 194 Cal., 229 P. 855; *People v. Shaffer*, 81 Cal.App. 752, 756, 757, 254 P. 666; *People v. Tugwell*, 28 Cal.App. 348, 152 P. 740."

[3] The appellant makes the further point that he was not given the benefit of counsel at the time the confessions were made. No objection was made on that score to the admission of the evidence of the confessions. The point is raised here for the first time and the argument is that the facts demonstrate that the confessions were not voluntary. The point is without merit. It is answered in *People v. Hoyt*, 20 Cal.2d 306, 314, 125 P.2d 29, 33, where the Supreme Court said: "The free and voluntary nature of the statements was testified to by the police officers present when they were taken. Hoyt's challenge that his statement or confession was improperly admitted in evidence because initially he was not apprised of his right to counsel, of his right to remain silent if he desired, and that his statements could be used against him, lacks merit. The contention is answered in *People v. Booth*, 72 Cal. App. 160, 236 P. 987, and in *People v. Ramirez*, 113 Cal.App. 204, 298 P. 60, wherein it is held that such matters do not render the statement involuntary and inadmissible."

We find no error in the record.

The judgment and the order are affirmed.

GOODELL and DOOLING, JJ., concur.

72 Cal.App.2d 699

PEOPLE v. MASON.
Cr. 3936.

District Court of Appeal, Second District,
Division 1, California.

Jan. 28, 1946.

1. Criminal law ⇨656(1,5)

Trial judge's constitutional authority to comment on the evidence, the testimony and credibility of witnesses is not plenary and his discretion in such matter is judicial, to be exercised in conformity with standards governing judicial office and such authority does not permit him to assume the role of a witness or distort or add to testimony. Const. art. 6, § 19.

2. Criminal law ⇨656(1,5)

Whether trial judge's comment on the testimony and credibility of witnesses has gone beyond judicial discretion is to be determined upon all the circumstances of the case. Const. art. 6, § 19.

3. Criminal law ⇨656(4)

Trial judge, in commenting upon the evidence, may not withdraw any material evidence from consideration of jury. Const. art. 6, § 19.

4. Criminal law ⇨304(2, 9), 777

In prosecution of a shipyard guard for murder, court was entitled to take judicial notice of the fact and to instruct jury that they could take notice of the fact that on November 9, 1944, date of alleged offense, the United States was at war, and could also take notice of congressional declarations and presidential and executive proclamations made in connection with prosecution of war. Executive Order Feb. 19, 1942, No. 9066.

5. Criminal law ⇨304(1)

Court could take judicial notice of constant war time attempts to work harm to American ships, not on high seas alone, but in American ports and shipyards.

6. Criminal law ⇨304(2)

It is common knowledge that Terminal Island, in Los Angeles county, is on the Pacific coastline at Los Angeles harbor, and, on November 9, 1944, was one of the most important shipbuilding and repairing installations in the United States and that hundreds of thousands of men and

women were there engaged in such work. Executive Order Feb. 19, 1942, No. 9066; 50 U.S.C.A. § 104.

7. Criminal law ⇨304(2)

It is common knowledge that war plants on the Pacific coast made a practice of instructing all new employees concerning rules and regulations with respect to entering and leaving their plants, wearing badges, carrying identification cards, the necessity for co-operation with guards, and particularly with respect to the provisions of the Espionage Act. Espionage Act, tit. 1, § 1, as amended, 50 U.S.C.A. § 31.

8. Criminal law ⇨304(2)

It is common knowledge that in a large shipyard, such as CalShip, where homicide in question occurred, no one knew the faces of all employees and could thus determine who was entitled to be upon the premises; that few, if any, foremen were able to recognize all men and women of their own groups; that even old well-known employees often had their faces so obscured by soot, grease, helmet or goggles that even close friends could not recognize them.

9. Criminal law ⇨656(1)

In prosecution of shipyard guard for murder arising out of the killing of an employee who attempted to pass through gates without being checked, where there was evidence as to rules of shipyard and of the United States Maritime Commission for wartime security measures, when jury made known desire to know about rules of Maritime Commission, court's action in advising jury that Maritime Commission had nothing to do with case exceeded permissible privilege of comment on evidence. Const. art 6, § 19.

10. Criminal law ⇨656(8)

In prosecution of shipyard guard for murder arising out of the shooting of an employee who attempted to pass through the gates without being checked, where guard was required to enforce rules relating to ingress and egress, and there was no evidence that deceased showed his badge or said that he was employee until after he was shot, and deceased made no attempt to obey rules respecting exit between shifts, whether defendant was justified in drawing his gun was a question of fact

for jury and court had no authority to comment that guard was without justification in drawing his gun. Const. art. 6, § 19.

11. Criminal law ⚡762(5)

The constitutional provision authorizing a trial judge to comment on the evidence does not justify an invasion of province of jury to extent of instructing that defendant is guilty. Const. art. 6, § 19.

12. Homicide ⚡103

Homicide necessarily or inadvertently committed by a public officer, or one acting under his authority, while in the exercise of his authority or duty, is generally justifiable or excusable.

13. Criminal law ⚡656(1)

In prosecution of shipyard guard for murder arising out of the shooting of employee who attempted to pass through gates without being checked, trial court's comment on evidence, alluding to and stressing only evidence of guilt, making no mention of defense of justification or testimony that at time fatal shot was fired, guard was retreating and deceased was advancing, went beyond constitutional privilege of comment on the evidence. Const. art. 6, § 19.

14. Criminal law ⚡656(8)

Constitutional privilege of comment by trial court on the evidence permits trial court to advise jury in respect to the facts, but court must keep in mind that ultimate decision of issues of fact must be fairly left to jury. Const. art. 6, § 19.

15. Criminal law ⚡863(2)

In prosecution for murder, where defendant adduced evidence tending to show justification in carrying out his duty as a shipyard guard in enforcing wartime security rules and regulations, court's action in calling jury in after it had been deliberating for three days and instructing that defendant was not justified in drawing his gun and that issue lay between manslaughter and second-degree murder was erroneous as going beyond constitutional privilege of comment on evidence. Const. art. 6, § 19.

16. Criminal law ⚡863(1, 2)

Trial judge may comment on the evidence and credibility of witnesses even after cause has been submitted to jury with the instructions, but such procedure should

be resorted to cautiously, and, when decided upon, should be indulged in a most dispassionate manner. Const. art. 6, § 19.

17. Homicide ⚡300(7)

In murder prosecution, an instruction respecting the creation of a dangerous situation which was not applicable to evidence was error, notwithstanding that it might have been applied to some theory that might have been advanced.

18. Criminal law ⚡656(1)

In murder prosecution where court exercises its constitutional privilege of commenting on evidence, court must correctly state the facts. Const. art. 6, § 19.

19. Criminal law ⚡1186(4)

Where record disclosed that jury was not convinced of defendant's guilt under a murder charge after deliberating for three days and returned a manslaughter verdict only after their province as triers of fact was invaded by trial judge in his comments to them, errors resulted in a miscarriage of justice and a reversal was required. Const. art. 6, §§ 4½, 19.

20. Criminal law ⚡1186(4)

The term "miscarriage of justice", as used in constitutional provision requiring affirmance unless error results in a miscarriage of justice, does not merely mean that a guilty man has escaped or that an innocent man has been convicted but may equally be applied where acquittal or conviction has resulted from some form of trial in which essential rights of the people or of the defendant were disregarded or denied. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

21. Constitutional law ⚡268

Criminal law ⚡1186(4)

In murder prosecution, act of trial judge in commenting on the evidence by referring exclusively to evidence of guilt and in invading province of jury by instructing under guise of comments that defense of justification was not established, resulted in a denial of a fair trial and a denial of due process of law, requiring a reversal of manslaughter conviction. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Harry V. Mason was convicted of manslaughter and from the conviction and from an order denying his motion for a new trial, he appeals.

Reversed and remanded for a new trial.

Everett W. Leighton and Gerald Bridges, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County defendant was accused of the crime of murder. Following entry of a not guilty plea and trial before a jury, he was convicted of the crime of manslaughter, a lesser and necessarily included offense. From the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

The circumstances out of which this prosecution arose may be thus epitomized: On the afternoon of November 9, 1944, defendant and appellant, Harry V. Mason, was a guard employed by California Shipbuilding Corporation. He wore a guard's uniform furnished by the United States Maritime Commission and a holster, in which was a pistol. His duty at that time was to enforce the rules and regulations of his employer and the United States Maritime Commission respecting ingress and egress to and from the CalShip yard through "Gate 3", where he was then stationed. "Gate 3" designated a series of gates, at one end of which was a room where persons not entitled to enter the shipyard might wait and a small office with windows facing one of the gates called the "office gate", through which persons (other than employees on change of shift) were required to enter or depart, to present proper passes, identify themselves and sign a register, and at the other end of which was the paymaster's office. Employees were required to use the "office gate" except for the usual change of shift. Just before, after and during change of shift, each gate in the series known as "Gate 3" was opened and a guard was stationed at each. Only defendant and one other guard at that gate carried guns. At 4:30 each afternoon the "swing shift" started work and the "day shift" came out. Just prior to 4:30 guards were required to allow no one to pass through Gate 3 except members of

the "swing shift" wearing their badges on "their left breast" and carrying proper identification cards. Guards were also required to examine packages carried by employees. Immediately after 4:30 guards similarly scrutinized and examined those leaving with the "day shift". The first whistle blew at 4:25 and the second at 4:30.

At 4:25 p. m. on November 9, 1944, Gerald Brackett Edwards, a colored boy about 18 years old, "broke through the gate to run, but he was stopped by Officer Mason * * *" and told to come back "and clear out the proper gate". The testimony of the various witnesses discloses some differences in what was seen and heard by them after Edwards was told to go back, but several witnesses for the prosecution, as well as witnesses for the defense, testified that Edwards then called defendant a vile name and said he would not go back, "and he started to push his way by Mr. Mason * * *". Mr. Mason laid his hand on his gun, and Edwards told him to go ahead and pull it, that he wasn't afraid of that peashooter, and again he tried to go by, and Mr. Mason pulled his gun out and leveled it towards Mr. Edwards, and the colored boy made a grab for the gun, and it went off." The gun was pointed towards the man's feet or legs. After the first shot was fired, "then he jumped at Mr. Mason" and Mr. Mason stepped back and another shot was fired. According to the expert from the Los Angeles Police Department, the gun was between six and ten inches from the body of deceased when fired. One of the shots entered Edwards' abdomen, causing his death shortly thereafter.

[1] The main ground urged for a reversal of the judgment and order herein is that the trial court exceeded the bounds of propriety and went beyond the power conferred upon it by section 19 of Article VI of our state Constitution to "make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case." Though the language of the constitution is in itself devoid of any limitation as to the comment the court may make on the evidence and the credibility of witnesses, it does not follow that the conferred power is plenary and without restriction or limitation. Indeed, as was said in *Quercia v. United States*, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed.

1321, quoted with approval in *People v. Ottey*, 5 Cal.2d 714, 724, 725, 56 P.2d 193, 198: "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be let without safeguards against abuses."

[2] Notwithstanding the numerous occasions upon which the trial court's conduct under the aforesaid constitutional provision has been before the appellate tribunals, such cases are helpful only so far as they enunciate certain general principles. No hard and fast rule can be laid down determinative of what a trial judge may say to a jury by way of comment on the evidence or the credibility of witnesses. Each case must turn upon its own peculiar circumstances. As was said in *People v. Ottey*, supra, 5 Cal.2d at page 724, 56 P.2d at page 198, "That question must depend, in a criminal case, upon the nature of the charge, the nature of the evidence, and, to some extent, on the arguments of counsel—in short, upon all the circumstances of the case. 'It is impossible, however, from the cases to find the dividing line between what is objectionable and what is not, and to lay down a hard and fast rule by which the doubtful cases can be placed on one side or the other of the dividing line. (Reviewing cases.) It is evident from an examination of these cases that each case, in a large measure, stands on its own bottom, except as to the recognition of certain general principles.' *Malaga v. United States*, 1 Cir., 57 F.2d 822, 827, 828; *Stokes v. United States*, 8 Cir., 264 F. 18; *People v. Lintz*, 244 Mich. 603, 222 N.W. 201."

In the case with which we are here concerned the record reveals that the jury was instructed and the cause submitted to them at 10 o'clock on the morning of April 6, 1945, without any comment by the judge upon the evidence or the credibility of witnesses. The jury deliberated all of that day, all day Saturday, April 7, and Sunday, April 8. On Monday, April 9, after the jury had been deliberating three full days, the trial judge on his own motion called them before him, and in the presence of

the defendant, his counsel, and the district attorney, announced: "Owing to the fact that we, in our opinion, do not regard and have never regarded the case as one of any particular complications, but is rather simple of solution, we feel that we not only have the privilege of discussing the case with the jury but a positive duty to discuss the evidence in view of the impasse which has developed." At the conclusion of his comments on the evidence the trial judge gave to the jury two additional instructions in writing.

Appellant contends that all of the somewhat lengthy comment made by the trial judge was erroneous and prejudicial. Because of the diversity of subjects contained in the questioned comments and for convenience, as well as clarity, we shall discuss seriatim the subjects covered, commencing with the following: "The first matter which I think should be disposed of is suggested by a question which one of the jurors asked, or suggested that *the jury would like to know about the rules of the Maritime Commission*. All I said at that time in response to that request was that all of the evidence which we deemed material had been presented to the jury, and dropped the matter there. I feel that I should go further and say that *the Maritime Commission has nothing whatever to do with this case*, and even if the defendant had been in the employ of the Maritime Commission, from the evidence which we have here, it still would have made no difference, *because the matters which you must decide rest entirely in the brief time in which the instant offense or transaction occurred—a matter probably of not more than two or three minutes, at the most, and the matter must necessarily be determined on that basis.*" (Emphasis added.)

While it is true in the instant action that the entire incident took place between the "first" and "second" whistles, which were blown at 4:25 and 4:30 p. m., respectively, it is not required that those few minutes be isolated and considered without regard to the general nature of the period of time of which they are a part.

[3-6] A search of the reporter's transcript does not reveal the question asked by a juror with reference to the rules of the Maritime Commission, but from the foregoing remarks of the court we shall assume that such a question was propounded. Evidently the juror desired to know what the rules of the Maritime Commission were

with reference to people entering and leaving the shipyards and what responsibilities, duties and rights the defendant had in the course of his employment to prevent the ingress and egress of people except through designated entrances and exits and when they were in possession of the requisite passes. One of the limitations upon the power of a trial judge in commenting upon the evidence is that he may not withdraw any material evidence from the consideration of the jury. *People v. Ottey*, supra, 5 Cal.2d at page 728, 56 P.2d at page 200. The court was entitled to take judicial notice of the fact and to instruct the jury that they could take notice of the fact that on November 9, 1944, the date of the alleged offense, the United States was at war, and could also take notice of Congressional declarations and Presidential and Executive proclamations made in connection with the prosecution of the war. 31 C.J.S., Evidence, § 62, p. 639. Judicial notice can be taken of the fact that constant attempts were being made throughout the war to work harm to American ships, not on the high seas alone, but in our own ports and shipyards. *Pan-American Pet. Transp. Co. v. Robins Drydock & Repair Co.*, 2 Cir., 281 F. 97, Id., 259 U.S. 586, 42 S.Ct. 589, 66 L.Ed. 1076. In *Ex parte Lincoln Seiichi Kanai*, D.C., 46 F.Supp. 286, 288, the United States District Court for the Eastern District of Wisconsin said, " * * * The field of military operation is not confined to the scene of actual physical combat. * * * The theater of war is no longer limited to any definite geographical area. Saboteurs have already landed on our coasts. This court can take judicial notice of the extensive manufacturing facilities for airplanes and other munitions of war which are located on or near our west coast. * * * At the present time, the right of our citizens to come and go as they please may be somewhat restricted by the necessity of protecting this nation from our enemies in time of war." The President of the United States, pursuant to the War Powers vested in him by Congress, by Executive Order No. 9066, dated February 19, 1942, stated that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities," and the Secretary of War and military commanders designated by him were authorized (50 U.S.C.A. § 104) to prescribe military

areas from which any and all persons might be excluded, and with respect to which the right of any person to enter, remain in or leave shall be subject to whatever restrictions may be by them imposed. Lt. Gen. DeWitt's Public Proclamation No. 1, on March 12, 1942, designated Military Area No. 1, which included Terminal Island, where the yard of CalShip was located. The trial court instructed the jury that Terminal Island is located in Los Angeles County. It is also common knowledge that it is on the Pacific coast line at Los Angeles Harbor, and, at the time involved, was one of the most important shipbuilding and repairing installations in the United States. It is also common knowledge that hundreds of thousands of men and women were there engaged in such work.

In the case of *In re Parker*, 57 Cal.App. 2d 388, 392, 134 P.2d 302, 304, Division Three of this court said: " * * * We also take judicial notice of the facts that at these times there were in Los Angeles County * * * a large number of factories engaged in making for the United States and other governments a variety of articles used or useful for war and defense purposes, that these factories employed many thousands of men in their work and were rapidly increasing the number of their employees, that they demanded of all applicants for employment proof of United States citizenship. * * *"

It was "common knowledge that the government was at that time greatly interested in the building of ships to be used by it for the transportation of men, munitions, and supplies." *Southern Bridge Co. v. United States Shipping Board Emergency Fleet Corp.*, D.C., 266 F. 747, 749.

The United States Maritime Commission was created as successor to the United States Shipping Board (which was held in the last-cited case, 266 F. at page 752, to be "an agency of the government") and was authorized, among other things, to "procure new vessels" for use "as auxiliaries to the naval and military services of the United States" (46 U.S.C.A. §§ 891c, 1111 et seq.) and "to adopt all necessary rules and regulations to carry out the powers, duties, and functions vested in it" (sec. 1114). Between 1941 and 1944 billions of dollars were appropriated by Congress for use by the Commission "for the purpose of providing as rapidly as possible cargo ships essential to the commerce and defense of the United States * * *; the establishment, ac-

quisition, construction, enlargement, or extension of plants or facilities * * * to be used for the construction of ships * * * and the maintenance, repair, operation (under lease or otherwise), and management of such plants and facilities * * *." Sec. 1119a, Ch. 27, Title 46 U.S.C.A.; sec. 632, Second War Powers Act, Title 50 U.S.C.A. Appendix; Executive Order No. 9129, 50 U.S.C.A. Appendix, § 632 note.

[7] It is common knowledge that the war plants on the Pacific Coast made a practice of instructing all new employees concerning the rules and regulations with respect to entering and leaving their plants, wearing badges, carrying identification cards, the necessity for co-operation with the guards, and particularly with respect to the provisions of the Espionage Act, which reads in part as follows: "Whoever, for the purpose of obtaining information * * * goes upon, enters * * * any place in which any vessel * * * (is) being made * * * on behalf of the United States * * *; or (e) whoever, being intrusted with or having lawful * * * control of any * * * information, relating to the national defense, through gross negligence permits the same to be * * * stolen * * * shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than \$10,000." (Title 50, sec. 31, U.S.C.A., enacted June 15, 1917, amended March 28, 1940.)

[8] It was also customary for all such concerns to keep uniformed and armed guards at all gates, as well as in other parts of their plants. It is common knowledge that in a large shipyard such as CalShip, where the homicide in question occurred, no one knew the faces of all employees and could thus determine who was entitled to be upon the premises; that few, if any, foremen were able to recognize all the men and women of their own groups; that even old and well-known employees often had their faces so marred by soot and grease or so obscured by helmet or goggles that even close friends would not recognize them. Under such conditions, if rules and regulations respecting ingress and egress from such a shipyard were not enforced, it would be sheer luck if the ships being manufactured for the war necessities of the United States proved seaworthy.

In the instant action there was testimony as to the existence of such rules, as to the instruction of "new hires" respecting them,

and that the rules were rules of CalShip and United States Maritime Commission, which were "the same".

While, as heretofore pointed out, the trial judge may exercise his own discretion with reference to the comments he makes, he abuses that discretion when in his comments he withdraws any material evidence from the jury's consideration. *People v. Ottey*, supra, 5 Cal.2d at page 728, 56 P.2d at page 200.

[9] Because there was evidence in the case at bar as to the nature of defendant's employment and the rules of his employer, CalShip, and the United States Maritime Commission, it must be held that when the jury made known their desire "to know about the rules of the Maritime Commission" the court erred in advising them that "the Maritime Commission has nothing whatever to do with this case", because in so doing the court in effect withdrew from consideration by the jury evidence affecting the rules of both defendant's employer, CalShip, and the United States Maritime Commission which the defendant was required to enforce. If the court desired to comment upon such evidence it should have done so by referring to the same in the light of the foregoing facts, of which the court took and the jury was entitled to take judicial notice. It was only fair to the defendant that the jury be permitted to judge of his conduct in the light of the nature of his employment and the duties and responsibilities thereof, measured by the foregoing facts of which the triers of fact were entitled to take judicial notice. The very inquiry of the jury was indicative of the fact that they desired to know what the evidence was with reference to the obligations imposed upon the defendant by reason of the rules of the Maritime Commission, which commission was authorized by section 1114 of Title 46 of the United States Code Annotated "to adopt all necessary rules and regulations to carry out the powers, duties, and functions vested in it." In view of the prevailing facts and circumstances surrounding this case, to dismiss the jury's request with the terse comment that "the Maritime Commission has nothing whatever to do with this case" and that the "matters which you must decide rest entirely in the brief time in which the instant offense or transaction occurred,—a matter of not more than probably two or three minutes at the most—" tended to prevent the defendant from having a fair and

impartial trial and does not come within the letter or spirit of the pertinent constitutional provision authorizing comment by the trial court upon the evidence or the credibility of witnesses.

We shall now give consideration to the following portions of the comments made to the jury upon the evidence after the jury had been deliberating thereon for three full days:

"Now, I want to say that *I have never been able to see in the evidence in this case from any witness, any circumstance, any reason or justification for the defendant drawing his gun at all*, and if there was no justification for that, why, then we have, I think less difficulty to surmount in arriving at a disposition of the case.

* * * * *

"Now, I said in the beginning that I haven't been able to discover any evidence which justified any conclusion that the defendant, at any time, had any occasion to draw his gun; * * *.

"* * * Now, that is why I say that *I see in the evidence nowhere anything which justified the defendant in drawing his gun at all. Certainly, no common sense would indicate that any rules of any sort would require that of a man*, because the other man violated the rule and with no more apparent reason than has been conveyed here.

"* * * *'A person cannot deliberately create a dangerous situation, either unlawfully or negligently, and thereafter be absolved from blame from some accidental or unintentional disaster which could not have happened but for the dangerous situation voluntarily and unnecessarily created.'*

"* * * *On the other hand, your own authority to judge the evidence and to determine the facts in the case has this limitation: It is not an arbitrary power but must be exercised with sincere judgment and in accordance with the rules of law stated to you.'*

[10, 11] The defendant was obligated and in duty bound to enforce the rules relating to ingress and egress to and from the shipyards on Terminal Island. This duty was enjoined upon him by duly promulgated rules made pursuant to the war power of the national government. Peacetime procedures do not necessarily fit wartime needs. *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774. In the case at bar there is no evidence that

the deceased showed his badge or said he was an employee until after he was shot. And even though he was an employee, he was required to obey the rules respecting exit between shifts. Not having done so, the defendant in his capacity as a guard had no way of knowing in what manner, authorized or unauthorized, the deceased gained entrance to the shipyards or what he had done while there, or what he might be taking from there. The question of whether the evidence "justified the defendant in drawing his gun" was a question of fact to be determined by the jury in the light of all the facts and circumstances to which we have herein adverted. To tell the jury that the defendant was without justification in drawing his gun was tantamount to instructing the jury that the shooting was unlawful, for if there was no authority for the defendant to draw his gun certainly there was no justification for him to shoot the deceased. This was the ultimate fact to be decided by the jury, and what the court said was for all practical purposes an instruction that the defendant was guilty. The constitutional provision authorizing a trial judge to comment on the evidence does not justify any such invasion of the province of the jury. *People v. DeMoss*, 4 Cal.2d 469, 477, 50 P.2d 1031; *People v. Talkington*, 8 Cal.App.2d 75, 96, 47 P.2d 368. While the court did instruct the jury that they were "the exclusive judges of the credibility of the witnesses and of all questions of fact submitted to you", nevertheless, as was said in *O'Shaughnessy v. United States*, 5 Cir., 17 F.2d 225, quoted with approval in *People v. Talkington*, supra, 8 Cal.App.2d at page 96, 47 P.2d at page 379, "General statements in the charge, to the effect that the jury were at liberty to disregard the court's views as to [the defendant's] guilt or innocence, and to base their verdict on their own conclusions from the evidence, did not cure the fault in the charge of a lack of impartiality in submitting the evidence to the jury, or justify the court in making one-sided recitals of evidence, or in furnishing arguments in behalf of only one side of issues as to which the evidence was conflicting."

In the case of *State v. Place*, 20 S.D. 489, 107 N.W. 829, 11 Ann.Cas. 1129, quoted with approval in *People v. Talkington*, supra, 8 Cal.App.2d at page 89, 47 P.2d at page 375, the Supreme Court of South Dakota had before it some of the questions here

under consideration and wherein the jury was returned into court after they had been deliberating, in holding the comments of the court erroneous, the following language was used: "In this enlightened age no one will contend that a verdict should stand which does not, at least presumptively, express the free and deliberate judgment of those who rendered it. The old rule permitting the coercion of juries has been swept away. Under modern methods of procedure the independence of the jury is, and it should be, respected. *People v. Sheldon*, 156 N.Y. 268, 50 N.E. 840, 41 L. R.A. 644, 66 Am.St.Rep. 564."

In *People v. Talkington*, supra, 8 Cal.App. 2d at page 88, 47 P.2d at page 375, the court quotes from Powers on "Judicial Discretion of Trial Courts" as follows: "It is a well-settled canon of practice that a trial judge has no authority, either by threat, intimidation, *undue urging*, or *inapt suggestions*, to affect the fair, conscientious and impartial deliberations of the jury. The fact-finding body of the mixed tribunal should be as unhampered and unfettered in the performance of its proper functions as is the judge in his. As the presiding officer of the forum, the administrator of the proceedings, the trial court may advise an unagreed jury of the importance of their reaching a verdict if they can do so without surrendering their conscientious convictions, but he cannot go beyond this and say anything to the prejudice of either party." (Emphasis added.)

[12] In 40 C.J.S., Homicide, § 100, p. 960, we find the following: "Homicide necessarily or inadvertently committed by a public officer, or one acting under his authority, while in the exercise of his authority or duty is generally justifiable or excusable."

[13] Throughout his entire lengthy comments to the jury the trial judge said not one word relative to testimony in favor of the defendant, but alluded to and stressed only the evidence of his guilt. For instance, no mention was made of the testimony that at the time the fatal shot was fired the defendant was retreating, while the victim was advancing upon him. No reference was made to the undisputed evidence of Ray Pinker, the Police Department expert, whose qualifications were stipulated, and who testified that at the time of the firing of the fatal shot the deceased was only eight inches from the

muzzle of defendant's weapon, which the witnesses testified was held at the defendant's hip. Nothing whatever was said of or concerning the threatening language used by the deceased as he advanced upon the defendant, nor was anything said about the testimony that before the second shot was fired the deceased "jumped at" the defendant. The comments therefore lacked impartiality and indicated the assumption by the court of the role of an advocate. In *People v. Dail*, 22 Cal.2d 642, 658, 140 P.2d 828, 837, the Supreme Court said: "The trial court, under the guise of comment, may not properly control the verdicts by a direction either directly or *impliedly* made."

[14-16] While the trial court may advise the jury in respect to the facts, he must ever keep in mind that the ultimate decision of issues of fact must be fairly left to the jury. In the instant case the jury had been patiently deliberating for three full days and were unable to agree. They were then called into court and advised that no justification whatever existed for the defendant to draw his gun and that the issue lay between manslaughter and second-degree murder. While it is established law in California that the judge may comment on the evidence and the credibility of witnesses after the cause has been submitted to the jury with the instructions (*People v. Talkington*, supra), nevertheless we are impressed that such a procedure should be resorted to cautiously and when decided upon should be indulged in a most temperate and dispassionate manner, to the end that comments made at such a time will not make more of an impression upon the minds of the jurors than the court desires, or than it properly should make or properly would have made if the comments had been delivered at the time the court instructed the jury prior to the submission of the case to them. In the case at bar, after three days of deliberation fruitless of agreement upon a verdict, we find the jury retiring after the court's belated comment on the evidence and within four hours dutifully returning into court with a verdict of guilty. Under the facts and circumstances here present we are impelled to hold that the jury's verdict was unduly influenced by the court's comments and the arguments advanced by the court in support of its expressed view that not only was the defendant guilty of either second-degree murder

or manslaughter, but that at no time was he justified in even drawing his gun.

The prejudicial effect of the court's comments was further manifested by the fact that at the time of making the comments an erroneous instruction was given by the court, as follows: "Now I think I will not prolong the matter further. I have given you what I think is the key which will unlock this case, and you are not bound to follow my advice at all, of which I will presently advise you; but in order that we may clarify one point, and that is if you are to adopt the theory of manslaughter, an unintentional slaying, you should be governed by this, which I have written out, and it adds somewhat to a more detailed instruction already given you, in connection with involuntary manslaughter, which reads as follows: 'A person cannot deliberately create a dangerous situation, either unlawfully or negligently, and thereafter be absolved from blame from some accidental or unintentional disaster which could not have happened but for the dangerous situation voluntarily and unnecessarily created.'"

[17, 18] A search of the record reveals no testimony that the defendant had unlawfully or negligently created a dangerous situation resulting in "some accidental or unintentional disaster". The court should give only such instructions as are applicable to the evidence in the case and not to some theory that might be advanced. "The instructions given to a jury must always be adapted to the evidence and the circumstances of the case on trial". 8 Cal.Jur. 321 and cases therein cited. The foregoing instruction was evidently predicated upon that portion of the trial judge's comments wherein he said: "Now, the defendant has interposed here, at some length, and you have been instructed at some length, on the matter of self defense. At the same time, the defendant, in testifying here, said that he never intended to shoot the deceased and that it was all an accident. The two positions are entirely inconsistent, because self defense implies an intention to assault his antagonist, or at least to wound him so that he can't proceed any further. It is entirely inconsistent with the idea of an accident. Now, the defendant here, as I have indicated, testified that he accidentally stepped back from the victim rushing toward him, dropped back on his heel, thereby lifting his gun and that the entire

transaction was accidental. The statements, two of them, one an oral statement and the other a written statement which he made on the afternoon of the transaction, said nothing about any such mishap at all, but stated other reasons for the unfortunate occurrence; but here he has stated that it was accidental, and as I have indicated, the two positions are entirely inconsistent. If you adopt the theory of self defense, then you have got to adopt the theory that he intended to shoot the boy. If you adopt the theory of its being accidental, why then you have got the other matter to consider."

We are impressed that the foregoing comment was based upon an erroneous interpretation of the defendant's testimony wherein he used the word "accidental", because a perusal of such testimony does not warrant the conclusion that the defendant intended to convey the impression that the firing of the shots was accidental, but that the killing of the deceased was unintentional and accidental; that he fired the shots at the decedent's legs, but because he slipped on his "bad foot" the weapon, instead of discharging in the direction of decedent's legs, discharged into his body. The pertinent testimony in that regard reads as follows:

"Q. Where did you aim the gun when you fired it? A. Towards his leg.

"Q. So then at the time you fired the second shot you didn't fire that in self defense then, is that right? A. I fired the shot accidentally, sir.

"Q. Entirely involuntarily on your part? A. I did not intend to kill anyone or to shoot anyone.

"Q. Were you intending to fire the shot at all? A. If I intended to fire the shot I was going to fire it in the ground again.

"Q. Had you been thinking about firing another shot? A. I had thought of firing another shot into the ground.

"Q. Had you thought of firing another shot and hitting him in the leg? A. I was shooting towards his legs."

That the defendant testified, "the entire transaction was accidental", as stated by the court in its comments, is not borne out by the former's testimony, which in that regard is as follows:

"A. Mr. Edwards said he wasn't going back. I stepped back, and as I stepped

back my hand went to my side, and he says, 'Go ahead and draw your pea-shooter. If you do I will make you eat it'. And he kept coming towards me. I backed off and as I backed up he came very close to me, I would say in a foot of me. I pulled my gun and asked him to stop. He says, 'I ain't going to stop. Now that you have drawn it, I'm not going to stop', and he made a pass for the gun. * * *

"* * * A. He was walking towards me quite fast with a frown on his face, and he kept saying, 'I ain't afraid of you. I ain't afraid of you. I ain't afraid of any of you monkeys with uniforms.'

"Q. Were you afraid of him? A. I was getting scared, yes.

"Q. Of what? A. Of bodily harm. He said he was going to take the gun, and I was afraid he was going to take the gun, and that is the reason I drew it. * * *

"* * * Q. So you became afraid that he was going to take the gun out of your holster, and you took it out, is that right? A. Yes, sir."

From the foregoing it must be held that the court incorrectly stated the facts, erroneously declared the law, and improperly invaded the province of the jury.

[19-21] Finally respondent, in an effort to save this conviction, invokes the provisions of section 4½ of article VI of our state Constitution. It is asserted by respondent that "the record clearly shows the appellant to be guilty". Respondent's statement that "the evidence of defendant's guilt is clear and convincing" is not borne out when consideration is given to the fact that a jury remained unconvinced of his guilt after deliberating thereon for three entire days and returned a verdict only after their province as triers of fact was invaded by the trial judge in his comments to them. And in any event, the term "miscarriage of justice", as used in the constitutional provision, "does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied." *People v. Wilson*, 23 Cal.App. 513, 524, 138 P. 971, 975. See also, *People v. Duvernay*, 43 Cal.App.2d 823, 829, 111 P. 2d 659. Our views with reference to the

applicability of section 4½ of article VI of the constitution are set forth at length in *People v. Smittcamp*, Cal.App., 161 P.2d 983, and cases therein cited. Under the facts of the instant case, "the conclusion is inescapable that the errors in this case resulted in a miscarriage of justice within the meaning of article VI, section 4½ of the California Constitution." *People v. Dail*, supra, 22 Cal.2d at page 659, 140 P.2d at page 837. And furthermore, we hold that the errors complained of were prejudicial, deprived the defendant of that fair and impartial trial guaranteed by law, and that such procedure amounted to a denial of due process of law.

The judgment and the order denying defendant's motion for a new trial are, and each is, reversed and the cause remanded for a new trial.

YORK, P. J., and DORAN, J., concur.



KRIER v. KRIER. *

Civ. 7186.

District Court of Appeal, Third District,
California.

Jan. 30, 1946.

Hearing Granted March 28, 1946.

1. Homestead ☞86, 87, 158

A declaration of homestead recorded by wife before husband obtained a divorce on premises on which she and minor daughter continued to live after husband left home was valid regardless of whether it was recorded on husband's separate property or upon property in which wife had a community interest as joint tenant. Civ. Code, §§ 1238, 1263.

2. Partition ☞12(3)

A valid homestead may not ordinarily be terminated by suit for partition and sale thereof, particularly where rights of minor children are involved regardless of whether it is recorded on separate property of husband or upon community in-

* Subsequent opinion 172 P.2d 681.

terests of the spouses. Civ.Code, §§ 137, 1238, 1263.

3. Homestead ⇨158

A Nevada decree granting husband a divorce without attempting to determine property rights between the parties did not terminate homestead previously recorded by wife on land in California which she and a minor child of the parties continued to occupy after husband had left home. Civ. Code, §§ 1238, 1263.

4. Divorce ⇨331

In action for divorce by husband from wife residing in California, Nevada court had no jurisdiction of the real property of the spouses located in California.

5. Evidence ⇨67(1)

Homestead ⇨57(1)

A homestead, the original validity of which has been established, is presumed to continue in force, and party seeking partition and sale of land impressed with such homestead has the burden of showing by satisfactory evidence that homestead has terminated. Civ.Code, §§ 137, 1238, 1263.

6. Judgment ⇨735

Wife's action for separate maintenance did not involve validity of declaration of homestead recorded by her on realty which she and minor child of the parties continued to occupy after husband left home and, in absence of evidence that the question was actually litigated and determined in maintenance action, judgment therein, though incidentally determining that wife had a community interest to the extent of \$500 in realty on which the homestead was recorded, did not terminate homestead and was not res judicata of wife's right to set up homestead as a bar to action by husband for partition and sale of the realty. Civ. Code, §§ 137, 1238, 1240, 1263; Code Civ. Proc. § 1911.

7. Divorce ⇨322

Property rights may be tendered and determined in a suit for divorce, but, if they are neither tendered nor determined therein, they may be litigated in another action. Code Civ.Proc. § 1911.

8. Judgment ⇨717

A judgment is res judicata only insofar as it is within the issues of the cause in which it is rendered. Code Civ.Proc. § 1911.

9. Judgment ⇨720, 725(1)

Where a question of fact essential to the judgment is actually litigated and determined by a valid final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action, but a judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action. Code Civ.Proc. § 1911.

10. Judgment ⇨713(2)

A former judgment between the parties to an action is conclusive in all subsequent actions involving the same questions, not only as to matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined. Code Civ.Proc. § 1911.

11. Judgment ⇨951(1)

Where husband in action for partition and sale of realty on which wife had recorded a declaration of homestead relied on judgment in wife's action for separate maintenance as terminating the homestead and as res judicata of wife's right to set up homestead as a bar to partition and sale of the realty, husband had the burden of proving that validity of declaration of homestead was placed in issue and actually litigated and determined by the court in separate maintenance action. Civ.Code, §§ 137, 1238, 1240, 1263; Code Civ.Proc. § 1911.

12. Judgment ⇨951(1, 2)

The party relying upon a prior judgment as conclusive of an issue arising in a later action between the same parties upon a different cause of action has the burden of proving that the matter in issue was actually litigated and determined in the prior action, and, if record does not show what was in fact litigated and determined, he can introduce evidence as to the proceedings at the trial to show what matters were in fact litigated and determined. Code Civ.Proc. § 1911.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action for partition and sale of realty by M. H. Krier against Lillian Krier,

wherein defendant filed a cross-complaint asking that homestead interest in the realty be vested in her. From an adverse judgment, defendant appeals.

Judgment for partition and sale of the property reversed with direction to render judgment in favor of cross-complainant validating her homestead.

Ira B. Langdon, of Stockton, for appellant.

Gumpert & Mazzer, by J. Calvert Snyder, all of Stockton, for respondent.

THOMPSON, Justice.

The defendant has appealed from a judgment which was rendered against her in a suit for partition and sale of real property impressed with a homestead which she had previously recorded. The court held that the homestead was terminated by the judgment in a former suit for separate maintenance, and that the last mentioned judgment is res judicata of her "right in and to said real property."

The appellant contends that the judgment in the separate maintenance action is not res judicata of her homestead interest in the property, and that partition and sale of the land will not lie to divest her of her valid homestead right.

The plaintiff and defendant were married November 12, 1929. One daughter, who is a minor, was born as the issue of that marriage. She resides with her mother on the property in question. At the time of their marriage the plaintiff owned twenty acres of farm land in San Joaquin County, together with a small dwelling house thereon, upon which he subsequently expended \$1,000 in improvements. The property was valued at \$8,000. It was subject to a trust deed to secure an indebtedness of \$1,800. Dissensions arose between the spouses. They separated in December, 1942. The husband then left their home. The defendant and their minor daughter continued to reside in the home. February 25, 1944, the plaintiff was granted a divorce upon default of the defendant in a Nevada court, but the complaint failed to ask for a determination of property rights and the decree did not mention such rights. The plaintiff immediately married another woman.

May 18, 1943, the defendant brought suit against her husband in San Joaquin County, California, under Section 137 of the Civil Code, for separate maintenance. On

the last mentioned date, while she still lived on the property with their minor daughter, and before the Nevada decree of divorce was granted, Lillian Krier recorded a homestead on the property in question, under Section 1238 of the Civil Code. In the suit for maintenance the court rendered judgment in favor of the wife awarding to her an amount for separate maintenance and further determined that she owned "an undivided one-half interest in and to * * * the following described real property of the value of \$1,000.00. * * * [Describing the property which is involved in this suit for partition and sale.]" The homestead was not mentioned in the pleadings of the maintenance suit, nor was it determined by the judgment which was rendered therein. The record of the maintenance suit is not before this court, but the trial court adopted findings in this partition action to the effect that Lillian Krier held a \$500 interest in the real property as previously stated, and that Mr. Krier is the owner of that property subject only to that \$500 interest. The court also found, however, that the trial court was not requested to vest the homestead in the wife in the maintenance suit. We assume the court's attention was not called to the homestead in that maintenance action.

This suit for partition and sale of the real property was filed by M. H. Krier June 13, 1944, almost one year after the suit for maintenance was determined. The complaint alleges that plaintiff is the owner of said real property subject to defendant's \$500 interest therein; that "said property is not capable of physical partition" without material injury to the respective parties, and that it is therefore necessary to sell the same. The prayer asked that the proceeds of sale be applied to payment of defendant's \$500 interest, to payment of the \$1,800 mortgage, and that the balance be paid to plaintiff.

The defendant filed an answer and cross-complaint denying certain material allegations and affirmatively alleging that she held an interest in the property by virtue of the judgment in the former suit for maintenance; that she was residing with their minor child on the property, and that she recorded a homestead thereon, May 18, 1943, a copy of which is attached to the cross-complaint as "Exhibit A." She thereupon prayed that the petition for partition and sale be denied and asked the

court to vest the homestead in her. Mr. Krier answered the cross-complaint, admitting the recording of the homestead, but alleging that it was terminated by the Nevada decree of divorce, and by the judgment in the suit for separate maintenance.

Upon the findings in this partition suit that the defendant and cross-complainant, Lillian Krier, held a \$500 community interest in the property, that the balance belongs to the plaintiff, that the prior judgment in the maintenance suit is *res judicata* of the wife's homestead interest in the property, that the homestead was terminated by the judgment in that case, and that partition of the property could not be made without substantial prejudice to the parties, it was held to be necessary to sell the property. Judgment was accordingly rendered to the effect that the homestead was terminated by the judgment in the maintenance suit which became *res judicata* of that issue, and that the defendant and cross-complainant was entitled to no more than her \$500 community interest in the property. The property was thereupon ordered to be sold. From that order of sale the defendant has appealed.

[1] The declaration of homestead filed by Lillian Krier May 18, 1943, before the decree of divorce was rendered, was originally valid regardless of whether it was recorded on her husband's separate property or upon property in which she had a community interest as a joint tenant thereof. (Civil Code, sec. 1238.) The homestead declaration complied in every respect with the provisions of Section 1263 of the Civil Code. It was recorded by her while she was the wife of M. H. Krier, before the Nevada decree of divorce was rendered. She continued to live on the premises with their minor daughter after her husband left the home. The homestead was not invalid, nor was it abandoned.

[2] In California valid homestead may not ordinarily be terminated by means of a suit for partition and sale thereof. *Walton v. Walton*, 59 Cal.App.2d 26, 138 P.2d 54; *Lang v. Lang*, 182 Cal. 765, 190 P. 181; 20 Cal.Jur. 611, sec. 25. This is especially true where the rights of minor children are involved in the homestead, regardless of whether it is recorded on the separate property of the husband or upon the community interests of the spouses. Civil Code, sec. 1238. It follows, under the

circumstances of the present case, in which the original validity of the homestead is conceded, that the suit for partition and sale thereof will not lie, unless the prior judgment in the action by the wife for separate maintenance is *res adjudicata* and that it had the effect of terminating the homestead. We are persuaded that judgment was not *res judicata*.

In the case of *Walton v. Walton*, *supra*, which was a suit by the husband for partition and sale of property held by the spouses in joint tenancy, upon which the wife had recorded a homestead in behalf of herself and their minor child after the desertion of the husband, the judgment of the trial court to the effect that the suit for partition and sale of the property would not lie, was affirmed on appeal. While a prior action by the wife for maintenance was pending, the husband brought this suit for partition and sale of the community property. Two days after filing the complaint for partition the wife recorded a homestead on the property. She answered the complaint for partition setting up her homestead as a bar. The suit for maintenance was first tried. In that action judgment was rendered awarding to her the custody of their minor child, and granting her specified sums of money for maintenance and support. Upon that showing the court subsequently held, in the partition suit, that the homestead was valid and that the property was therefore not subject to partition and sale. The court said in that regard [59 Cal.App.2d 26, 138 P.2d 58]:

"It follows necessarily, therefore, that since a husband cannot in any manner, without his wife's consent, destroy a homestead declared by her on property of which he is sole owner, he cannot by an action in partition bring about the destruction of a homestead declared by her on property in which he owns a lesser estate, namely, only a joint tenancy interest."

Section 1240 of the Civil Code provides in that regard:

"The homestead is exempt from execution or forced sale, except as in this title provided." (Italics ours.)

In the *Lang* case, *supra*, the wife recorded a homestead on their community property in behalf of herself and her husband, while they were living together on the property. There were no children as the issue of their marriage involved in

the homestead right. The husband subsequently secured a divorce from his wife, by default, on the ground of her desertion. The complaint failed to mention property rights. It was not alleged there was any community property, and the homestead was not mentioned in the pleadings. In spite of that fact, the final decree set the homestead apart to the husband. The wife thereafter brought suit for partition of the community property. The husband answered her complaint alleging there was no community property since the decree of divorce had assigned the homestead to him. The trial court ordered the partition of the community interests. On appeal that judgment was affirmed. But the Supreme Court held that the divorce court erroneously set the homestead apart to the husband since it was not an issue in the divorce proceeding, no property interests having been pleaded in the complaint. The court said in that regard that "It is a well-established rule that in a default case the relief granted cannot exceed the prayer." (Citing authorities.) [182 Cal. 765, 190 P. 182.] The court further held that the husband, James A. Lang, having left his wife, *and there being no children involved*, he was no longer the head of the family and therefore could not claim his right under the homestead, which was therefore terminated by the decree of divorce. On that theory the subsequent petition of the wife to partition the community property was granted. Apparently the wife waived her homestead right. There is a clear distinction between the facts of that case and the present action. In this case the husband is petitioning for partition and sale of the property. He left his wife and their home. She continued to reside on the property *with their minor child*, and under such circumstances she recorded the homestead. She still lives with that child on the property. The Lang case recognizes the validity of a homestead recorded by the wife *where there are minor children who are interested therein*. The Supreme Court bases its opinion in the Lang case on its statement that "Here, however, the rights of minor children are not involved." Regarding the principle that the homestead is not affected by a decree of divorce which fails to determine property rights, when there are minor children involved, the court said:

"Authority can be found to the effect that where the rights of children are concerned the homestead is not affected by the

divorce where the decree is silent upon the question. *Redfern v. Redfern*, 38 Ill. 509; *Holcomb v. Holcomb*, 18 N.D. 561, 120 N.W. 547, 21 Ann.Cas. 1145; and *Byers v. Byers*, 21 Iowa 268. The cases to this effect are based upon the theory that there is still a head of a family within the meaning of the homestead acts, *and that the children's rights cannot be affected by the quarrels of their parents*. 2 Bishop, Marriage, Divorce and Separation, § 1210. *Here, however, the rights of minor children are not involved*. The only issue of the marriage was a son, who at the date of the entry of the final decree was an adult. It is not contended that defendant had residing with him upon the property in question any of the persons mentioned in section 1261 of the Civil Code upon which a claim could be based that he was the head of a family. No such questions are presented by this appeal." (Italics added.)

The Lang case, therefore, supports the validity of the homestead under the circumstances of this case.

[3-5] The Nevada decree of divorce, which was rendered after the homestead was recorded, did not terminate the homestead. That divorce court did not attempt to determine the property rights between the spouses. It had no jurisdiction of their real property in the State of California. *Taylor v. Taylor*, 192 Cal. 71, 76, 218 P. 756, 51 A.L.R. 1074; 27 C.J.S., Divorce, § 330, p. 1287. The original validity of the homestead having been established, it is presumed to continue in force and the burden was on the cross-defendant in this case to show by satisfactory evidence that it had terminated. *De Haven & Son Hardware Co. v. Schultz*, 122 Or. 493, 259 P. 778. This, he failed to do, unless the fact that Lillian Krier *might have litigated* the validity of her homestead in the maintenance suit renders the judgment in that case *res judicata*.

[6] We are of the opinion the judgment in the suit for separate maintenance did not terminate the prior valid homestead recorded by Lillian Krier and that it is not *res judicata* of that issue. The homestead was neither mentioned nor litigated in that proceeding. It is true that it might have been made an issue, and if so, its validity might have been determined in the suit for maintenance, but it was not. It is apparent from the record in this case that the validity of the homestead was raised

by the pleadings for the first time in this suit for partition and sale of the property. The findings in this case affirmatively determine that "It is true that in said separate maintenance action * * * the plaintiff did not request the Court to set aside said homestead to her." It is further found in this case that the court merely awarded to the wife in the maintenance suit a specified monthly sum as maintenance, a division of certain farm equipment and a community interest to the extent of \$500 in the real property in question. The finding with respect to that "community interest" provides that the judgment in the maintenance action determined merely:

"That plaintiff is hereby awarded one-half of the above described *community property*, as follows: An undivided one-half interest in and to the following described property:

"An interest in the following described real property of the value of \$1,000.00, to-wit: Said property is described as follows: [Describing the real property in question.]"

It is conceded that the foregoing \$500 community interest which was awarded to Lillian Krier in the maintenance suit was her share of community funds which were invested in the property by the spouses during the time of their marriage. That interest had no bearing upon, or application to, the homestead.

[7,8] A suit for separate maintenance does not necessarily involve the determination of the validity of a homestead recorded by one of the spouses. If the homestead is not tendered as an issue, and its validity is not determined in a suit for maintenance, we assume the judgment is not *res judicata* of that subject, and its validity may then be litigated in another action, or it may be a bar to the sale of the property on a partition suit. The same thing is true regarding the failure to determine the property rights of the spouses in a suit for divorce. Property rights may be tendered and determined in a suit for divorce, but where they are neither tendered nor determined therein, they may be litigated in another action. *Callnon v. Callnon*, 7 Cal. App.2d 676, 46 P.2d 988; *Paduweris v. Paris*, 213 Cal. 169, 1 P.2d 986; *Green v. Green*, 66 Cal.App.2d 50, 151 P.2d 679. In the *Callnon* case, *supra* [7 Cal.App.2d 676, 46 P.2d 990] it is said:

"A judgment is *res judicata* only in so far as it is within the issues of the cause in which it is rendered. (Citing authorities.)

"In an action for divorce the parties may seek a determination of their property rights; but, if they elect not to do so, such rights are not deemed adjudicated and are subject to determination in another proceeding. (Citing authorities.)"

In the *Paduweris* case, *supra*, suit was brought by the husband to quiet title to certain real property, after a final decree of divorce had been rendered against him by default. The divorce decree did not mention the property rights. In her complaint for divorce the wife alleged that the spouses owned community property, but the divorce court failed to determine such alleged rights. In response to her husband's contention, in his subsequent suit to quiet title, that the real estate was his separate property to which title was acquired by a previous deed of conveyance from his wife, she contended that the default of her husband in the divorce case constituted an admission on his part that it was community property, and that the divorce decree was therefore *res judicata* of that issue. The trial court found in favor of the husband in the suit to quiet title, determining that the deed was valid and that he was therefore the owner of the property and entitled to its possession. On appeal that judgment was affirmed. The Supreme Court said [213 Cal. 169, 1 P.2d 987]:

"Had the decree found in accordance with said admission, the defendant would have been precluded from proving, in a subsequent action instituted by him, that the property was his separate property on the date to which the adjudication made in the divorce decree related. * * * This result would follow from an application of the general rules governing the conclusiveness of judgments. But an admission made by failure to answer is not the equivalent of an adjudication. *Where the divorce decree fails to determine the property rights of the parties, the husband is not precluded from thereafter showing that the wife had relinquished her community interest pending the divorce action.*"

In 1 Southern California Law Review, at page 166, it is said with respect to the conclusiveness of a decree of divorce upon the property rights of the spouses that:

"There can be no doubt that, as to the specific property put before the court for its decision, the court's judgment is *res judicata*. (Citing *Allen v. Allen*, 1911, 159 Cal. 197, 113 P. 160.) On the other hand, where the question has been placed before the court by the pleadings and a division of the property has been asked for *but the judgment has been silent as to the status of property rights put in issue by the pleadings*, the decree merely awarding a divorce, *it has been held that the decree is not res judicata as to the property rights of the parties.*" (Italics added.)

[9] With respect to the conclusiveness of a former judgment between the parties to a suit, whether it is rendered in a divorce proceeding or in a different action, it is said in Section 68 of Restatement of the Law of Judgments, at page 293 and following, that:

"(1) Where a question of fact essential to the judgment is *actually litigated and determined* by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action. * * *

"(2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action. * * *

"* * * Where the subsequent action is based upon a different cause of action from that upon which the prior action was based, the effect of the judgment is more limited. The judgment is conclusive between the parties in such a case as to questions actually litigated and determined by the judgment. *It is not conclusive as to questions which might have been but were not litigated in the original action.* This is the doctrine of collateral estoppel." (Italics added.)

To the same effect is the case of *Green v. Green*, *supra*.

Section 1911 of the Code of Civil Procedure provides:

"That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." See 15 Cal.Jur., Sec. 190, p. 137.

[10] The rule with respect to the extent to which a former judgment between the same parties is an estoppel to a sub-

sequent suit involving the same subject-matter is concretely stated in *Edmonds v. Glenn-Colusa Irr. Dist.*, 217 Cal. 436, at page 446, 19 P.2d 502, at page 506, as follows:

"A former judgment between the parties to an action is conclusive, in all subsequent actions *involving the same questions*, not only as to matters actually decided in the former controversy, but as to all matters *belonging to the subject of the controversy* and property within the scope of the issues which also might have been raised and determined." (Citing authorities.)" (Italics ours.)

Applying that rule to the present action, it seems clear that the proceeding for separate maintenance did not involve the question of the homestead right. That question was neither pleaded nor determined therein. The only controversy in that proceeding was the question as to how much money the husband should be required to contribute to the support of his wife and their minor child. The court did incidentally determine that the wife held a community interest to the extent of \$500 in the real property. There was no controversy over the homestead. That homestead was neither actually nor necessarily involved in the maintenance suit. It was an entirely different subject matter from those which were litigated, and that judgment therefore did not estop the wife from setting up her homestead claim in this subsequent action for partition and sale of the property.

[11, 12] In this suit for partition and sale of the property, the burden was on the respondent and cross-defendant, M. H. Krier, to prove that the validity of the homestead was placed in issue and actually litigated and determined by the court in the prior suit for maintenance. He failed to sustain that burden. The record in this case contains no evidence upon that subject. In Section 68 of Restatement of the Law of Judgments, at page 306, it is said in that regard:

"Where a later action was brought between the same parties upon a different cause of action, and one of the parties relied upon the prior judgment as conclusive on an issue arising in that action, the burden of proof lay upon him to show that the matter in issue was actually litigated and determined in the prior action; and if the record did not show what was in fact liti-

gated and determined, he could introduce evidence as to the proceedings at the trial in order to show what matters were in fact litigated and determined."

Applying the preceding statements of law to the facts of this case we are impelled to hold that the validity of Lillian Krier's homestead was neither litigated nor determined in the prior suit for maintenance, and that the judgment in that case is not res judicata of that issue in this different cause of action for partition and sale of the property. The court did not find in this action that the homestead was litigated or determined, or even mentioned in the pleading or trial of that case. At least there is no evidence in this case to support the court's conclusion "that said judgment in said separate maintenance action is res judicata."

The judgment for partition and sale of the property is therefore reversed, and the court is directed to render judgment in favor of the cross-complainant validating her homestead thereon.

ADAMS, P. J., and PEEK, J., concur.



72 Cal.App.2d 689

**SOUTHWESTERN INV. CORPORATION
v. CITY OF LOS ANGELES.**

Civ. 14899.

District Court of Appeal, Second District,
Division 1, California.

Jan. 28, 1946.

Rehearing Denied Feb. 14, 1946.

Hearing Denied March 28, 1946.

1. Appeal and error ⇨931(1), 1010(1)

All presumptions, intendments, and inferences are in favor of judgment and all conflicts and discrepancies in the evidence must be resolved on appeal in support of the judgment, and, if there is substantial evidence directly or indirectly tending to support trial court's findings, judgment must be affirmed.

2. Trusts ⇨43(1)

Oral evidence was not admissible for purpose of establishing a trust for dumping rights on behalf of plaintiff on por-

165 P.2d—32

tion of realty acquired by defendant city, where pleadings contained no allegation of mistake and no prayer seeking cancellation or reformation of quitclaim deeds conveying realty to city, and especially where alleged trust was claimed entirely upon agreement of board of public works of defendant city without any showing as to authorization or ratification by city council. Civ.Code, § 1625; Code Civ.Proc. § 1856.

3. Deeds ⇨99

Where, at time of execution of a deed, the grantee executes an instrument in nature of a defeasance, the two must be read as one instrument.

4. Municipal corporations ⇨221

Communications from board of public works, consenting that plaintiff should continue its dumping activities after execution of quitclaim deeds to city conveying its interest in property on which dumping pit was located, were not contemporaneous writings which would be read together with quitclaim deed and be held to constitute one instrument.

5. Municipal corporations ⇨221

Evidence failed to establish that quitclaim deeds executed by plaintiff to defendant city conveying its interest in property on which dumping pit was located were delivered to city solely for purpose of obtaining a cancellation of taxes upon ground under the pit and that thereafter deed was to be invalidated. Code Civ.Proc. § 1963, subs. 15, 19.

6. Escrows ⇨14(1)

Evidence failed to establish that escrow agent delivered plaintiff's quitclaim deeds to defendant city in violation of plaintiff's escrow instructions.

7. Eminent domain ⇨300

Municipal corporations ⇨221

Evidence justified finding that plaintiff's quitclaim deeds conveying to defendant city its interest in property on which dumping pit was located were executed and delivered for full and fair consideration, and that there was no taking of private property by defendant city for public use without just compensation. U.S.C.A.Const. Amend. 5; Const.Cal. art. 1, § 14.

8. Trusts ⇨365(2)

Where there was a delay of more than three years between plaintiffs' delivery of

quitclaim deeds conveying its interest in property on which dumping pit was located to defendant city and filing of action to establish the trust for dumping rights on a portion of realty so conveyed, action was barred by laches.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Southwestern Investment Corporation against City of Los Angeles to establish a trust for dumping rights on a portion of certain realty acquired by defendant city. From a judgment for defendant, the plaintiff appeals.

Affirmed.

James R. Jaffray and Don Lake, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and Bourke Jones and Roger Arnebergh, Asst. City Attys., for respondent.

DORAN, Justice.

The plaintiff has appealed from an adverse judgment in an action seeking to establish a trust for dumping rights on a portion of certain real estate acquired by the City of Los Angeles, known as the Blue Diamond Pit and located at Washington Boulevard and Alameda Street in said city. On May 13, 1927, the plaintiff acquired from the owner, Henry G. Weyse, an exclusive leasehold right to use the pit for dumping purposes until the same should be filled, paying therefor a royalty of 50% of all dumping fees received by plaintiff from third persons. On November 22, 1929, for a consideration of \$175,000, Weyse deeded to the city a 90 foot right of way across the pit for the purpose of extending Washington Boulevard, the plan then being to build a trestle over the excavation. This plan was later abandoned and the city decided to extend the boulevard by filling in the 90 foot right of way across the pit.

The city, on February 11, 1931, acquired from Henry G. Weyse an easement for a roadway around the southerly side of the pit, to be used as a temporary extension of Washington Boulevard. The agreement covering this easement contained a provision that Weyse would be relieved of "any liability arising from the use of said temporary road by the party of the second part" (the city). In March, 1933, soon after this temporary road had been opened

to the public, two men, Benjamin Heaton and Walter Brown, riding in an automobile, drove into the pit and were killed. In a death action by Heaton's widow there was a judgment against Weyse for \$10,000, and on execution sale the pit property was bid in by the widow for \$10,000. An action by Brown's administrator was also pending at this time, but was not brought on for trial. The question was then presented as to the city's liability to Weyse under the indemnity agreement hereinbefore mentioned which relieved Weyse from "liability arising from the use of said temporary road." It was suggested that this liability might not be measured by the amount of the judgment against Weyse, but by the value of the pit property which Weyse might lose as a result of the execution sale, estimated at upward of \$200,000.

"In the latter part of the year 1934," quoting from the Settled Statement of Appeal, "one Clay McCarty made an offer to the City through the Board, which would primarily, relieve the City of such possible liability by the means of the City purchasing, for a consideration of \$25,000, the right to fill the space in the 90-foot right-of-way and necessary slopes across the Pit. * * * As additional benefits to the City, the purchase of these rights at this time would enable the Heaton judgment to be paid, and the Brown case to be compromised." On March 12, 1935, the City Council adopted a resolution accepting the above offer on certain conditions. These conditions included a requirement that in place of the above mentioned right to fill in the 90 foot right of way, the city be granted a fee title "to approximately nine acres of real property adjoining the 90-foot right-of-way," which title, however, should revert to H. G. Weyse when the total area of the pit was brought to the grade of Washington Blvd. In addition to this grant deed from Weyse, the city demanded a quitclaim deed from the Southwestern Investment Corporation and its president, "conveying all their rights in and under the 90-foot right of way and the nine acres to be conveyed by H. G. Weyse," and a release "of all dumping rights within the 90-foot right of way owned by the City across the Pit." Upon the vesting of title in the city the City Real Estate Agent was directed to secure from the Board of Supervisors of the county, a cancellation of all delinquent taxes against the property, amounting to more than \$32,000. A letter report from

Commissioner of Public Works Allan to the City Council, dated October 24, 1934, recommending acceptance of the McCarty offer, says nothing about appellant retaining any dumping rights, but suggests that the city secure a deed or release from appellant "concurring in this transaction," and states that "This would give the City complete jurisdiction of the pit of approximately 400 feet wide, including the present Right of Way owned by the City, and the sole right to fill the pit * * *." (Italics added.)

Pursuant to the proposed settlement an escrow was opened on March 14, 1935, and on April 16, 1935, new escrow instructions were filed which increased the acreage to about 12 acres, covering all of the property north of the temporary roadway. Appellant's contentions are, in part, based upon a letter of April 17, 1935, from the Board of Public Works, stating that the Board "hereby consents" to appellant filling a portion of Parcel C included in the escrow. The record fails to disclose any authorization, ratification, or other action by the City Council in reference to this letter.

A quitclaim deed containing no reservations or exceptions and covering the 12.09 acres contemplated by the amended escrow instructions, was presented to appellant in April, 1935, signed by Southwestern on September 23, 1935, and deposited in escrow on October 29, 1935. Accompanying this quitclaim deed were instructions by Southwestern that the same should be used when the escrow agent could hold for Southwestern the sum of \$8500 together with "a duly authorized letter from the Board directed to the Southwestern setting forth the right of the Southwestern to proceed with its filling operations on the property described in the inclosed quitclaim deed." On November 5, 1935, the Southwestern Investment Corporation modified the above instructions as follows: "That portion of the instructions dated October 29, 1935, wherein the undersigned called for a letter from the Board of Public Works * * * setting forth the rights of the parties to proceed with their filling operations on the property described in the Quitclaim Deed, *are hereby cancelled and no such letter is to be placed in this escrow.*" (Italics added.) The following day, November 6, 1935, Southwestern gave to the escrow agent final instructions reading: "This Quitclaim Deed you are authorized to use in connection with your escrow only

when you can comply with the instructions of the undersigned dated October 29, 1935, which instructions authorized the delivery of a Quitclaim Deed when you could collect for the account of Southwestern Investment Corporation and/or C. C. Bigelow the sum of \$8500.00 in cash. The Quitclaim Deed handed you herewith is under no circumstances to be used unless you can comply with said demand of October 29, 1935." The requirement contained in the original escrow instructions of October 29, 1935, that a letter should be furnished by the Board confirming Southwestern's dumping rights, is marked "Waived," such notation presumably being made by the escrow agent pursuant to Southwestern's amended instructions of November 5, 1935. On November 7, 1935, the escrow was closed, the deeds delivered to the City and the \$25,000 paid over, of which Southwestern and its assignee received \$8500. The deeds were formally accepted by the City Council on November 26, 1935.

Following the close of the escrow by which the City acquired a fee title to the Blue Diamond Pit, the Board of Public Works, under date of December 18, 1935, wrote a letter to appellant and its president stating that the City had acquired all of such pit and that the Board "consents to the Southwestern Investment Corporation filling to the grade of Washington Boulevard, * * * that portion of Parcel 'C' * * * lying southerly 150 feet south of the south line of Washington Boulevard," etc. Again it may be noted that no authorization, ratification or other action by the City Council in reference to the consent embodied in such letter, appears of record. On December 27, 1935, President C. C. Bigelow of Southwestern wrote to appellant's attorneys that "The letter referred to above is not at all satisfactory, and does not state the terms of the agreement, upon which we finally consented to deposit our quit-claim deed in Escrow." President Bigelow further stated that prior to April 1, 1935 city representatives had called at the pit and that: "I told these four representatives * * * that we did not want to quit-claim our rights without having our new rights under the city ownership thoroughly covered by a contract between the City of Los Angeles and our Corporation. Mr. Allan (Commissioner of Public Works) explained that the Board of Public Works could not enter into a contract without authority from the City Coun-

cil, but that the Board of Public Works could and would give us a letter, after the city had acquired title, which would be better than any contract * * *." (Italics added.) The letter also mentions an action by Weyse, the owner, to cancel appellant's lease, certain conferences in September, 1935, and affirms that: "Soon after Mr. Weyse's assurance that the Board of Public Works would give us a letter, worded as we wanted it, we deposited our deeds in the above escrow and about two months afterwards * * * the escrow was closed." This letter was sent to the City Real Estate Agent by appellant's attorneys, and on the letter of transmittal is found the following notation in the handwriting of Commissioner of Public Works Robert M. Allan: "There is very little truth in this letter."

Six months later, on June 10, 1936, the city, relying on the fee title conveyed by the deeds from Weyse and Southwestern, evicted appellant from the pit. Not until December 18, 1938, however, did the appellant institute the present action or any action to protect its alleged dumping rights. After various delays the case was finally tried before a judge sitting without a jury on August 20, 1940, and a judgment rendered against the appellant. A new trial was granted, and on August 24, 1944, after a trial before another judge, a judgment was again entered against the appellant from which judgment the present appeal is prosecuted.

In the language of appellant's brief: "The Southwestern claims that, notwithstanding such quitclaim deeds, only the space needed for such street extension was bought, paid for and acquired by the City, and that possession of the rest of the Pit should be returned." The apparent basis for this claim is found in the amended complaint which alleges: "For the purpose of obtaining a cancellation of the taxes upon the ground under said pit, defendant (the city) requested and obtained a quitclaim of the title to said pit, to be held temporarily and until such cancellation of taxes was obtained, and then to be returned to its maker (appellant)." The prayer is for judgment that "the inclusion of the title to so much of said pit as is not included in the volume requisite to support said street across said pit, be held in trust for plaintiff," that possession of the pit to that extent be restored to plaintiff, and that judgment be awarded for the rea-

sonable value of such portion of the pit used by the city.

The findings of fact were, in substance, that the city had acquired a fee title and all rights of ownership and possession in and to the pit; that there was no fraud, and that appellant's quitclaim deeds were given "for a full and fair consideration." The conclusions of law were that the cause of action was barred by laches, and that appellant was "estopped to deny the terms and provisions of said quitclaim deeds."

The appeal in this case is presented upon what is denominated a "Settled Statement on Appeal," which is of doubtful compliance with the Rules on Appeal, containing, as pointed out by the respondent, "a running statement against the judgment." Nevertheless, the appeal has been considered on its merits, and the voluminous exhibits accompanying the record examined in detail.

[1] Appellant's "Point One on Appeal" is that the findings of fact and conclusions of law adverse to its contentions, "are not justified by the law and the evidence." At the outset, however, as said by the reviewing court in *Miller v. Pacific Freight Lines*, 40 Cal.App.2d 451, 453, 104 P.2d 1069, 1070, "we are confronted with the well-established rule that all presumptions, inferences and inferences are in favor of the judgment of the trial court and all conflicts and discrepancies in the evidence must be resolved on appeal in support of the judgment of the trial court. Where there is substantial evidence directly or indirectly tending to support the findings of the trial court the judgment must be affirmed." That such substantial evidence tending to support the judgment exists in the instant case, there can be no doubt. It is, in fact, difficult to see how any court could arrive at a conclusion different from that reflected by the similar judgments rendered in the two trials of this action.

[2] As said in the respondent's brief: "The deeds by which title to this property passed to the City of Los Angeles speak for themselves; they are clear and unambiguous." "Fraud," according to appellant's own statement, "is not an issue in this case." Nor can any doubt exist that appellant at all times knew exactly what was taking place and recognized the legal effect of its deeds, for it was represented by able counsel. C. C. Bigelow, the president of Southwestern, testified that "he did not set

up any reservation of dumping rights in the quitclaim deed, and that he was acting on the advice of counsel." (Italics added.) Moreover, the pleadings contain no allegation of mistake, nor does the prayer of the complaint seek cancellation or reformation of the instruments in question. In view of this situation and the above evidence considered in connection with the entire record, the conclusion of the trial court that appellant "is estopped to deny the terms and provisions of said quitclaim deeds," finds ample justification.

The claim that a trust should be declared for the purpose of protecting appellant's alleged dumping rights in the pit, is based upon certain representations and negotiations prior to execution of the deeds by Southwestern. However, such negotiations were had, not with the City Council which had authorized the purchase, but with the Board of Public Works, Commissioner Allan of such board, and the City Engineer. In this respect the case is not unlike *Thomas Kelly & Sons, Inc. v. City of Los Angeles*, 6 Cal.App.2d 539, 543, 45 P.2d 223, 225, where the court said: "The generous declaration of the city engineer, who was not authorized to contract for the city, to the effect that because of hardship encountered plaintiff should be paid more than the contract provided, could not be construed as binding upon the city." The record is entirely silent concerning any authorization or ratification by the City Council of the alleged understanding that appellant should be permitted to continue its pit operations. Moreover, appellant's President Bigelow wrote that Commissioner Allan had advised that "the Board of Public Works could not enter into a contract without authority from the City Council." Likewise, Robert F. Witter, City Real Estate Agent, gave similar advice in July, 1935, stating that the escrow instructions could not be amended so as to permit Southwestern to retain its dumping rights without action by the City Council. In the face of these definite statements, appellant saw fit to give to the city absolute deeds containing no reservations of any rights whatsoever.

In *Resh v. Pillsbury*, 12 Cal.App.2d 226, 229, 55 P.2d 264, 266, the court said: "We see no escape from the conclusion that the entire title to these properties passed upon the execution and delivery of these deeds. * * * The oral agreement that during her lifetime the grantor should retain the

rents and profits from the properties was merged in the written instruments and was nullified thereby. Civ.Code, § 1625; Code Civ.Proc., § 1856. Evidence of the oral agreement was not admissible under these circumstances for the purpose of changing the effect of the deeds." In that case, as in this, the plaintiff sought to avoid the effect of the above rules of law by seeking to impress a trust upon the property. Again, in *Johnson v. Ware*, 58 Cal.App.2d 204, 206, 136 P.2d 101, 103, the court held that the rule against defeating the clear and unambiguous provisions of a deed applied even where there is "an inconsistent provision in a contract of purchase pursuant to which the deed was given," and that in the absence of a reformation of the deed, the nature of the title acquired "was determined by the language in the deed and not by the statements in the agreement of purchase."

[3,4] The appellant contends that the communications from the Board of Public Works hereinbefore mentioned, consenting that Southwestern should continue its dumping activities, were contemporaneous writings which "should be read with the deed from the grantor (Southwestern), and the two must be held to constitute one instrument," citing such cases as *Patterson v. Donner*, 48 Cal. 369; *Janes v. Throckmorton*, 57 Cal. 368; *Younger v. Moore*, 155 Cal. 767, 103 P. 221, and *Sledge v. Stolz*, 41 Cal.App. 209, 182 P. 340. While it is doubtless true, as stated in the *Patterson* case, that where at the time of execution of a deed the grantee executes an instrument in the nature of a defeasance, the two must be read as one instrument, none of the cases cited bear any resemblance to the present situation and such cases do not support the appellant's claim. Nor is the quotation from *Downing v. Rademacher*, 133 Cal. 220, 224, 65 P. 385, 386, 85 Am.St.Rep. 160, that "As between the parties * * * there is no such magic in a conveyance of a title in fee, which can be used to do an owner out of his property," of any material assistance.

[5] The appellant insists that the quitclaim deeds in question were delivered to the city solely "for the purpose of obtaining a cancellation of taxes upon the ground under said pit * * *" to be held (by the city) temporarily and until such cancellation of taxes was obtained, and then to be returned to its maker (appellant). Just why either the city or the appellant

should enter into such an obviously fraudulent arrangement, for the purpose of evading taxation, is not explained, nor does the evidence justify such a conclusion. The right of the city to secure a cancellation of the delinquent taxes on the pit property acquired by it from the owner Weyse, which conveyance was concurred in by appellant's quitclaim deeds, was sustained in *City of Los Angeles v. Ford*, 12 Cal.2d 407, 84 P.2d 1042. It is true, as stated by appellant, that Southwestern was not a party to that case. The existence of such litigation does not, however, as appellant seems to infer, provide any corroboration of the contention that the quitclaim deeds were delivered solely for the questionable purpose of having the delinquent taxes cancelled, and that thereafter such deeds were to be invalidated. There is nothing of record in the instant case which in any manner tends to rebut the presumption that "private transactions have been fair and regular" (C.C.P. Sec. 1963 (19), or the corresponding presumption that "official duty has been regularly performed", (C.C.P. Sec. 1963(15).

[6] The delivery of the quitclaim deeds in question appears to have been regularly effected through the usual instrumentality of an escrow. Appellant's amended complaint, upon which the case was tried, contains no attack upon this escrow or the conduct of the escrow agent. On appeal, however, the appellant affirms that "the record shows that the escrow agent delivered Southwestern's deeds to the (City) Real Estate Agent, regardless of Southwestern's escrow instructions of October 29 and November 6, 1935." This point was not an issue in the court below, but even if reviewable, appellant's contention ignores the modified escrow instructions of November 5, 1935, and the exhibits and other evidence indicate that the point is untenable.

[7] Appellant complains of the trial court's finding that the quitclaim deeds were executed and delivered to the city "for a full and fair consideration." It is argued that the \$8,500 received by Southwestern and its assignee pursuant to the escrow instructions, was a mere "pittance" amounting to such a "gross inadequacy of consideration" as to shock the conscience and justify rescission. In support of this argument appellant affirms that the value of the entire pit is at least \$655,000. Two things must be noted, however, in connec-

tion with the contention; first, that appellant's action was not for rescission and cancellation of the deeds, nor for reformation of the instruments; and second, that appellant never owned any part of the pit, its sole right being a leasehold dumping privilege. And, as hereinbefore mentioned, neither fraud nor mistake is an issue in this case.

In reference to the adequacy of consideration respondent calls attention to the fact that the pit property had been sold to the state for taxes, which with penalties amounted to over \$32,000, and that apparently neither Weyse the owner, nor Southwestern the lessee, had funds available to redeem the property. "Moreover," continues the respondent's brief, "an action was pending * * * to cancel plaintiff's lease * * * (Def. Exh. E.). It is thus seen that, instead of plaintiff's leasehold interest being wiped out under a tax sale, or by possible judgment cancelling plaintiff's lease, plaintiff received \$8,500 for quitclaiming its rights, whatever they were." That appellant and its attorneys had weighed these possibilities, cannot well be doubted. The court's finding that there was a full and fair consideration, was fully justified. There is, therefore, no merit in the contention that the transaction violated Amendment V to the Constitution of the United States, and Article I, Section XIV of the California Constitution, which prohibit the taking of private property for public use without just compensation.

[8] The trial court's conclusion that plaintiff's action was barred by laches, is assailed as not justified by the findings and evidence. However, it is to be noted that the evidence showed and the court found that there was a delay of more than three years between the delivery of the quitclaim deeds and the filing of the appellant's action, and the conclusion that laches existed, appears to be justified. The question of laches is however quite immaterial, since the same result, adverse to appellant's claims, must have been arrived at even if the action had been filed immediately after appellant's eviction from the pit.

Appellant's criticism of the other findings of fact and conclusions of law is likewise without merit, as is the contention that the court failed to find upon material issues.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. MORRIS.*

Civ. 15012.

District Court of Appeal, Second District,
Division 2, California.

Jan. 22, 1946.

Rehearing Denied Feb. 7, 1946.

Hearing Granted March 21, 1946.

1. Taxation ☞59

Where only one conclusion might be drawn from undisputed facts, whether real estate broker's salesmen were employees within Unemployment Insurance Act, or independent contractors, was a question of law and not of fact. St.1935, p. 1226, as amended.

2. Master and servant ☞11, 78

The Unemployment Insurance Act is a valid exercise of the police power, is remedial in character, and must be liberally construed to effectuate its purpose. St. 1935, p. 1226, as amended.

3. Master and servant ☞78

The real intent of Unemployment Insurance Act is to accumulate a reserve fund from which benefits can be paid when contributing employees become unemployed, and the contribution or tax is not the essence of the act, but is merely an incident implementing its social and economic purposes. St.1935, p. 1226, as amended.

4. Master and servant ☞78

The provisions of Unemployment Insurance Act should not be whittled down by narrow construction, nor should exceptions not clearly justified by their language be engrafted upon them by judicial interpretation. St.1935, p. 1226, as amended.

5. Master and servant ☞78

The obvious design of Unemployment Insurance Act should not be sacrificed to a literal interpretation of its language, and court must give effect to spirit and purpose of such act as far as possible without doing violence to its clearly expressed provisions to end that public policy as declared by the act may be achieved, and court should not so restrict scope of act as to deprive of its benefits those whom Legislature intended to protect during periods of unemployment. St.1935, p. 1226, as amended.

6. Statutes ☞228

Exemptions from a remedial statute must be strictly construed.

* Subsequent opinion 172 P.2d 497.

7. Statutes ☞179

Generally, Legislature may prescribe definitions of words used in statutes and, when it does so, definitions are binding on courts.

8. Statutes ☞174

The definitions of terms "employment", "services", and "wages", and like terms within Unemployment Insurance Act, are controlling, and in construing the act court must give effect to them to exclusion of dictionary definitions. St.1935 p. 1226, as amended.

9. Statutes ☞179

The commonly used or dictionary definition of a term cannot be substituted for that contained in statute which Legislature has directed shall be used to exclusion of all others.

10. Master and servant ☞5

The orthodox test to determine whether relationship is that of "independent contractor" or "employee" is the right of other party to control and direct persons who perform the services, not merely as to result to be obtained but as to means used to gain the result, and it is not the fact that one party actually directs or controls the other nor the extent of directional control, but it is his potential power to guide and regulate and determine relationship of employer-employee.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

11. Master and servant ☞5

That some freedom of action is permitted in manner in which service is performed, employee choosing his own time to go and return and not be directed where to go or to whom to sell, does not change character of employment if employer retains general supervision over it.

12. Taxation ☞59

The absence of right of direction and control does not necessarily exclude parties or their relationship from operation or scope of Unemployment Insurance Act. St. 1935, p. 1226, as amended.

13. Master and servant ☞5

An "independent contractor" is a person who is engaged in independent occupation, responsible to his principal for result of his operations, and not for means of its accomplishment.

14. Master and servant ◊5

The method of compensation does not determine whether a person is an employee or independent contractor.

15. Taxation ◊59

A real estate broker's salesmen whose sales were subject to broker's confirmation, who were permitted to use desks in broker's office, who carried cards bearing broker's name and place of business, who were not required to devote any specified time in performance of their duties, and who furnished their own telephone and stenographic services, etc., rendered services for broker within Unemployment Insurance Act, and broker's alleged failure to control the salesmen did not change their status from that of "employees" to "independent contractors". St.1935, p. 1226, as amended.

16. Taxation ◊59

The term "wages" is the equivalent of "remuneration", and if one person renders personal service to another, for which he is entitled to remuneration, the relationship is within Unemployment Insurance Act. St.1935, p. 1226, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Remuneration" and "Wages".

17. Taxation ◊59

The method utilized to determine payment to be made for work done is not controlling in determining whether a person is covered by Unemployment Insurance Act. St.1935, p. 1226, as amended.

18. Taxation ◊59

In determining whether a real estate broker's salesmen were employees within Unemployment Insurance Act, it was immaterial that broker issued no sales or instruction manuals or rules, or that salesmen furnished their own business cards and stationery and paid for their stenographic services, where, in performance of their duties in selling broker's property, salesmen were under his direction and control. St.1935, p. 1226, as amended.

19. Master and servant ◊1

One who pays his own expenses while in performance of his duties is an "employee" if employer exercises general control over his work.

20. Taxation ◊59

That real estate broker never prohibited salesmen from selling lands for

other brokers did not make the salesmen "independent contractors" without the coverage of Unemployment Insurance Act where, if salesmen had done so, salesmen and such other brokers would have violated penal provisions of real estate act. St. 1935, p. 1226, as amended; Gen.Laws 1937, Act 112, §§ 2, 9a, 11, 17, 18.

21. Taxation ◊59

An employer cannot evade or avoid provisions of statutes prohibiting broker from paying compensation to any person other than a salesman licensed under him or to another licensed broker, nor can employer destroy relationship of employer-employee within Unemployment Insurance Act by arrangement between himself and his salesman that such relationship does not exist, or by adopting a particular method of doing business in attempt to make his salesman an independent contractor. St. 1935, p. 1226, as amended; Gen.Laws 1937, Act 112, §§ 2, 9a, 11, 17, 18.

On Petition for Rehearing**22. Taxation** ◊59

A real estate broker's salesmen were employees within Unemployment Insurance Act even if broker was engaged solely in sale of his own property where, under Real Estate Act, he could not have compensated salesmen for their services unless they had been licensed as real estate salesmen under him. St.1935, p. 1226, as amended; Gen.Laws 1937, Act 112, §§ 17, 18.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the California Employment Stabilization Commission, successor to California Employment Commission, against Everett Marshall Morris, individually and doing business as State Development Company, to recover contributions, interest, and penalties allegedly due from defendant to plaintiff. From a judgment for defendant, plaintiff appeals.

Reversed.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Eugene L. Wolver and Maurice Gordon, both of Los Angeles, for respondent.

WILSON, Justice.

The only question to be determined is whether, by reason of the provisions of

the statute known as the California Unemployment Insurance Act, Stats.1935, ch. 352, p. 1226, and amendments thereto, real estate salesmen are employees of the real estate broker under whom they are licensed to operate.

This action was brought under the provisions of sections 37, 38, and 44 of said act, St.1937, p. 2054, St.1943, p. 3055, to recover contributions, interest, and penalties alleged to be due and unpaid from defendant to plaintiff. Judgment was for defendant and plaintiff appeals.

During the period covered by this action respondent was a licensed real estate broker doing business under the fictitious name of "State Development Company." He engaged the services of six salesmen and two licensed brokers to sell land owned by him. Both salesmen and brokers operated under oral agreements. Before the salesmen began the performance of their services respondent signed either an application for a salesman's license or a transfer of the salesman's license to himself as the employer-broker. When a salesman terminated his services respondent also signed a transfer of the salesman's license. The salesmen were instructed not to make any misrepresentations. All sales were subject to respondent's confirmation. Respondent furnished contract blanks to the salesmen for their use in making sales. When a sale was made and the payment received from the purchaser, the salesman would deliver the payment to respondent and would receive respondent's check for his commission. Salesmen were permitted to use desks in respondent's office and they used the office in making sales. Salesmen had their prospects come into respondent's office and received their calls there. They carried cards which bore the words "State Development Company" and the address and telephone number of respondent's place of business. If lots were sold on installments the salesmen received a percentage of the deferred payments until the unpaid balance was paid. Respondent did not have any sales instruction manuals or rules directing the manner in which the salesmen were to perform their duties. Salesmen were not required to be present at any given place for any number of hours, and they were not required to devote any specified time in the performance of their duties. They were not assigned to a territory to be canvassed and were not required to follow any sales route or schedule of

calls or to call on any particular number of prospects. Respondent did not furnish the names of prospective customers and the salesmen obtained their own lists, paying for the same. They were not required to submit, and did not submit, any written report and were not required to report at respondent's place of business or to make collections or to attend sales meetings. Respondent did not furnish telephone or stenographic services. The salesmen furnished their own telephones and paid for their stenographic work, stationary, postage, and business cards. Their stenographic work was not done in respondent's office. Some of the salesmen bought and sold lands for themselves other than respondent's property without objection from respondent. No commissions were paid in advance to the salesmen.

[1] The trial court found that the salesmen and brokers were not employees of respondent and that their compensation was received by them as independent contractors. The evidence is uncontradicted and we therefore have to consider whether it sustains said finding or whether, as contended by appellant, the trial court must be required to find on the evidence that said persons were in the employ of respondent and that the compensation received by them was "wages" as defined by the statute. If from the undisputed facts only one conclusion may be drawn, the question whether respondent's salesmen were employees or independent contractors is one of law and not of fact. *Yucaipa Farmers Coop. Ass'n v. Industrial Acc. Com.*, 55 Cal.App.2d 234, 238, 130 P.2d 146. See also *Chapman v. Edwards*, 133 Cal.App. 72, 79, 24 P.2d 211; *Burlingham v. Gray*, 22 Cal.2d 87, 100, 137 P.2d 9.

1. *Purpose of the statute.* Section 1 of the statute declares that large numbers of persons in California do not enjoy permanent employment, and purchasing power is thereby rendered unstable; that private charity and local relief cannot alone prevent the effects of unemployment; and that in order to meet the situation created by excessive unemployment "this act is designed to accumulate a reserve to assist in protecting the public against the social effects of unemployment which may be created in future years." Stats.1935, ch. 352, p. 1226. By amendment in 1939 the legislature declared that the public good and the general welfare of the citizens of the state required the enactment of the statute to establish a system of unem-

ployment insurance providing benefits "for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum." Stats.1939, ch. 564, p. 1967.

[2-6] The statute under consideration is a valid exercise of the police power, is remedial in character, and must be liberally construed to effectuate its purpose. *California Employment Comm. v. Butte County Rice Growers Ass'n*, 25 Cal.2d 624, 630, 154 P.2d 892. It declares the social and economic policy of the state, and its purpose is, by providing the means of avoiding the evil economic effects of unemployment, to give effect to such declared policy. The levy of "contributions," which may be appropriately regarded as taxes under a more euphemistic designation, upon employers and employees is for a more beneficent purpose than merely that of producing revenue. The real design of the act is to accumulate a reserve fund from which benefits can be paid when the contributing employees become unemployed. The contribution or tax is not, as is true of measures designed for revenue purposes only, the essence of the statute but is merely an incident implementing its social and economic purposes. With these purposes in mind the provisions of the statute "should not be whittled down by narrow construction, nor should exceptions not clearly justified by their language be engrafted upon them by judicial interpretation." *California Employment Comm. v. Black-Foxe Military Inst.*, 43 Cal.App.2d Supp. 868, 872, 110 P.2d 729, 732. "The obvious design of the law should not be sacrificed to a literal interpretation" of its language and it is the duty of the court to give effect to the spirit and purpose of such legislation as far as may be possible, without doing violence to its clearly expressed provisions, to the end that the public policy as declared by the legislature may be achieved. *Los Angeles County v. Frisbie*, 19 Cal.2d 634, 639, 122 P.2d 526, 529. The court should not so restrict the scope of the act as to deprive of its benefits those whom the legislature intended to protect during periods of unemployment. Exemptions from a remedial statute must be strictly construed.

[7-9] 2. *Statutory definitions of terms.* The legislature has power, within reasonable limitations, to prescribe definitions of words used in statutes and when it does

so the definitions are binding on the courts. *In re Monrovia Evening Post*, 199 Cal. 263, 269, 248 P. 1017. As defined and used in the statute the terms "employment," "services," and "wages" are broader in meaning and application than under the common law. Such definitions of these and like terms as are found in personal injury cases and in actions arising under other statutes must be disregarded and the definitions in the statute under consideration must be followed. The latter are controlling and in construing the act the court is bound to give effect to them to the exclusion of definitions usually found in dictionaries. *Rideaux v. Torggrimson*, 12 Cal.2d 633, 636, 86 P.2d 826; *Levitt v. Faber*, 20 Cal.App.2d Supp. 758, 762, 64 P.2d 498; *Creameries of America v. Industrial Comm.*, 98 Utah 571, 102 P.2d 300, 302. The commonly used or dictionary definition of a term cannot be substituted for that contained in the statute which the legislature has directed shall be used to the exclusion of all others. *Fox v. Standard Oil Co.*, 294 U.S. 87, 96, 55 S.Ct. 333, 79 L.Ed. 780, 787.

The Unemployment Insurance Act has provided a glossary of terms particularly applicable to its subject matter. The following definitions found therein are pertinent to this discussion: "'Employment' * * * means service, * * * performed for wages or under any contract of hire, written or oral, express or implied." Sec. 6.5, Stats.1937, ch. 739, p. 2052. "'Wages' means all remuneration payable for personal services, including commissions and bonuses and the cash value of all remuneration payable in any medium other than cash." Sec. 11, Stats.1937, ch. 752, p. 2079.

The liability of respondent to contribute to the fund will be resolved by the answers to these questions: (1) Did respondent's salesman render service to him or were they independent contractors? (2) If they rendered personal services were they compensated in "wages" as that term is above defined?

[10-13] 3. *Determination of relationship of employer-employee.* One of the best tests, in fact the orthodox test, to determine whether the relationship is that of an independent contractor or employee is the right of the other party to control and direct the person who performs the services, not merely as to the result to be obtained but as to the means used to gain the

result. It is not the fact that one party actually directs or controls the other, nor the extent of the direction or control, but it is his *potential power* to guide and regulate that determines the relationship of employer-employee. *California Employment Comm. v. Los Angeles Down Town Shopping News Corp.*, 24 Cal.2d 421, 425, 150 P.2d 186; *Baugh v. Rogers*, 24 Cal.2d 200, 206, 148 P.2d 633, 152 A.L.R. 1043; *Burlingham v. Gray*, 22 Cal.2d 87, 99, 137 P.2d 9; *Press Publishing Co. v. Industrial Acc. Comm.*, 190 Cal. 114, 121, 210 P. 820; *S. A. Gerrard Co. v. Industrial Acc. Comm.*, 17 Cal.2d 411, 414, 110 P.2d 377. The fact that a certain amount of freedom of action is permitted in the manner in which the service is performed, the employee choosing his own time to go and return and not being directed where to go or to whom to sell, does not change the character of the employment if the employer retains general supervision over it. *Burlingham v. Gray*, *supra*, 22 Cal.2d at page 100, 137 P.2d 9; *Riskin v. Industrial Acc. Comm.*, 23 Cal.2d 248, 253, 144 P.2d 16; *Easton v. Industrial Acc. Comm.*, 34 Cal.App. 321, 328, 167 P. 288; *May v. Farrell*, 94 Cal.App. 703, 710, 271 P. 789; *Cameron v. Pillsbury*, 173 Cal. 83, 86, 159 P. 149; *Curcie v. Nelson Display Co.*, 19 Cal.App.2d 46, 50, 64 P.2d 1153. The right to terminate the relationship without liability is but another way of stating the right to discharge immediately, and this means the right of control. *Hillen v. Industrial Acc. Comm.*, 199 Cal. 577, 582, 250 P. 570; *Chapman v. Edwards*, 133 Cal.App. 72, 77, 24 P.2d 211; *Riskin v. Industrial Acc. Comm.*, *supra*. But the absence of the right of direction and control does not necessarily exclude the parties of their relationship from the operation or scope of the statute. *Singer Sewing Machine Co. v. Industrial Comm.*, 104 Utah 175, 134 P.2d 479, 485, rehearing denied 104 Utah 196, 141 P.2d 694. An independent contractor is a person who is engaged in an independent occupation, responsible to his principal only for the result of his operations and not for the means of its accomplishment. *California Employment Comm. v. Los Angeles Down Town Shopping News Corp.*, 24 Cal.2d 421, 424, 150 P.2d 186.

[14] The method of compensation does not determine whether a person is an employee or an independent contractor. An agent selling real estate for a commission,

paying his own expense, but under the general control of his principal, was held to be an employee. *Brown v. Industrial Acc. Comm.*, 174 Cal. 457, 461, 163 P. 664. Where the owner of a building engaged another to make alterations thereon under an agreement whereby the latter's compensation was to be a percentage of the cost of the labor and materials used in the work, the latter was held to be an employee of the owner and not an independent contractor. The owner had the right to discharge the other person at any time and exercised control over the construction work. *Charles R. McCormick Lumber Co. v. O'Brien*, 90 Cal.App. 776, 781, 266 P. 594.

[15] Respondent was, by the express provisions of the statute, the director of the operations of his salesmen and they were legally under his control. They could not act independently nor under the orders of others. Respondent's failure, if he did fail, to exercise the duty imposed on him by law to control and direct them did not change their status from that of employees to independent contractors.

[16,17] The term "wages" is the equivalent of "remuneration." If one person renders personal service to another for which he is entitled to remuneration the relationship is within the act. *Singer Sewing Machine Co. v. Industrial Comm.*, *supra*. "Wages may be measured by time, by the piece, or by any other standard." *La Franchi v. Industrial Acc. Comm.*, 213 Cal. 675, 676, 3 P.2d 305, 306. Drivers of delivery trucks are employees where their compensation for delivering merchandise to customers consists of the difference between the amount charged them for the merchandise and the amount they receive from their customers. *Sisk v. Arizona Ice, etc., Co.*, 60 Ariz. 496, 141 P.2d 395, 397; *Jack and Jill, Inc., v. Tone*, 126 Conn. 114, 9 A.2d 497, 499. In *Northern Oil Co. v. Industrial Comm.*, 104 Utah 353, 140 P.2d 329, 333, solicitors for the sale of corporate stock, working under division managers and receiving a commission on sales, the percentage being more if they were present when the sale was consummated than if absent, were held to be in "employment" under the statute. The method utilized to determine the payment to be made for the work done is not of controlling significance. A workman who is not on the payroll, but is paid by the piece or quantity, is in the relationship of em-

ployee. *Caraher v. Sears, Roebuck & Co.*, 124 Conn. 409, 414, 200 A. 324, 327.

[18,19] No importance attaches to the fact that respondent issued no sales or instruction manuals or rules, nor to the arrangement whereby the salesmen furnished their own business cards and stationery and paid for their stenographic services. In the performance of their duties in selling respondent's property they were under his direction and control. One who pays his own expenses while in the performance of his duties is an employee if the employer exercises general control over his work. *Hall v. Sera*, 112 Conn. 291, 295, 152 A. 148, 150.

[20] The fact, testified to by respondent, that he never prohibited salesmen from selling lands for other brokers, does not make the salesmen independent contractors. If they had done so both they and the other brokers would have violated the penal provisions of the Real Estate Act herein-after quoted.

4. *Effect of the provisions of the Real Estate Act.* The relationship between respondent and his salesmen of employer and employees is definitely established by the following provisions of the California Real Estate Act, as the same read during the period of respondent's operations, 1 Deering's Gen.Laws, 1937 Ed., Act 112, p. 30 (emphasis added): A real estate broker is a person "who, for a compensation, sells or offers for sale, * * * real estate, * * * for another or others." Sec. 2. A real estate salesman is "one who for a compensation is *employed* by a licensed broker to sell, or offer for sale, * * * real estate, * * *." Sec. 2. An applicant for a salesman's license shall state in his application "the name and place of business of the person * * * then *employing* him, or in whose *employ* he is to enter." Sec. 9a. The salesman's license shall be displayed in the office of the real estate broker; the salesman cannot do business except from the location stipulated in the license; "the salesman's license shall remain in the possession of the licensed broker *employer* until canceled or until said licensee shall leave the *employ* of said broker"; immediately upon the salesman's withdrawal from the *employ* of the broker, the latter shall return the salesman's license to the commissioner for cancellation. Sec. 11. It is declared to be a crime for any person to act as a real

estate salesman without a license. Sec. 17. And it is made unlawful for any licensed broker to pay any compensation to any person who is not a licensed broker, or a salesman licensed under the broker paying the compensation, or for any real estate salesman to be *employed* by or to accept compensation from any person other than the broker under whom he was at that time licensed. A licensed broker is forbidden to *employ* or compensate, directly or indirectly, any person for performing any of the acts specified in section 2 who is not a licensed broker or who is not a salesman licensed under the broker *employing*, or paying the compensation to, such person. Sec. 18.

These provisions of the Real Estate Act vest in the broker the right and power of control over the salesmen and the brokers working under him. He is the employer, they the employees. A salesman cannot obtain an independent or general license but must be licensed under the broker by whom he is *employed*; he can do business only from the office of and can work for no one other than the broker *employer*. By reason of the statutory provisions the salesman is never a free agent. He cannot delegate his duties and can do no independent act. He is at all times subservient to the will of the broker and is under the latter's control, direction, and authority. He cannot represent to the public that he is in business for himself. His sales must be made in the name of the broker under whom he is licensed. He is forbidden to accept compensation for making sales from any person other than the broker. When the jurisdiction of the broker to direct the acts of his salesman ceases the latter ceases to be a salesman; he can make no sales and can receive no compensation. The relationship of broker-employer and salesman-employee may be terminated at the will of either party, and in the instant case respondent had the right to discharge his salesmen at any time without liability.

Where real estate salesmen worked under a broker as provided by a statute regulating real estate brokers, and had the right to sell only property listed with the broker, receiving their commissions from him and having no right to collect commissions from the owners of property sold, they were held to be employees of the broker and the commissions were denominated "wages" under the statute. *Babb & Nolan*

v. Huiet, 67 Ga.App. 861, 21 S.E.2d 663, 667. In Lowmiller v. Monroe, Lyon & Miller, Inc., 101 Cal.App. 147, 151, 281 P. 433, 282 P. 537, the court held that a real estate salesman, licensed under a broker, was an employee and that any attempt to create for him the status of independent contractor or broker would have been in violation of the penal provisions of the statute.

In 1938 the Bureau of Internal Revenue ruled that real estate salesmen who were engaged in the sale of real estate for a broker, their remuneration consisting entirely of commissions on sales made by them, and who were prohibited by law from performing services for any broker other than the one with whom they were registered, were not employees of the broker for the purpose of the Social Security Act. S.S.T. 346, Cum.Bul. 1938-2, p. 300. This regulation was declared to be erroneous and was revoked in April, 1943. Mim. 5504, Cum.Bul.1943, p. 1066. In the latter ruling the Bureau held that the salesman's function is to represent the broker and whatever business he transacts is the business of the broker; that regulatory laws in most of the states contemplate that a salesman is not privileged to engage in his occupation independently nor in the course of his own business but only as his activities may be related to and under the supervision of a licensed broker; that the salesman is not obligated to achieve a certain result and he has no delegable duties. It is further stated that although it is not feasible for a broker to exercise complete control over all of the physical activities of his salesmen, nevertheless, under the customs and practices and usual agreements, the broker has the right to control the means and methods of such services as the salesmen undertake to perform on behalf of the broker.

5. *Cases distinguished.* Nothing is found in the cases cited by respondent that sustains his contention. In Royal Indemnity Co. v. Industrial Acc. Comm., 104 Cal.App. 290, 285 P. 912, the alleged employee did not obtain a salesman's license under the broker but operated as an independent broker under his own license. 104 Cal.App. at page 296, 285 P. at page 914. In Firpo v. Murphy, 72 Cal.App. 249,

254, 236 P. 968, it is held that a broker is not entitled to a commission when the transaction is handled by a salesman who is not licensed under the broker as required by law. Koeberle v. Hotchkiss, 8 Cal.App.2d 634, at page 640, 48 P.2d 104, at page 107, held that a broker who was licensed when his services were performed was entitled to maintain an action to recover his compensation although he did not hold a license at the time the cause of action arose. Gray v. Horne, 48 Cal.App. 2d 372, 373, 119 P.2d 779, holds that the services described in the complaint were not those required to be performed by a licensed broker. The cases arising under the workmen's compensation laws do not lend aid in solving the instant case by reason of material differences in the nature and purpose of the statutes and the variances in their details.

[21] An employer cannot evade or avoid the specific provisions of the statute declaring it to be unlawful for a broker to pay compensation to any person other than a salesman licensed under him or to another licensed broker, Real Estate Act, sec. 18, supra, nor can he destroy the relationship of employer-employee by an agreement or arrangement between himself and his salesman that such relationship does not exist, or by adopting a particular method of doing business in an attempt to make his salesman an independent contractor.

The finding that the salesmen and brokers working under respondent were not his employees is not sustained by the evidence.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.

On Petition for Rehearing.

PER CURIAM.

[22] Even though respondent was engaged solely in the sale of his own property, he could not have compensated his salesmen for their services unless they had been licensed as real estate salesmen under him as a real estate broker. In the absence of such licenses it was unlawful for him to pay and for them to accept compensation. Real Estate Act, secs. 17 and 18.

The petition for rehearing is denied.

72 Cal.App.2d 728

PEOPLE v. BASKINS et al.

Cr. 3943.

District Court of Appeal, Second District,
Division 2, California.

Jan. 29, 1946.

1. Homicide ⇨256

In prosecution for having solicited another to commit and join in commission of murder, where person allegedly solicited testified as to the solicitation, testimony of two other witnesses that defendants solicited such witnesses to commit murder satisfied the statutory requirement that such crime must be proved by testimony of two witnesses or of one witness and corroborating circumstances. Pen.Code, § 653f; Code Civ.Proc. § 1839.

2. Criminal law ⇨562

Under statute requiring that offense of soliciting another to commit certain crimes including murder must be proved by testimony of two witnesses or of one witness and corroborating circumstances, the corroborating evidence need not be strong nor even sufficient in itself, without the aid of other evidence, to establish the fact. Pen.Code, § 653f.

3. Criminal law ⇨507(1)

In prosecution for having solicited another to commit and join in the commission of the crime of murder, the person allegedly solicited was not an "accomplice." Pen.Code, §§ 653f, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

4. Criminal law ⇨507(1)

An accomplice must stand in the same relation to the crime as the person charged therewith and must approach it from the same direction, and similarity of offense is not the same as identity. Pen.Code, § 1111.

5. Criminal law ⇨829(3)

In prosecution for having solicited another to commit and join in the commission of the crime of murder, instruction given sufficiently covered subject of corroboration and rendered unnecessary instructions requested by defendant and refused. Pen. Code, § 653f; Code Civ.Proc. § 1839.

6. Criminal law ⇨829(1)

A defendant is not entitled to repetitive instructions on the same subject when it has been sufficiently and properly covered by an instruction given by the court.

7. Homicide ⇨307(3)

In prosecution for having solicited another to commit and join in the commission of crime of murder, refusing requested instruction defining manslaughter was not error. Pen.Code, § 653f.

8. Homicide ⇨307(3)

In prosecution for having solicited another to commit and join in the commission of the crime of murder, requested instruction that to make a crime a murder, party must die within a year and a day after the stroke is received or cause of death administered had no reference to any issue in case and was properly refused. Pen.Code, § 653f.

9. Criminal law ⇨800(4)

Where a person is charged with soliciting another to commit or to join in commission of any of the offenses specified in statute, the jury should be given an instruction defining the offense alleged to have been solicited. Pen.Code, § 653f.

10. Criminal law ⇨1186(4)

In prosecution for having solicited another to commit and join in the commission of the crime of murder, failure to give requested instruction defining murder was not reversible error, in view of evidence. Pen. Code, § 653f; Const. art. 6, § 4½.

11. Criminal law ⇨1163(1), 1186(4)

Prejudice cannot be presumed from mere fact of error, and to justify reversal of conviction it must affirmatively appear to satisfaction of appellate court from inspection of entire record, including evidence, that accused may well have been substantially injured by the error of which he complains, and, unless appellate court can say after such examination that miscarriage of justice has resulted, judgment must be affirmed. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County, Clement D. Nye, Judge.

Beatrice Baskins and Carrier Broussard were convicted of having solicited another

to commit and join in the commission of the crime of murder, and they appeal.

Affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan and Robert Wheeler, Deputy Dist. Atty., all of Los Angeles, for respondent.

WILSON, Justice.

Defendants were charged under section 653f of the Penal Code with having solicited Henry Davis to commit and join in the commission of the crime of murder of one John R. Baskins. They were tried by a jury and convicted. Each defendant made a motion for a new trial based upon all statutory grounds and said motions were denied.

Defendants' appeal is upon two grounds: (1) The insufficiency of the evidence; (2) prejudicial error of the court in refusing to give instructions requested by defendants.

1. *Sufficiency of the evidence.* Henry Davis, the person alleged to have been solicited to commit the murder, testified that he rented a room from appellant Mrs. Broussard. Shortly thereafter he was introduced by Mrs. Broussard to her sister, appellant Mrs. Baskins, the latter then being the wife of the person whose murder was sought. He related conversations with both appellants in which they asked him if he would kill Baskins. The witness testified that Mrs. Broussard offered him \$600 and showed some bonds as evidence that she was able to pay him. Davis not having been acquainted with Baskins, Mrs. Baskins gave Davis a picture of her husband so that he could be identified. Baskins was killed, but the record does not show who committed the murder.

Another witness who roomed at the Broussard home testified that Mrs. Broussard asked him to kill Baskins and offered him several hundred dollars if he would do so. A third witness, who was also a roomer at Mrs. Broussard's house, testified that Mrs. Baskins asked him if he would get someone to kill Baskins or do so himself, offering to pay him therefor. Both appellants, testifying in their own behalf, denied that they had ever requested Henry Davis or any other person to kill Baskins.

[1,2] Section 653f of the Penal Code provides that the offense of soliciting another to commit one of the crimes named in said section "must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances." Corroborative evidence is additional evidence of a different character, to the same point. Code Civ.Proc. sec. 1839. The testimony of the two witnesses other than Davis was of a different character but to the same point as that of Davis, and satisfies the requirement of said section of the Penal Code. *People v. Tolmachoff*, 58 Cal.App. 2d 815, 822, 138 P.2d 61; *People v. Wymer*, 53 Cal.App. 204, 206, 199 P. 815; *People v. Helmlinger*, 69 Cal.App. 139, 142, 230 P. 675; *People v. Knocke*, 94 Cal.App. 55, 64, 270 P. 468; *People v. Foillette*, 74 Cal.App. 178, 204, 240 P. 502. The corroborative evidence need not be strong nor even sufficient in itself, without the aid of other evidence, to establish the fact. *People v. Tinnin*, 136 Cal.App. 301, 305, 28 P.2d 951; *People v. Martin*, 19 Cal.App. 295, 301, 125 P. 919.

[3,4] The witness Henry Davis was not an accomplice. An accomplice is one "who is liable to prosecution for the identical offense charged against the defendant on trial * * *." Penal Code, sec. 1111. He could not have been prosecuted for soliciting another to commit the crime of murder. He did not solicit nor did he join with appellants in the solicitation of any person to commit a crime. An accomplice must stand in the same relation to the crime as the person charged therewith and must approach it from the same direction. Similarity of offenses is not the same as identity. *People v. Galli*, 68 Cal.App. 682, 684, 230 P. 20. Davis not having been an accomplice, and his evidence having been corroborated by that of two other witnesses who testified that the appellants solicited them to commit the murder, the evidence answers the demand of section 653f.

2. *The refusal to give certain instructions to the jury.* Appellants claim that the court committed prejudicial error in refusing to give certain instructions:

[5,6] (a) Two instructions requested and refused related to the corroboration of evidence as follows: (1) "The law does not permit a Defendant to be convicted in an offense of this nature upon the uncor-

roborated testimony of a single witness. Corroborative circumstances must in and of itself, and independent of the testimony of the witness, tend to inculcate the Defendant on trial with the commission of the offense." (2) "Corroborative circumstances are insufficient where it merely casts a grave suspicion upon the accused, and corroborative circumstances must not only show the commission of the offense and the circumstances thereof, but must also implicate the accused in it." The court did, however, instruct the jury as follows: "The offense charged in the information must be proved by the testimony of two witnesses or one witness and corroborating circumstances. Such corroborating circumstance may be shown by the acts, declarations or conduct of the defendants, or any circumstance independent of the testimony of the one witness who has testified to the fact, which in and of itself tends to connect the defendants with the commission of the offense charged." The instruction given sufficiently covered the subject of corroboration and rendered unnecessary the two instructions requested by appellants and refused. A defendant is not entitled to repetitive instructions on the same subject when it has been sufficiently and properly covered by an instruction given by the court.

[7] (b) It was not error to refuse the instruction defining manslaughter. In a trial for homicide it is frequently necessary to define murder and manslaughter, but appellants were not charged with that crime. Nor were they charged with having solicited Davis to commit the crime of manslaughter. The solicitation of the commission of the latter crime is not declared by section 653f of the Penal Code to be an offense.

[8] (c) Appellants requested an instruction that to make a crime a murder the party must die within a year and a day after the stroke is received or the cause of death administered. Since appellants were not charged with murder, the requested instruction had no reference to any issue in the case.

[9,10] (d) Appellants requested this instruction: "Murder is the unlawful killing of a human being with malice aforethought." We agree with and adopt the following statement contained in respondent's brief:

"When a person is charged with soliciting another person to commit or to join in the commission of any of the offenses specified in section 653f of the Penal Code the jury should be given an instruction defining the offense alleged to have been solicited so that the jury may determine from the evidence whether or not the designated offense was solicited by the person charged." However, the failure in this case to give the requested instruction is not reversible error. The question before the jury was not whether a murder had been committed but whether appellants had solicited Davis to commit a murder. The crime was complete even though the intended victim had never been harmed.

[11] The former rule that prejudice is presumed from an error of law has been abrogated by the adoption of section 4½ of Article VI of the Constitution. *People v. Chapman*, 55 Cal.App. 192, 201, 203 P. 126. Injury or prejudice cannot be presumed from the mere fact of error. To justify a reversal of a judgment of conviction it must affirmatively appear to the satisfaction of the appellate court from an inspection of the entire record, including the evidence, that the accused may well have been substantially injured by the error of which he complains, and unless the appellate court can say, after such examination, that a miscarriage of justice has resulted the judgment must be affirmed. *People v. Watts*, 198 Cal. 776, 793, 247 P. 884; *People v. Hoffman*, 199 Cal. 155, 162, 248 P. 504; *People v. Stefani*, 114 Cal.App. 530, 533, 300 P. 112.

The jury was not misled upon any issue vital to the defense, and no prejudice resulted to appellants by the failure of the court to give the instruction. It appears clearly from the evidence that appellants were guilty of the crime charged and that the failure of the court to give the requested instruction defining murder did not result in a miscarriage of justice. *People v. Lawlor*, 21 Cal.App. 63, 71, 131 P. 63; *People v. Graves*, 137 Cal.App. 1, 21, 29 P.2d 807, 30 P.2d 508 (opinion of supreme court denying a hearing); *People v. Fellows*, 63 Cal.App. 557, 561, 219 P. 80.

The judgment and the order denying a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

72 Cal.App.2d 832

HALSTEAD v. HALSTEAD.

Civ. 12924.

District Court of Appeal, First District,
Division 1, California.

Feb. 4, 1946.

1. Army and navy ☞34

Under the Soldiers' and Sailors' Civil Relief Act, court is vested with discretion as to whether it should vacate or stay an attachment. Soldiers' and Sailors' Civil Relief Act of 1940, § 203, 50 U.S.C.A. Appendix, § 523.

2. Army and navy ☞34

Where application was made for discharge of attachments issued in action against member of Armed Forces, trial court ordering that all proceedings under writs of attachment be stayed, fully complied with mandatory requirements of Soldiers' and Sailors' Civil Relief Act. Soldiers' and Sailors' Civil Relief Act of 1940, § 203, 50 U.S.C.A. Appendix, § 523.

3. Attachment ☞1

Where plaintiff had alleged in her complaint that defendant was obligated to plaintiff on a written contract in amount of approximately \$3,000 which was due and unpaid, and obligation was unsecured and plaintiff filed affidavit and furnished good and sufficient undertaking in support of attachment, writs of attachment issued, not as precepts emanating from exercise of judicial favor or discretion, but as writs of right. Code Civ.Proc. §§ 537-539.

4. Attachment ☞1

The usual and main purpose of an attachment is to secure and insure the payment of any judgment that may be recovered in the successful prosecution of an action.

5. Army and navy ☞34

Where plaintiff alleged in her complaint that defendant was obligated to her on written contract in sum of approximately \$3,000 which was then due and unpaid, and obligation was unsecured, and plaintiff qualified herself for issuance of writ of attachment by substantial compliance with statute but application for discharge of attachment was made on behalf of defendant who was a prisoner of war, action of court in denying the application and in ordering

that all proceedings under the writs of attachment be stayed, was proper. Code Civ. Proc. §§ 537-539; Soldiers' and Sailors' Civil Relief Act of 1940, § 203, 50 U.S.C.A. Appendix, § 523.

Appeal from Superior Court, San Francisco County; I. L. Harris, Judge.

Action by Margaret Halstead against Earl T. Halstead for breach of a written agreement wherein Clarice Halstead filed an application for discharge of attachments. From an adverse order, Clarice Halstead appeals.

Affirmed.

C. Huntington Jacobs, of San Francisco, for appellant.

Simeon E. Sheffey and Naomi Hammond, both of San Francisco, for respondent.

ATTERIDGE, Justice pro tem.

This is an appeal from an order denying appellant's application to vacate, i. e., discharge, two attachments which had been levied pursuant to the requirements of two antecedently issued writs commanding such action. All proceedings taken in relation to the issuance of the writs and the levies made pursuant thereto were regular and legal.

In May, 1942, plaintiff Margaret Halstead brought an action against her former husband, Earl T. Halstead, for his alleged breach of his written agreement to pay to her monthly a minimum sum of \$50. The agreement further provided for an increase in such monthly payments in the ratio in which Earl T. Halstead's pay should increase while serving as an officer in the United States Army. The agreement was entered into in September, 1932, and was also embodied in a decree of divorce obtained by the parties in October, 1933. Mr. Halstead was then an army lieutenant. In her complaint plaintiff alleged that defendant was then in default upon his said contractual obligation in an amount approximating \$3,000. The first writ of attachment was issued contemporaneously with the filing of said complaint, and an alias writ was issued on December 6, 1943. The items of property attached were two bank accounts. In the interval between the two levies, appellant and applicant, Clarice Halstead, who is Halstead's second wife, had by her withdrawals from the bank account last attached

in point of time depleted the same from an amount in excess of \$1,500 to the sum of \$5.

At the time when the action was commenced in 1942, and at all times subsequent thereto until his very recent liberation, Halstead was a prisoner of war of the Japanese armed forces on Tai Waen Island, in or near the Pacific theater of World War II, and he was also at all of said times a member of the United States Army with the rank therein of lieutenant colonel. His present wife, Clarice Halstead, filed the hereinbefore-referred-to application for the discharge of said attachments, alleging that she did so in behalf of Colonel Halstead, and in claimed pursuance of the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. Appendix § 501 et seq., and the particular provision upon which she premises her claim for the said requested action is section 523 of Title 50, U.S.C.A. Appendix (sec. 203 of the act). She similarly prosecutes this appeal in his behalf, but had no specific or other personal authorization from him to take either of said steps. Her contention on this appeal is that under the evidentiary facts before it, and under the above-specified section of said last-mentioned act, the trial court had no discretion except to grant her application. Not only does she contend that the trial court abused its discretion in denying the application, but she further, in effect, contends that it had none. It will presently appear that both contentions are without merit.

Section 203 of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A. Appendix § 523, reads as follows:

"In any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the court may, in its discretion, on its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service—

"(a) Stay the execution of any judgment or order entered against such person, as provided in this Act; and

"(b) Vacate *or* stay any attachment *or* garnishment of property, money, or debts in the hands of another, whether before *or* after judgment as provided in this Act." (Italics added.) (N.B. Only the last-

quoted subdivision "b" of the section is *appertinent* to *or* involved on this appeal.)

[1,2] It is first to be observed that it clearly appears with unmistakable certainty that the said subdivision "b" of the statute sets up on its very face and confers upon a trial court a most definitely stated discretion to itself elect whether or not it shall, even in a proper case, "vacate" *or* "stay" an attachment. Under the statute a court which had acted in accord with either one of said alternatives certainly could not be commanded to act in the other, nor could its said action in so doing be annulled by writ of review. In the present instance the trial court did act in precise accordance with the requirements of the statute by ordering that *all* proceedings under the writs of attachment be stayed,—and thereby fully complied with the only mandatory requirement of the statute in cases where any action is called for. On this appeal appellant's counsel stated that he had been unable to find any judicial precedent interpretative of the statute which recognized any discretion in a trial court to deny such an application. The reason for his inability in this respect is obvious,—the statute is itself so clear that it is difficult to perceive how anyone could reasonably question the existence of the discretion it so plainly sets up on its very face. For this reason alone there has been a dearth of precedents in that respect. The existence of such a discretion, however, is expressly recognized in the case of *Shaffer v. Shaffer*, 69 Ohio App. 447, 42 N.E.2d 176, 178, where the court states: "The 5th ground of the motion [to discharge an attachment] is that the defendant is in military service on active duty." In its disposition of this ground, the reviewing court said: "The [Soldiers' and Sailors' Civil Relief] act further vests discretion in the trial judge to vacate *or* stay any attachment as therein provided. The act did not in the situation here presented require the court to discharge the attachment on this ground of the motion." (Italics added.)

The nature and extent of the wide discretion which is generally vested in trial courts in passing upon various motions made under the Soldiers' and Sailors' Civil Relief Act of 1940 has been heretofore the subject of extensive consideration by this court in *Johnson v. Johnson*, 59 Cal.App.2d 375, 139 P.2d 33, and in referring to the act generally on page 383 of 59 Cal.App.2d, on page 37 of 139 P.2d, the court, speaking

through its Presiding Justice, declared: "The Congress determined that, in considering the rights of all concerned, they could all be best protected, including the rights of those in the service, by vesting a wide discretionary power in the trial courts of the nation. It was believed that the rights of those in service would be adequately protected by the trial judges who, in each case, could determine whether the service man's rights would be adversely affected by the fact of his service. The Congress also determined that the rights of civilian litigants must also be considered."

[3, 4] The last-above-quoted sentence is especially apposite to the present appeal, when consideration is given to the nature of the rights of the present parties as they appeared to the trial judge in determining the motion to vacate the attachments. Plaintiff had alleged in her complaint that the defendant was obligated to her upon a written contract in the sum of approximately \$3,000, which was then due and unpaid. The obligation was unsecured. These factors entitled her to a writ of attachment. Code Civ.Proc. sec. 537. She further had qualified herself for the issuance of the writ by substantial compliance with sections 538 and 539 of the Code of Civil Procedure by the filing of the therein prescribed affidavit and by furnishing a good and sufficient undertaking in support of the attachment. Under the given circumstances, these writs issued, not as precepts emanating from the exercise of judicial favor or discretion, but as writs of right. The usual and main purpose of an attachment is to secure and insure the payment of any judgment that may be recovered in the successful prosecution of an action. As early as 1851 the second Legislature assembled in California saw fit to enact into law, and to grant to unsecured creditors whose demands arose from contracts, the provisional and summary remedy known as "attachment" proceedings in order to insure that the ends of successful litigation should not be fruitlessly pursued or frustrated. Stats. 1850-1853, p. 539 et seq. These statutes as thus contained in the early Practice Act were enacted almost in haec verba in the Code of Civil Procedure, and throughout the years have undergone surprisingly little alteration. Our courts during the same period provided only that in such proceedings there shall have first been shown a sufficient compliance with the provisions under which the writs are to issue, thus uniformly protecting

and insuring a qualified litigant in his right to security at the hands of a defendant who allegedly is in default upon a contractual obligation.

[5] These considerations have been adverted to in order to point out that the trial court had no light or welcome duty to discharge in choosing between what at most might be, on the one hand, a seeming appreciation of the patriotic performance of military duty by a man who was then most unfortunately situated and, on the other, the denial to a litigant of a substantial and long judicially respected right. It clearly appears, however, that the court made the right determination in denying the application. First of all, its order staying all proceedings preserved the status quo of the litigation; no adverse right of the plaintiff could ripen into a judgment while the defendant continued to be absent on military service or remained in the hands of the Japanese. All rights of the defendant in the funds under attachment were fully secured, by a good and sufficient undertaking, against any damages which could possibly be sustained by reason of the attachment. The rights of any third party in and to the funds are not involved, but were such rights involved they would likewise be similarly stayed by the court's order staying all proceedings.

As a matter of fact, however, the record shows that Colonel Halstead was in nowise injured by the court's refusal to abate the attachment. He was in the anything but merciful hands of the Japanese, where he personally was unable to withdraw or use the said funds for any purpose. No one else could withdraw them unless there was outstanding an executed power of attorney of his own creation, and, as appeared on the hearing, it would not have been possible to transmit any of said funds to him. Plaintiff testified that during the period between his capture and the hearing Colonel Halstead's pay had continued to accumulate at the rate of \$700 per month, while appellant testified in this connection that it accumulated at the monthly rate of \$450, and was such as readily to permit the satisfaction of defendant's entire current obligation to plaintiff and to leave him with a fairly large cash surplus. In either event, the sum accumulated was substantial. Appellant had placed \$2,000 of his prior accumulations in her own personal savings account. Plaintiff, on the other hand, had received no payments from Colonel Hal-

stead under the contract since before the fall of Manila early in 1942. At that time, she testified, he was substantially in arrears in his payments to her under the contract. His intermarriage with appellant had occurred in October, 1940.

The evidence further disclosed that plaintiff's situation was most unfortunate. She had been largely dependent for her livelihood upon the payments theretofore received by her under the contract. She lived with her daughter who worked, and she herself engaged in part-time work, but her ability to do so has become impaired by the condition of her health.

The trial judge with great patience entertained this application on five distinct occasions, covering a period of seven months, and was so considerate of the interests of all concerned that he even conducted a night session of his court. In fairness to Colonel Halstead, it further should be stated that it does not appear that he had personal knowledge of the application, or that he personally approved the same. In fact, about three weeks before the fourth and next to final hearing thereof, plaintiff received a letter from him reading as follows: "Dear Mother: [a term by which, she testified, he usually addressed her] I am permitted to tell you very little except that I am well and in good health and am slowly gaining weight. By radio I allotted part of my pay to the American Trust and instructed them to give you your monthly check. I do not know if my letters were received so am trying it again. Tell me if you are receiving your checks. If not, present this letter to the bank—they will credit your account with the \$48.00 monthly from March 1, 1942. [It should be mentioned that the variance between \$48 and the sum of \$50 specified in the contract arises from the deduction of \$2.00 monthly to cover certain insurance policies.] Do you hear from Zachary [their son, also an army officer] regularly? Advise him of this letter. I have not heard from him. Best love to you, Ethel [plaintiff's daughter] and Zachary. E. T. Halstead, Lt. Colonel, U. S. Army."

This letter came from Tokyo. It is as against the thus expressed wishes of the soldier in whose behalf the application we have just reviewed is claimed to have been

made that appellant contends that the trial court in its denial thereof abused its discretion. This letter, as are all the other appearing circumstances, is in eloquent refutation of the merits of the claim. It is stated by the United States Court of Appeals, Eighth Circuit, that: "A motion under the [Soldiers' and Sailors' Civil Relief] act is addressed to the discretion of the trial court. The mere fact of service in the armed forces of the United States does not entitle a party to a stay of proceedings against him as a matter of right. The trial court may and should deny the stay when it is apparent that the party absent in the military service will not be materially prejudiced * * *." *Gross v. Williams*, 8 Cir., 149 F.2d 84, 86.

The further reasons advanced by the appellant in support of her application and her appeal are clearly unsubstantial. She contends that the continued existence of the attachment impairs the credit of Colonel Halstead and would have a tendency toward retarding his further promotion in the army after the war. We cannot believe that the War Department would seriously hold such a circumstance against a man who had been for more than two years a prisoner of war of the Japanese; and it further was most unlikely that the existence of the attachment would ever come to its attention, since the funds were not attached at their source but were levied on after they had come into the hands of a banking institution. If his credit ever has been impaired, it will be speedily repaired from the funds which have accumulated during his enforced absence.

Appellant's counsel advises us that one of the main purposes of the appeal was to secure from an appellate court a construal of the meaning and effect of the hereinbefore-specified section 203 of the Soldiers' and Sailors' Civil Relief Act in conformation with his own conception thereof. It is, however, hard to conceive of a case where the underlying equities and appearing circumstances render it as poorly adapted for the achievement of said purpose as the one which has been selected for such test.

The order from which the appeal is taken is affirmed.

PETERS, P. J., and WARD, J., concur.

72 Cal.App.2d 860

SCHAAD v. HAZELTON.

Civ. 7175.

District Court of Appeal, Third District,
California.

Feb. 5, 1946.

Rehearing Denied March 4, 1946.

1. Work and labor ☞4(2)

Generally, where one performs services for another at his instance and request, the law implies a promise to pay and request may be inferred from circumstances, and where one accepts or receives benefits of another's work, the law implies a promise to pay what services are reasonably worth but such rule is founded on a mere presumption of law which may be rebutted.

2. Work and labor ☞7(1)

Where services are rendered between members of a household or between those closely related by blood, the law will ordinarily presume that they were prompted by motives of love, friendship and kindness rather than by desire for gain.

3. Work and labor ☞7(1)

In order to support a claim for services made by child or relation who remains with parent or kin after majority, circumstances must show either an express contract or that compensation was in contemplation of the parties.

4. Executors and administrators ☞221(5)

In action by daughter to recover from her mother's estate for reasonable value of services rendered, evidence was insufficient to establish that mother intended to pay daughter for services in household or that daughter contemplated that she should receive payment and was insufficient to establish either an express contract or circumstances from which a contract could be implied.

Appeal from Superior Court, Glenn County; W. T. Belieu, Judge.

Action by Marjorie M. Schaad against Earl J. Hazelton, as executor of the last will of Addie M. Hazelton, deceased, to recover the reasonable value of services rendered to the deceased. Verdict for plaintiff for \$4,300. From a judgment for

defendant notwithstanding the verdict, plaintiff appeals.

Affirmed.

Curtiss E. Wetter, of Red Bluff, for appellant.

J. K. Burnett, of Orland, Duard F. Geis, of Willows, and Alfred E. Frazier, of Red Bluff, for respondent.

ADAMS, Presiding Justice.

This action was brought by plaintiff, the daughter of Addie M. Hazelton, deceased, to recover from the estate of said decedent the sum of \$21,178.83 claimed to be the reasonable value of services rendered by her to said decedent from July 1, 1926, to March 10, 1943, "in serving as companion, housekeeper, nurse, furnishing transportation, sewing, washing, ironing and otherwise" for said Addie M. Hazelton, "with the understanding and agreement between said Addie M. Hazelton and Plaintiff that said Addie M. Hazelton would compensate Plaintiff for said services by leaving to her * * * one-half of all the estate of said Addie M. Hazelton and which estate should include all the property of said Addie M. Hazelton except the home of said Addie M. Hazelton and the home of Earl J. Hazelton." The filing of a claim against the estate of the decedent and its rejection were alleged, a copy of the claim being attached to the complaint. The action was tried before a jury and resulted in a verdict in favor of plaintiff for the sum of \$4,300. Thereafter, on motion of defendant, the trial court entered a judgment in favor of defendant notwithstanding the verdict, and this appeal followed.

The only question before this court is whether there was produced before the trial court evidence which, viewed in its most favorable aspect, was sufficient to support the jury's verdict.

J. B. Hazelton and Addie M. Hazelton were husband and wife. They acquired considerable property, including a substantial home and a lumber yard in Orland. They had two children, Marjorie and Earl, both of whom were, in March, 1926, of adult age. The daughter, who was apparently unemployed, was living in the home of her parents, and the son, who was then working for his father in the lumber yard, was married and occupied a home of his own in Orland.

On July 10, 1926, plaintiff married Clarence Schaad. She brought her husband

into the home of her parents where they continued to reside until May 1, 1931, when they moved to Willows, and, later, to Sacramento. In July, 1934, when Mr. Schaad lost his job they returned to the Hazelton home where they continued to reside. A son was born to the Schaads in 1927, and he, too, lived in the Hazelton home with his parents. On August 5, 1941, J. B. Hazelton and Addie M. Hazelton executed a deed conveying to their daughter the family home in Orland. This deed was deposited with the attorney who had drawn same, with instructions to deliver it to the grantee upon the death of the survivor of the grantors. Prior to his death J. B. Hazelton, who was suffering from cancer, conveyed his property to his wife, and on February 23, 1942, he died.

Mrs. Hazelton died in April, 1943, leaving a will dated April 3, 1942, in which she gave the family home, variously valued at from \$8,000 to \$15,000, and its contents, appraised at \$1,100, to her daughter, reciting that a deed to the home had already been placed in escrow. The will also stated that prior to her husband's death they had agreed between them and their children that all debts owing by their son, and by their daughter and her husband, either to them or the lumber company, were forgiven, and that it was her will that they be canceled. The will devised to plaintiff a life estate in certain other real property with remainder to her children, which property was given value of \$5,000 to \$8,500, gave the lumber mill and business and other real property to the son, and divided the residue between the two children equally. The whole estate was appraised by the official appraiser at \$44,929.86.

Plaintiff produced no evidence whatsoever of any express contract on the part of her mother to compensate her, either by will or otherwise, for any services she might or did perform in the home shared by the two families, nor was there any testimony that either of the parties ever made any reference to any such purported agreement. Appellant does not even contend in her brief that such evidence was produced, but argues that there *must have been* such an agreement because (a) at the time of a family conference held just before Mr. Hazelton's death he stated to his son that the daughter had been generous in asking that the debts of the son as well as her own be forgiven, and that

he wanted them to share the estate equally; (b) that the Schaad boy testified he had heard his grandmother say to his mother, more than once, that the estate was to be settled equally between the son and daughter; (c) that the Schaads paid rent, and (d) that the household expenses were apparently paid from what was called "the bank", into which Mr. Schaad and Mr. Hazelton both put money.

The statement in appellant's brief that the Schaads paid rent is a conclusion based upon the testimony of the Schaad boy that he had seen his mother give his grandmother money for the rent, and had heard his grandmother ask for the rent. When this occurred or how many times, whether during the first or the second period of residence by the Schaads in the Hazelton home, or how much was asked or given was not stated. There was, however, testimony that Mrs. Hazelton had said to her daughter on one occasion that they did not pay rent—which was not denied by plaintiff. The statement in the brief that household expenses were paid out of a so-called "bank" is merely a conclusion from the testimony of the Schaad boy that in the kitchen was a brown purse called "the bank" into which he had seen both his grandfather and his father put money. When and how often this occurred, or what amounts were contributed by either was not stated; nor was there any evidence as to the purpose of these contributions or how or for what the moneys in the brown purse were spent; and there was no evidence that household expenses were paid out of it.

Regarding the services performed by plaintiff in the home of her parents, while there was testimony that she engaged in the general household duties, they appear to have been no different from those which she would have performed for her own family in her own home had she occupied one, except that, owing to operations which Mrs. Hazelton underwent in 1926, and in 1941, she was unable to raise her arms so as to reach the back of her head, and her daughter combed her hair for her, and during her convalescence, assisted in caring for her. It is true that after her operation in 1926 Mrs. Hazelton's health was not good, but it is undenied that except for short periods after her operations, she was able to and did assist with the housework, put up fruit, made the pies, doughnuts, etc., ironed, worked

in her garden, washed dishes, did mending, and, during the infancy of the Schaad child, assisted in caring for him. Apparently during the three years that the Schaads lived elsewhere she was able to run her own home. It is undenied, also, that at the time of Mr. Hazelton's last illness a nurse was in attendance for several weeks; and that another woman came in and worked for a few hours a day when Mr. Hazelton's condition was very critical. There was also a nurse in attendance during the month preceding Mrs. Hazelton's death. While there is some testimony that plaintiff, in her own car, at times took her mother to San Francisco and elsewhere and also performed personal services for her, the evidence fails signally to show that the services performed by her in the household were other than those which would naturally be performed by a loving and dutiful daughter in the home of her parents which she and her family shared with them; and their performance is insufficient to give rise to an inference that such services were performed for her mother any more than for her father, or for her husband and her son who alike shared the benefits of same, or that there was any intention on the part of the mother that she should pay for them, or any intention on the part of plaintiff that she should be paid for them.

The statements of the parents that their two children were to share equally in this estate was but natural, and do not imply that the daughter was to be paid for her services in the home; rather the contrary. Furthermore, appellant's claim that in 1926 her mother agreed to compensate her by leaving her one-half of all her estate "except the home of said Addie M. Hazelton and the home of Earl J. Hazelton," is fictitious on its face, since at that time Mrs. Hazelton had no estate, her husband being then living; and it is not reasonable that Mrs. Hazelton could have anticipated that her husband would predecease her, or that should she survive her husband, the home would be excluded from her estate, as it was by the subsequent deed executed by both Mr. and Mrs. Hazelton.

[1-3] While as a general principle of law where one performs services for another at his instance and request the law implies a promise to pay, and the request may be inferred from circumstances, and that where one accepts or receives the

benefit of another's work the law implies a promise to pay what the services are reasonably worth, the rule is founded upon a mere presumption of law which may be rebutted. And where services are rendered between the members of a household or between those closely related by blood, the law will ordinarily presume that they were prompted by motives of love, friendship and kindness, rather than the desire for gain. And, as was said in *Winder v. Winder*, 18 Cal.2d 123, 127, 128, 114 P.2d 347, 350, 144 A.L.R. 935, "in order to support a claim for services made by a child or relation who remains with his parent or kin after majority the circumstances must show either an express contract or that compensation was in the contemplation of the parties." Also in that case the court cited and quoted from *Wainwright Trust Co. v. Kinder*, 69 Ind.App. 88, 120 N.E. 419, to the effect that while the intention to pay and the expectation of compensation may be inferred from conduct where equity and justice require compensation, and expectation of compensation may coexist with higher motives prompted by affection or the sense of duty, to warrant the finding of such contract the elements of intention to pay on the one hand, and expectation of compensation on the other must be found to exist, though they may be inferred from the relation and situation of the parties, the nature and character of the services rendered, and any other facts or circumstances which may reasonably be said to throw any light upon the question at issue.

Appellant relies upon *Winder v. Winder*, asserting that the facts in that case and those in the case before us are parallel. We think them clearly distinguishable, for in the *Winder* case there was evidence that the mother, who was living alone, induced her son, the plaintiff, to live with her upon her promise to leave her property to him; also that the son paid his mother \$25 a month as rent, furnished her with board and personal care, and paid all other expenses except medical, special nursing and hospitalization. There was also evidence that when, after an absence, the son resumed the care of his mother, she reaffirmed her promise to leave the home to him in return for his services. Also there the mother left all of her estate to others, with nothing to plaintiff. None of those facts appear in the present case.

In *Fuller v. Everett*, 100 Cal.App. 593, 280 P. 550, a daughter sought to recover from the estate of her deceased mother for the reasonable value of board and lodging, nursing and personal attendance furnished her mother, alleging that the mother had come to the home of plaintiffs at her own request, and that the services and maintenance were rendered at her special instance and upon a promise to pay therefor. There was testimony that when the mother was ill she said to her daughter that she was going home with her; that the mother thereafter repeatedly remarked that her daughter took fine care of her, and that she would never regret what she had done for the mother; that the mother often said she intended to pay her daughter and pay her well, but never said when or how she would pay her. The court said that this presented appellant's case in its strongest light, but showed no meeting of the minds upon any agreed kind or amount of compensation; that to warrant an inference that one relative became indebted to the other for such service the evidence must be such as reasonably to indicate that it was the expectation of both parties that compensation should be made; that the presumption ordinarily prevailing, that the services were to be paid for, could not be invoked in such cases, but, on the contrary, as was said in *Ruble v. Richardson*, 188 Cal. 150, 157, 204 P. 572, 575, quoting from 1 Beach on Contracts, "where services are rendered by members of a family, living in one household, to each other, or necessities are supplied by one near relation to another, the law will presume that they were gratuitous favors merely, prompted by friendship, kindness, and the relationship between them. And in such case, before the person rendering the service can recover, the express promise of the party served must be shown or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of making compensation therefor."

In *Ruble v. Richardson*, plaintiff, who was a niece of a Mrs. Kitchen, brought suit against the executor of Mrs. Kitchen's estate claiming payment for services rendered by her to decedent in whose home she lived as a daughter performing the ordinary services of a daughter. An implied contract to pay for such services

was relied upon. The court said that in the absence of evidence of an express contract plaintiff was compelled to rely upon circumstances from which the law might raise an implied promise to compensate her for services rendered; but that evidence that she had performed the ordinary services of a daughter did not raise an inference in law that there was a promise to pay for the services rendered.

In *Murdock v. Murdock*, 7 Cal. 511, plaintiff, who was the stepmother of defendants, at the request of defendants resided in their home as mother of the family for several years. Becoming dissatisfied, she left the home, and sued for compensation for her services. The court said that there seemed to have been no mutual expectation of compensation on either side; that plaintiff did not occupy the position of a servant in the family and was not so treated; and that "where a party sustains to others a certain relation, and assumes a certain position, inconsistent with the claim set up, the proof should either show an express contract, or conclusive circumstances from which a contract might be justly implied."

In *Farmer v. Underwood*, 164 Iowa 587, 146 N.W. 18, a daughter and her husband and their family came to live with the daughter's father and mother on their farm. From time to time the son-in-law worked on the farm doing general farm work. Nothing was said by either the father or the son-in-law as to payment of wages, except that some five or six years after the parties began living together, the son-in-law, needing money, stated that he was leaving to seek employment elsewhere, at which time defendant stated that if plaintiff wanted to work he could stay there and defendant would give him \$25 per month. The court, in an action by plaintiff to recover for his services, directed a verdict for defendant, and on appeal the judgment was affirmed, the court saying that there was nothing to indicate that defendant at any time understood that plaintiff was working for him in expectation of remuneration, and nothing to indicate that defendant did not understand that plaintiff was there with his family, as a member of defendant's household, receiving support for himself and family, and that the services rendered by him were rendered in that capacity; that no express agreement for compensation was shown and that the facts and circum-

stances gave rise to no implication that plaintiff intended to charge for his services or that defendant intended to pay him therefor; that before plaintiff could recover the evidence must disclose a mutual purpose and intent that the services should be paid for before the presumption that they were gratuitously rendered was overcome; and that plaintiff had failed to sustain the burden which rested upon him, to show these matters. Also see *Moulin v. Columbet*, 22 Cal. 508, 510; *Spadoni v. Giacomazzi*, 27 Cal.App. 149, 149 P. 51; *Crane v. Derrick*, 157 Cal. 667, 109 P. 31; *Newbert v. McCarthy*, 190 Cal. 723, 214 P. 442; *In re Teynor's Estate*, 203 Wis. 369, 234 N.W. 344; *In re Chent's Estate*, 217 Wis. 631, 259 N.W. 865, 866; *Donovan v. Driscoll*, 116 Iowa 339, 90 N.W. 60; 28 R.C.L. secs. 13, 15, pp. 677-681.

[4] We are satisfied that the evidence relied upon by appellant as giving rise to an inference that the mother intended to pay her daughter for her services in the household, or that appellant contemplated that she should receive payment for same is insufficient, and that plaintiff failed to meet the burden imposed upon her, of proving either an express contract or circumstances from which a contract could be implied. The judgment notwithstanding the verdict is, therefore, affirmed.

PEEK and THOMPSON, JJ., concur.



72 Cal.App.2d 839

VALLEY CONST. CO. et al. v. CITY OF CALISTOGA.

Civ. 12946.

District Court of Appeal, First District,
Division 2, California.

Feb. 4, 1946.

1. Contracts ⇨166

Where reference in contract to plans and specifications indicates an intention to incorporate the plans and specifications generally, they become a part of the contract for all purposes.

165 P.2d—33½

2. Contracts ⇨166

A construction contract providing that plans and specifications and all modifications incorporated in the plans and specifications before their execution were annexed to and incorporated in and made a part of the contract, made the entire plans and specifications and the modification of the plans an integral part of the contract.

3. Contracts ⇨232(1)

The reservation in a construction contract of right to make alterations in the plans is limited to changes that do not unreasonably alter the character of the work or unduly increase its costs.

4. Appeal and error ⇨1011(1)

The resolution of all conflicts in the evidence is for the trial court, and its judgment supported by substantial evidence is final.

5. Contracts ⇨350(1)

Evidence as to whether change in construction of spillway unreasonably altered the character of work or unduly increased the costs of construction under contract providing that contractor was not entitled to extra compensation by reason of change in location of spillway, was insufficient to permit contractors to recover increased costs of excavation at changed location of spillway and increased costs of pouring cement for spillway under changed plans.

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action by the Valley Construction Company, a copartnership and others against the City of Calistoga, a municipal corporation, for the recovery of an additional amount for the construction of a spillway. From a judgment for the defendant, the plaintiffs appeal.

Affirmed.

James F. Boccardo and Edwin H. Williams, both of San Jose, for appellants.

Lowell Palmer, City Atty. of City of Calistoga, of St. Helena (Coombs & Dunlap, of Napa, and Conrad Weil, Jr., of San Francisco, of counsel), for respondent.

DOOLING, Justice.

The plaintiffs entered into a contract with the defendant, City of Calistoga, for the construction of a dam and spillway. The contract was based upon unit prices for

the various items included in the contract. The contract contained the following provision: "True copies of the Notice Inviting Sealed Proposals, Instructions to Bidders, Proposal of the Contractor, and Plans and Specifications, together with all modifications incorporated in those documents before their execution, are hereunto annexed by reference thereto incorporated herein and made a part hereof as though in this document fully set forth."

Paragraph 48 of the specifications so annexed and referred to reads: "48. Modification of Plans. The location of the dam, spillway, control works, cut-off trenches and appurtenances are shown on the plans as tentative, based on the expectation of finding satisfactory foundation in the positions shown. If excavation discloses the necessity of change to other elevations or locations than shown on the plans to secure satisfactory foundations, and to satisfy the conditions of greatest economy and the requisite safety, the contractor shall not be entitled to any compensation by reason of such change, other than payment for the actual work done based on the measured quantities at the unit prices named in his contract."

The spillway as shown in the original plans was on the right abutment of the creek, but after the work on the dam was commenced the State Department of Public Works determined that as so planned the spillway would be unsafe and the plans were changed to require the construction of the spillway on the opposite bank.

After the work was completed and the final payment according to the unit prices had been received in full plaintiffs commenced this action seeking the recovery of an additional amount alleged to be the increase in the cost of the work of constructing the spillway in the new location. The trial court gave judgment for defendant and this appeal followed.

Appellants first claim that paragraph 48 of the specifications was not part of the contract, citing such cases as *Moreing v. Weber*, 3 Cal.App. 14, 20, 84 P. 220, and *Nielson v. Swanberg*, 99 Cal.App. 270, 279, 278 P. 876, which announce the rule that where a contract refers to another writing for a particular specified purpose such other writing becomes a part of the contract for the specified purpose only. The reference hereinabove quoted makes the plans and specifications "a part hereof as though in this document fully set forth." The ref-

erence is general not specific. The rule is thus stated in 9 Am.Jur. 11: "Where the plans and specifications are by express terms made a part of the contract, the terms of the plans and specifications will control with the same force as though incorporated in the very contract itself. Where, however, the plans and specifications are referred to in the contract for a particular specified purpose, such specifications can serve no other purpose than the one specified, and are foreign to the contract for all other purposes."

Supporting cases for both statements will be found collected in the note in Ann.Cas. 1913C at pages 225, 226.

[1] The authorities in California are clear that if the reference in the contract to the plans and specifications indicates an intention to incorporate them generally they become a part of the contract for all purposes. *Woollacott v. Meekin*, 151 Cal. 701, 91 P. 612; *Gray v. Cotton*, 166 Cal. 130, 134, 134 P. 1145; *Bird v. American Surety Co.*, 175 Cal. 625, 631, 166 P. 1009; 6 Cal.Jur. 321; cf. *Roberts v. Security T. & S. Bank*, 196 Cal. 557, 563, 566, 238 P. 673; *Bell v. Rio Grande Oil Co.*, 23 Cal.App.2d 436, 440, 73 P.2d 662; *Beedy v. San Mateo Hotel Co.*, 27 Cal.App. 653, 660, 150 P. 810.

[2] Under the broad language of this contract we are satisfied that the entire plans and specifications, including paragraph 48 above quoted, became an integral part of the contract.

[3] Appellants' main argument is directed to the proposition that even though paragraph 48 is a part of the contract the reservation in a construction contract of the right to make alterations in the plans is limited to changes that do not unreasonably alter the character of the work or unduly increase its cost. *Wood v. Fort Wayne*, 119 U.S. 312, 7 S.Ct. 219, 30 L.Ed. 416; *Bay City v. Frazier*, 6 Cir., 77 F.2d 570; *Salt Lake City v. Smith*, 10 Cir., 104 F. 457. The rule may be conceded, but it still remains to determine whether under the evidence appellants brought their case so clearly under the rule that we must hold as a matter of law that the trial court erred in denying them a judgment.

Certain items of damage alleged in the complaint were abandoned on the trial. The only items that appellants now seek to recover amount to \$6,523.93, claimed to be made up of increased costs of excavation at the changed location of the spillway, and

increased cost of pouring cement for the spillway under the changed plans. The depositions of the appellant Mahan and of one Fertig were the only evidence produced by plaintiffs.

Insofar as increased cost of excavation is concerned they testified that the original location of the spillway was in soft dirt and ash which could have been excavated by "cats and carryalls" in a few days, whereas the spillway was actually built in hard rock which required blasting with dynamite, entailing overbreaks which they had to fill with cement without compensation, and greatly increasing the time required for, and the actual cost of, the work of excavation itself. Respondent's engineer, who supervised the work, testified that the original site was overlaid with rock 20 feet deep which would have had to be removed if the spillway had been constructed there, and that most of the excavation work actually done was "excavated with a bulldozer and rooter and with caterpillar power. Very little—practically no blasting was done except under the spillway structure itself, the overflow of the structure itself, where we had to go down and get an anchorage." Respondent's witnesses also testified that at appellants' request the crest of the dam was raised five feet so that it would require less excavation to construct the spillway and for the additional material used in so raising the dam appellants were paid at the unit prices.

Insofar as the increased cost of pouring concrete is concerned appellants' witnesses testified that the original spillway channel was designed with walls on a one to one slope and the concrete could have been placed on such a slope without the necessity of building forms, whereas the spillway as actually constructed required the building of forms. Mahan was asked on cross-examination if concrete could be laid on a one-quarter to one slope without forms and answered, "No". Respondent's witnesses testified that the slope of the walls of the spillway channel shown on the original plans was "practically vertical, one-quarter to one foot" and as originally designed would have necessitated the use of forms.

The five cross-sections of the spillway channel shown on the plans attached to, and made a part of, the original contract actually scale to show a slope of one-quarter to one, and not one to one as claimed by appellants. Other changes in design were also claimed to have increased the cost of pouring concrete, but both of appellants' witnesses testified to a flat sum increase without any break down of their figures, so that it is impossible to tell what percentage of the whole they attributed to these other factors.

The appellant Beaton was present representing the partnership at the meeting of the council at which the final payment on the completed contract was authorized. There was a disputed item of \$278.18. There is testimony that before allowing this item Beaton was asked if this final payment that was up for action represented all of the claims that he had against the City of Calistoga, to which he answered, "Yes".

[4, 5] The case falls under the familiar rule that the resolution of all conflicts in the evidence is for the trial court, and its judgment if supported by substantial evidence is final. *Juchert v. California Water Service Co.*, 16 Cal.2d 500, 503, 106 P.2d 886. Not only was there a substantial conflict of evidence as to whether the change in the spillway was of such a radical character or so greatly increased the cost as not to fall within paragraph 48 of the specifications, but the court was entitled to consider the testimony, if believed, of the appellant Beaton's admission made under the most solemn circumstances while he was actually representing the partnership in the collection of the final instalment under the contract. That alone would support the inference that appellants themselves did not believe that the change in the location and design of the spillway fell outside of the power reserved in paragraph 48 of the specifications.

Other matters are suggested by appellants but not seriously argued.

The judgment is affirmed.

NOURSE P. J., and GOODSELL, J., concur.

73 Cal.App.2d 1

ATTEBURY v. WAYLAND.

Civ. 12947.

District Court of Appeal, First District,
Division 2, California.

Feb. 7, 1946.

1. Appeal and error ⇨231(3)

An objection to evidence or to the introduction of exhibits during trial on the ground of incompetency, irrelevancy and immateriality is too general to be considered on appeal.

2. Appeal and error ⇨242(1)

Specific objections not urged below will not be considered on appeal.

3. Appeal and error ⇨232(2)

A party who, during trial, objected to admission of deeds solely on the ground that they were incompetent, irrelevant and immaterial could not on appeal urge that deeds were not properly authenticated and that no proper foundation had been laid for their admission, since a specific objection during trial would have afforded party offering the evidence opportunity to remedy the defect. Code Civ.Proc. § 1918, subd. 7.

4. Appeal and error ⇨231(3)

A party who fails to point out error to the trial court, particularly where the vice is latent, cannot for the first time on appeal have specific objection to admission of evidence considered.

5. Husband and wife ⇨262(1), 264

The statutory presumption that property acquired by a married woman by an instrument in writing is presumably her separate property is disputable except as against a bona fide purchaser for value, but a husband seeking to overthrow the presumption must establish by clear and convincing proof that the property was paid for with community funds. Civ.Code, § 164.

6. Appeal and error ⇨1008(1)

Whether evidence is sufficient to overcome statutory presumption that property acquired by a married woman by an instrument in writing is presumably her separate property is for the trier of facts. Civ.Code, § 164.

7. Husband and wife ⇨264

In action by surviving husband against daughter to recover property conveyed to daughter on ground that it was community property, evidence relating to source of money with which wife purchased the property and tending to establish that it was her separate money sustained finding that the property was separate property of wife and that husband had no interest therein. Civ.Code, § 164.

8. Husband and wife ⇨273(12)

Evidence sustained finding as to value of the community property left by deceased wife to which estranged husband was entitled as against children.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by Richard Attebury, special administrator of the estate of Sarah Linda Attebury, also known as Lina Attebury, deceased and another against Ada B. Wayland to quiet title and to recover personal property. Judgment for defendant, and plaintiff appeals.

Affirmed.

John H. Leonard, of Santa Cruz, for appellant.

Rankin, Oneal, Luckhardt & Hall, of San Jose, and Stanford G. Smith, of Santa Cruz, for respondent.

NOURSE, Presiding Justice.

Plaintiff, as special administrator of the estate of his deceased wife, Lina Attebury, brought this action against their daughter to quiet title to certain real property and to recover personal property in which he alleged a community interest.

The evidence presented to the trial court indicated that in 1910 plaintiff Richard Attebury with his wife and ten children moved from Kansas to Oregon where he engaged in the livestock business on a small scale. There was testimony to the effect that Mrs. Attebury also earned money and that one of her sons gave her some calves which she raised into a small herd and sold. In February, 1915, Louis Attebury, the family's eldest son, conveyed a house and lot in Standfield, Oregon, to "R. Attebury and Lina Attebury, husband and wife." Subsequently by deed dated April 1, 1915, plaintiff conveyed this prop-

erty to his wife; it was stated in the instrument that the reason for the conveyance was that the property "should have been deeded directly to the said Lina Attebury, as she paid the entire consideration therefor, and this grantor herein had no interest thereto. Hence this deed from him to his said wife to place the title of record where it properly belongs." Finally by a deed dated March 9, 1923, Lina Attebury and R. Attebury conveyed the property to one Virgie Ball. Certified copies of the three deeds were admitted into evidence over plaintiff's general objection.

The evidence showed that decedent, who had received the monetary consideration for the sale of the Oregon property, left her husband and moved to Yuba City, California, with her son, Theodore. She received no support from plaintiff while living there. Mrs. Attebury purchased a partially completed house in Yuba City in her own name and her son finished the interior of the dwelling for her. The purchase price of approximately \$650 was paid by the decedent from money she brought from Oregon, although its exact origin is left in doubt by the record. In 1927 Lina Attebury sold the Yuba City property for \$1,250 and moved to San Jose where she resided with various of her children for a period of about five years.

In 1932 Mrs. Attebury moved to Santa Cruz and purchased the property which is the subject of this litigation for \$550. The deed, dated September 21, 1932, conveyed the small house to her in her own name. She resided there until her death in 1943. In 1937 plaintiff lived with his wife for six months after which time they separated again. Finally, by a deed dated December 15, 1938, and recorded on December 21, 1943, the decedent conveyed the Santa Cruz property to her daughter, Ada B. Wayland, defendant herein. The deed described the grantor as "Lina Attebury, a single woman."

Plaintiff commenced this suit to recover the Santa Cruz property from his daughter on the ground that it was purchased out of community funds and therefore was community property. He also prayed for the recovery of certain personal property which Mrs. Attebury's children had distributed among themselves. The trial court found that the house was the separate property of the decedent, that it had

been conveyed to defendant and hence concluded that Mrs. Wayland is the owner of that property. The judgment awarded the real property to defendant and allowed plaintiff the sum of \$150 as the value of his interest in the personalty. A motion for new trial was denied and plaintiff appeals from the judgment.

[1-4] The first contention on appeal is that the court committed prejudicial error in admitting the three Oregon deeds into evidence over appellant's objection. It is now claimed that they were not properly authenticated and that no proper foundation was laid for their admission. The record on appeal shows that at the conclusion of the trial below the court instructed counsel to communicate with a searcher of records or an attorney at Pendleton, Oregon, for the purpose of checking the conveyance from Louis Attebury to his parents in 1915. Counsel for defendant agreed to carry out the court's instruction and plaintiff's attorney offered no objection. Subsequently when the three certified copies of the Oregon deeds were obtained they were offered in evidence by defendant. The record before us shows only that plaintiff objected on the ground that the deeds were incompetent, irrelevant and immaterial. However, the instruments were marked "court's exhibits" and were received in evidence. In view of the record showing only a general objection the specific objections raised by appellant at this time cannot be considered on appeal. It is well settled that an objection to evidence or to the introduction of exhibits into evidence during the trial of an action on the ground of incompetency, irrelevancy and immateriality is too general to be considered on appeal and that specific objections not urged below will not be considered on appeal. *Saecker v. Cohn*, 180 Cal. 151, 153, 179 P. 890; *Crocker v. Carpenter*, 98 Cal. 418, 421, 33 P. 271; *Bell v. Central Bank*, 89 Cal.App. 551, 553, 265 P. 551; *French v. Atlas Milling Company*, 17 Cal.App. 226, 227 and 228, 119 P. 203. The reason for this rule of law becomes apparent in a situation such as this. If, at the time the deeds were offered in evidence, counsel had objected to their admission on the specific ground that they had not been authenticated or proved as required by law it would have been a relatively simple procedure to have returned them to the state and county of their origin for the

certification under subd. 7, sec. 1918, Code of Civil Procedure that the recorder of conveyances, who certified that they were true copies of the deeds recorded in his files, was actually in office at the time he attached his seal to such certificate. A specific objection would have allowed the party offering the evidence to have remedied the defect in the technical manner of the certification. But having failed to point out the error to the trial court, particularly where the vice is latent, a party cannot for the first time on appeal have the specific objection considered. 2 Cal. Jur. 269.

[5,6] Appellant argues that the evidence did not support the finding of the trial court to the effect that the property was not purchased out of community funds and was the separate property of the decedent. From the time Mrs. Attebury separated from her husband and came to California she entered into all real estate transactions in her name alone. The Santa Cruz property which is the subject of this action was conveyed to her alone and she subsequently deeded the property as "a single woman" to the defendant. Since 1889 section 164 of the Civil Code has provided that "* * * whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property * * *." Except as against a bona fide purchaser for value the presumption set forth in that code provision is disputable (*Gilmour v. North Pasadena Land, etc., Co.*, 178 Cal. 6, 8, 171 P. 1066; *Pabst v. Shearer*, 172 Cal. 239, 242, 156 P. 466), but in order to overthrow the presumption the husband must establish by clear and convincing proof that the property was paid for with community funds. *Stafford v. Martinoni*, 192 Cal. 724, 738, 221 P. 919; *Thompson v. Davis*, 172 Cal. 491, 494, 157 P. 595; *Alferitz v. Arrivillaga*, 143 Cal. 646, 649, 77 P. 657; *Vandervort v. Godfrey*, 58 Cal.App. 578, 582, 208 P. 1017. It is for the trier of facts to determine whether the evidence is sufficient to overcome the presumption. *Stafford v. Martinoni*, supra, and cases cited.

[7] Conceding the proposition that respondent was not a bona fide purchaser for value the evidence presented to the trial

court was sufficient to support the finding now under attack. The testimony in support of appellant's claim was to the effect that Mrs. Attebury had no separate funds when the family arrived in Oregon and that any money subsequently acquired was community property. There was, however, substantial evidence to the contrary. It was shown that the decedent had sold a small herd of her own cattle. One son testified that the property in Standfield, Oregon, was purchased by decedent with her separate money and that testimony was substantiated by documentary evidence. The deed dated April 1, 1915, showed that appellant conveyed the Oregon property to his wife. That evidence would tend to establish that the real property in California was purchased by Mrs. Attebury with her separate money and hence would constitute her separate property. 3 Cal. Jur. Supp. 521 and cases cited. The testimony taken before the trial court in support of appellant's claim was vague and conflicting. It is apparent that the evidence was sufficient to sustain the court's finding that the property was separate since the appellant failed to sustain his burden of overcoming the statutory presumption by clear and convincing proof.

[8] Appellant finally argues that the finding to the effect that there was community property in the value of \$150 only was not supported by the evidence. This contention cannot be sustained. The amount and value of the personal property which Mrs. Attebury took with her when she moved to California is most uncertain. However, the evidence showed that, except for the period of six months in 1937 when appellant resided with his wife, all of her support was derived from a small pension and occasional gifts from her children. Decedent gave her daughter \$425 prior to her death which was used for the burial expenses. The remainder of her property consisted of a few household items and preserves which were divided between the heirs. In view of the small value of the property the court's estimate of \$150 was reasonable and the finding on that issue is supported by the evidence.

The judgment is affirmed.

GOODELL and DOOLING, JJ., concur.

72 Cal.App.2d 791

**AUCLAIR v. AUCLAIR.
DRISCOLL v. SAME.**

Civ. 3409, 3410.

District Court of Appeal, Fourth District,
California.

Jan. 30, 1946.

1. Divorce ⇨249(1)

Where the evidence established that property was acquired by the husband prior to the marriage and record failed to show that the case was tried on theory that such property was community property, the trial court was without power to award such property to the wife upon granting her a divorce. Civ.Code, § 163.

2. Husband and wife ⇨279(3)

Where property settlement agreement did not mention question of separation of the parties and was not conditioned thereon, the fact that husband and wife continued to reside together for several days after execution of the agreement did not automatically invalidate the agreement.

3. Husband and wife ⇨279(2)

Where court, in setting aside property settlement agreement between husband and wife and canceling a deed executed by wife to husband on ground of husband's fraud, considered the equities of the entire case and that husband was liable for wife's support during all the time involved, fact that wife failed to offer to restore everything of value received under the agreement, did not render the order of rescission invalid. Civ.Code, § 1691.

4. Divorce ⇨249(2)

The court has full power to examine contract settling property rights in divorce proceeding and the facts surrounding its execution, and may dispose of the community property in spite of the agreement if the provision made is against public policy or not sufficient for the wife's needs, and may provide for her support without requiring the return of what she received under the agreement. Civ.Code, §§ 146, 163.

5. Divorce ⇨249(3)

Where a finding that particular property was community property had evidentiary support, court was authorized under statute in setting it aside to the wife upon granting divorce. Civ.Code, § 146.

6. Husband and wife ⇨39

The right of husband or wife to enter into agreements with the other is subject to the general rules which control the actions of persons occupying confidential relations with each other, as in trusts.

7. Husband and wife ⇨30

The least overreaching or misrepresentation by a husband through which he gains the property of his wife is fraudulent and will justify an action to avoid a settlement.

8. Husband and wife ⇨39

A husband is bound in his dealings with his wife to the highest and best of good faith and if he would avoid the presumption of undue influence emanating from the procurement of any advantage over the wife, he should make a full and fair disclosure to her of all she should know for the protection of her interest, giving her the opportunity of independent advice.

9. Divorce ⇨253

The trial court must consider all surrounding circumstances in determining issue whether an agreement settling property rights in connection with divorce action was consummated in the utmost good faith. Civ.Code, §§ 146, 163.

10. Divorce ⇨253

Evidence supported finding of fraud and undue influence on part of husband in securing the execution of property settlement agreement in connection with divorce action and a subsequent quitclaim deed from the wife, and warranted cancellation of the agreement and the deed.

11. Divorce ⇨253

In a divorce proceeding, issues may be broadened at the trial to include questions not made an issue by the pleadings and where the entire controversy as to the disposition of the community property is submitted to the court, it may make a fair disposition of the property rights in consonance with the law and a general accounting. Civ.Code, §§ 146, 163.

12. Divorce ⇨249(3)

Where the evidence showed that certain furniture, fixtures and personal effects were community property, awarding such items to the wife upon granting her a divorce would not be disturbed, but such award would not be effective as to any of

husband's personal property which was his separate property. Civ.Code, §§ 146, 163.

13. Divorce ⇐276(4)

Evidence sustained finding that deed from husband to defendant, conveying a home which had been community property and which through husband's fraud wife had been induced to convey to husband, was without consideration and was executed and accepted for sole purpose of defrauding wife of her rights thereto, and warranted judgment refusing to quiet defendant's title thereto.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Eloge Auclair against Marie Auclair for divorce, wherein defendant filed a cross-complaint for divorce and sought to set aside a property agreement and quitclaim deed executed by her to plaintiff, which action was consolidated with a quiet title action brought by Josephine R. Driscoll against the defendant Marie Auclair. From a judgment for defendant Marie Auclair in both actions, the plaintiffs appeal.

Affirmed in part and reversed in part.

E. John Eriksson and Homer M. Bail, both of San Bernardino, for appellants.

Fred A. Wilson, of San Bernardino, for respondent.

GRIFFIN, Justice.

On May 27, 1943, Eloge Auclair, plaintiff and appellant, brought an action (No. 3409) for divorce against his wife, Marie Auclair, defendant and respondent, in which he alleged that there was no community property. In an amended cross-complaint filed by the wife, she sought a divorce and alleged that the parties were the owners of certain community property described as parcel No. 1 (the Burton Place), consisting of 2½ acres, which constituted the home place of the parties, and parcel No. 2 (the Mining Property), which was a leasehold in 80 acres of school land. By the same action the wife sought to set aside an alleged property settlement agreement and a quitclaim deed to her husband of parcel No. 1, claimed to have been obtained through fraud practiced upon her by her said husband. On March 25, 1944, one Josephine R. Driscoll, plaintiff and appel-

lant, brought a quiet title action (No. 3410) against the wife, Marie Auclair, defendant and respondent. This action affected parcel No. 1, above mentioned. Mrs. Auclair alleged in her answer (Case No. 3410) that on October 12, 1943, during the divorce action, her husband executed a quitclaim deed of those premises to plaintiff, Mrs. Driscoll, without any consideration, and with knowledge on the part of the plaintiff that the real property was community property and that the deed thereto was accepted by plaintiff for the purpose of defrauding defendant of her rights in said real property.

Relation of a part of the factual background leading up to the execution of the documents herein involved is essential. Mr. and Mrs. Auclair, shortly after their marriage, went to Twenty-nine Palms to live. They ran a cafe and lived on the Burton place (parcel No. 1). Mrs. Driscoll, a married woman, denominated Mr. Auclair's paramour, came out to stay at their place for a short time. Soon thereafter, she returned to her home in Los Angeles and, as reflected by numerous letters written by her to Mr. Auclair, thereafter she pursued a course of conduct endeavoring to entice Mr. Auclair away from his wife. They met, on many occasions, at a place away from their respective homes. The letters revealed that the relationship between them was of the closest character. It was apparent therefrom that they planned a subsequent marriage after arranging some property settlement and after divorces were obtained from their respective husband and wife. Mr. Auclair, according to Mrs. Auclair's testimony, never mentioned to her any suggestion of divorce or separation, but in order to get title to the Burton property and the mining claim, falsely represented to her that the purpose of the property settlement agreement and quitclaim deed was to so segregate their property that his mine and the Burton Place would not be held liable for any judgment that might be obtained against her for any liability created as the result of the operation of the cafe, and vice versa; that she did not have independent legal advice as to the legal effect of the documents involved; that they were living together at the time and that they continued to do so for 17 days after the execution of the document, at which time he stated that he was leaving for the city on business; that he kissed her good-bye; that she expected him to return, but instead

he had divorce papers prepared and came back and drove her from the premises. The record indicates that one of the gravest errors Mr. Auclair made was to bury the solicitous letters he received from Mrs. Driscoll in a near-by sand pile, which letters were subsequently found by Mrs. Auclair and with which both of them were confronted at the trial of the present actions.

The trial court granted Mrs. Auclair a divorce and awarded to her the two parcels of property above mentioned, together with the household furnishings, and invalidated the property settlement agreement as well as the deed from her to her husband. The husband appealed from that judgment.

In the Driscoll action (No. 3410) the court found in all respects in favor of defendant Mrs. Auclair, and that Mrs. Driscoll had no interest in the property involved. By stipulation, the two cases were jointly tried and consolidated and are thus presented on appeal. Although Mr. Auclair appealed from the entire judgment, he now concedes, on appeal, that there is ample evidence in the record supporting the portion of the judgment awarding the decree of divorce to his wife, but argues that the findings are unsupported by the evidence in the following particulars: (1) That there is no evidence showing that parcel No. 2 was community property; that in fact it was his separate property and that therefore the order awarding his separate property to her was invalid; (2) That his wife never restored nor offered to restore to him the rights or interests which he conveyed to her under the property settlement agreement, namely, the cafe or the proceeds from the sale thereof; (3) That the evidence is not sufficient to support the order rescinding the agreement and deed; and (4) That the order setting aside the personal property to Mrs. Auclair was erroneous.

As to the first point, Mr. Auclair admits that parcel No. 1 and the cafe (subsequently sold by Mrs. Auclair) was community property. The parties were married on July 1, 1940. The cross-complaint alleges that all of the above-mentioned property is community property. The answer thereto denies such allegations. The trial court found all of the property, including the furniture, to be community property, including the mining property (Parcel No. 2), acquired by Mr. Auclair prior to their marriage. It is argued that there is no testimony what-

soever in the record as to the character of the leasehold interest described in Parcel No. 2 (Golden Bear Mine) and that since it is recited in the property settlement agreement dated May 8, 1943, that the permit from the State Land Commissioner to prospect for minerals upon such land was dated July 27, 1939, over six months prior to their marriage, the finding that the permit and leasehold interest is community property is erroneous, citing *Reid v. Reid*, 112 Cal. 274, 44 P. 564. By the purported property settlement agreement Mrs. Auclair released to Mr. Auclair all of her right, title and interest therein. It further recites: "* * * that the parties are husband and wife and are desirous of settling * * * all their property rights * * * and all liabilities of one to the other". The party of the first part (Eloge Auclair) released all of his interest in the leasehold on a certain described cafe business at Twenty-nine Palms, together with all fixtures and personal property therein, to party of the second part (Mrs. Auclair). She in turn released to him any interest she might have in the home place (Burton Place) described as Parcel No. 1, and in the permit from the Land Commissioner to prospect for minerals (Parcel No. 2, Golden Bear Mine) dated December 27, 1939. The property settlement agreement further provided that Mr. Auclair was released from all obligation to support or maintain Mrs. Auclair at any future period, or for the payment of any court costs, attorneys' fees or any expenses in any action which might be filed by either of the parties affecting their marital rights, and each party waived any interest in property acquired in the future by the other party. On the same day Mrs. Auclair executed a quitclaim deed of parcel No. 1 to Mr. Auclair.

In disposing of the issues presented, we should first relate the contents of the pleadings filed by the several parties. It will be remembered that Mr. Auclair's complaint merely seeks a divorce and alleges that there was no community property. The answer merely denies these allegations and by the amended cross-complaint Mrs. Auclair seeks a divorce and specifically alleges that the parties are the owners of "the following community property, to wit:" Parcel No. 1 (home place, the Burton place), and Parcel No. 2 (the mining leasehold interest), describing each by metes and bounds. No mention is made of household furniture, money in bank, or leasehold in-

terest in the cafe, which was given to Mrs. Auclair under the property settlement agreement. The only relief sought by the amended cross-complaint is to set aside the quitclaim deed of the Burton Place (Parcel No. 1) and the property settlement agreement executed by the parties, and then it is alleged that those two instruments were obtained by fraud and undue influence on the part of Mr. Auclair. The prayer is that Mrs. Auclair be awarded the "community property aforesaid" annulling the two "documents aforesaid" and for general relief. The answer to the cross-complaint merely denies those allegations. The property settlement agreement specifically describes Parcel No. 2 (the mining lease) and shows on its face that the permit was acquired before the marriage of the parties.

[1] Section 163 of the Civil Code provides that "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." There is no evidence of any substantial character that Parcel No. 2 (mining property) was or ever became the community property of the parties and therefore subject to an order assigning that property to Mrs. Auclair in a decree disposing of the community property. In this respect counsel for Mrs. Auclair argues that there is no evidence that that property was community property but that during the trial the "court as well as the wife was led to believe that plaintiff so conceded"; that the case was tried upon that theory and that it is now too late to raise that question, citing *Cullinan v. Mercantile Trust Co.*, 80 Cal.App. 377, 252 P. 647, 650, which recites that: "Where a cause is so conducted that the court and counsel may rightly and do infer that certain facts are conceded or admitted, the court may so treat them." We have examined the entire record and are unable to agree with counsel's version of the evidence and facts presented by the pleadings. The pleadings clearly place this question in issue and the property settlement agreement which the court set aside clearly shows that the permit in dispute was acquired before marriage. Mrs. Auclair, in her testimony, referred to the mines as her husband's property and said she figured if she should get into financial trouble in connection with the cafe business, her creditors might "come onto his property" to satisfy their claims. This was in reply to the fol-

lowing question propounded to her on cross-examination by counsel for plaintiff: "Q. It was your intention for your husband to have the Burton property, you have the cafe, and your husband to have the property he owned, or mining property, before he married you. Isn't that right? A. No, sir, it wasn't. * * * The only thing I was signing was signing a paper and what I was doing was, that if I got in trouble, which I might have with the business * * * I figured well, after all, he has got his mine out here, and working to get the money we could to get us straightened up, and if I should get in trouble they can, or they could, come onto his property". From this evidence it is clear that Mr. Auclair did claim the mining property to be his separate property throughout the trial. There is no evidence that there was a transmutation of the separate property into community property by the parties hereto. Therefore, the finding that Parcel No. 2 was community property is not supported by the evidence and the trial court is without power to award, in a divorce action, the separate property of the husband to the wife. *Roy v. Roy*, 29 Cal.App.2d 596, 603, 85 P.2d 223.

The evidence shows that Mrs. Auclair, by the property settlement agreement, accepted title to the cafe, and Mr. Auclair accepted title to Parcel No. 1 (the Burton Place). Both properties were admittedly community property. Mrs. Auclair subsequently, and prior to trial, sold the lease on the cafe and fixtures for approximately \$951. It is now argued by Mr. Auclair that before the rescission of the property settlement agreement and quitclaim deed may be effective, she must allege and prove restoration or an offer of restoration of everything of value she received under the agreement, citing *More v. Calkins*, 85 Cal. 177, 24 P. 729; *Clanton v. Clanton*, 52 Cal.App. 2d 550, 126 P.2d 639. This contention deserves careful consideration.

[2] Respondent argues that since Mr. Auclair continued to reside with Mrs. Auclair for 17 days after the execution of the property settlement agreement, it was automatically invalidated, citing *Wells v. Stout*, 9 Cal. 479. The case involved a *separation agreement*. The property settlement agreement here involved does not mention the question of separation and that feature of it is not a condition thereof. This distinction was fully discussed in *Sanguinetti v. Sanguinetti*, 51 Cal.App. 347, 196 P. 799.

Section 1691 of the Civil Code imposes upon one who seeks to rescind, the duty to make or offer restoration of what he received under the contract. The cases cited by appellant hold that the fact that the contract is between a husband and wife does not take it out of the general rule. However, there are certain well-recognized exceptions to this general rule. In *Milekovich v. Quinn*, 40 Cal.App. 537, 181 P. 256, it was held that no offer to return the property received by the plaintiff under the agreement was necessary where she would have actually received the property deeded back, in addition to other property fraudulently concealed from her and not mentioned in the agreement.

In *Green v. Duvergey*, 146 Cal. 379, 389, 80 P. 234, 238, it was said: "It is not an invariable rule that the rescission of a contract obtained by fraud will be denied merely upon the ground that the parties cannot be placed in statu quo. If equity can still be done between the parties, courts will grant relief to the defrauded party." (Citing cases.)

In *Re Estate of McNutt*, 36 Cal.App.2d 542, 552, 98 P.2d 253, 257, the court said: "Since the plaintiff herein was entitled to receive 'a modest personal allowance' from her husband, who counted his annual income in the tens of thousands, it would have been inequitable to require the plaintiff to restore the sums which had supported her in her distress in order to maintain her action. (Citing cases). No estoppel arises from the acceptance of benefits provided for by a contract, where the person accepting is entitled thereto, regardless of the transaction in question."

In *Simmons v. Briggs*, 69 Cal.App. 447, 231 P. 604, it was held that where a contract between a plaintiff and her husband required the latter to pay certain street assessments, but it did not appear whether he paid the assessments or whether he was under legal obligation to pay the same prior to the execution of the agreement and an accounting was necessary to ascertain the amount, if any, to which the husband was entitled on account of such payment, an offer of restoration thereof was not required to make plaintiff's rescission effective.

In *re Estate of Barrow*, 27 Cal.App.2d 402, 80 P.2d 1006, it was shown that the wife had used some of the money received under the property settlement agreement for living expenses during the separation and was un-

able to restore the full amount paid her under the agreement. The court said (27 Cal. App.2d at page 406, 80 P.2d at page 1009): "It would be manifestly unjust to require of the wife, as a prerequisite to maintaining an action to rescind a property settlement agreement on the ground of fraud, that she restore to the husband the moneys received by her under the agreement and used for living expenses and to which under the law she would have been entitled to so receive and use notwithstanding the agreement." See, also, *Ramos v. Pacheco*, 64 Cal.App. 2d 304, 148 P.2d 704.

[3] From the pleadings in this case, it does not appear that the question of failure of Mrs. Auclair to restore or offer to restore the cafe or its proceeds to the common fund was ever raised or considered. That question, apparently, was not forcefully presented to the trial court by way of argument. The evidence on the question is meager. After testifying that Mr. Auclair drove her off of the Burton property, no longer provided for her support, and that she was without means to support herself, she testified that she "had to" sell the cafe. It was necessary that she employ an attorney to defend the action and to prosecute the action to annul the alleged property settlement agreement. She asked for \$250 attorneys' fees and \$100 per month for support money. The trial court made no allowance to her for this purpose. After setting aside the agreement and quitclaim deed, a full accounting of the claimed community property was had. We must assume that the \$950, proceeds from the sale of the cafe, if any, were taken into consideration when making the accounting and the award of the entire community property to the wife, and that the trial judge fully considered the facts, the equities of the entire case, and that Mr. Auclair was liable for her support during all of the times mentioned (*Title Insurance & Trust Co. v. Ingersoll*, 158 Cal. 474, 492, 111 P. 360); that the proceeds of the sale were consumed in living expenses required to be furnished by her husband and in enforcing her claim to the community property; that these items were all considered in the general accounting and award; and that the case comes within the recognized exception to the general rule which would not require a previous offer of restoration.

[4] In an agreement between a husband and wife made in connection with a divorce proceeding, in settling property rights, the

court has full power to examine the contract and facts surrounding its execution and may, under certain conditions, accept or reject it in whole or in part and may dispose of the community property in spite of the agreement if the provision made is against public policy or not sufficient for the wife's needs, and may provide for her support without requiring the return of what she received under the agreement. *Roberts v. Roberts*, 83 Cal.App. 345, 256 P. 826; *Kelly v. Kelly*, 129 Cal.App. 325, 18 P.2d 781; *Moog v. Moog*, 203 Cal. 406, 264 P. 490; 3 Cal.Jur.Supp. 677, sec. 155.

[5] Under the authorities cited, the finding that parcel No. 1 (the Burton property) is and at all times remained the community property of the parties has evidentiary support, and the order setting it aside to Mrs. Auclair is authorized under section 146 of the Civil Code. *Crouch v. Crouch*, 63 Cal.App.2d 747, 147 P.2d 678.

[6-10] The right of a husband or wife to enter into engagements with the other is subject to the general rules which control the actions of persons occupying confidential relations with each other, as in trusts. The relation is declared to be confidential and all transactions between them respecting property are made subject to the same rules that control a trustee. The least overreaching or misrepresentation by a husband through which he gains the property of his wife is fraudulent and will justify an action to avoid a settlement. *Vragnizan v. Savings Union, etc., Co.*, 31 Cal.App. 709, 161 P. 507. That confidential relation exists so long as the parties are husband and wife. *Dolliver v. Dolliver*, 94 Cal. 642, 30 P. 4. A husband is bound in his dealings with his wife to the highest and best of good faith and if he would avoid the presumption of undue influence emanating from the procurement of any advantage over the wife, he should make a full and fair disclosure to her of all she should know for the protection of her interest, giving her the opportunity of independent advice. *In re Estate of Cover*, 188 Cal. 133, 204 P. 583; *Hensley v. Hensley*, 179 Cal. 284, 183 P. 445. The trial court must take into consideration all of the surrounding circumstances in determining the issue whether or not the transaction was consummated in the utmost good faith. *Murdock v. Murdock*, 49 Cal.App. 775, 194 P. 762. We are convinced that the evidence in this case, if believed by the court, is sufficient to support the finding of fraud

and undue influence on the part of the husband in securing the execution of the property settlement agreement and subsequent quitclaim deed.

[11, 12] The next complaint affects the award of the community personal property to Mrs. Auclair. It is true that the pleadings make no mention of the fixtures or personal property located on parcels No. 1 or No. 2. The findings do not refer to that property. However, the judgment awarded all of the household goods, furniture, furnishings, fixtures, and personal property located on parcels No. 1 and No. 2 to Mrs. Auclair, without describing them in detail. The pleadings are limited in their scope. In a divorce proceeding, however, issues may be broadened at the trial to include questions not made an issue by the pleadings and where the entire controversy as to the disposition of the community property is submitted to the court, it may make a fair disposition of the property rights in consonance with the law and a general accounting. *Queen v. Queen*, 44 Cal.App.2d 475, 479, 112 P.2d 755; *Roy v. Roy*, 29 Cal. App.2d 596, 85 P.2d 223; *Ramos v. Pacheco*, supra, 64 Cal.App.2d at page 307, 148 P.2d 704. There is evidence that certain furniture, fixtures and personal effects were community property. The award of those undescribed items to Mrs. Auclair will not be disturbed. However, such award would not be effective as to any of Mr. Auclair's personal property, which is his separate property and is located on the parcels enumerated.

[13] As to the judgment in the Driscoll case (No. 3410), the only real question raised involves the sufficiency of the evidence to support the finding: that at all times parcel No. 1 was the community property of Mr. and Mrs. Auclair; that Mrs. Driscoll and Mr. Auclair, in April, 1943, became infatuated with each other; that Mr. Auclair drove Mrs. Auclair from the home which was located on parcel No. 1; that Mrs. Driscoll came to that home and subsequently resided there; that on October 12, 1943, Mr. Auclair executed a quitclaim deed, deeding to her the home here involved; that such deed was executed without any consideration and recorded by Mr. Auclair, with the knowledge on the part of Mrs. Driscoll that the property, at all times, constituted Mr. and Mrs. Auclair's home and was community property and that the deed was executed and accepted by her for the sole purpose of defraud-

ing Mrs. Auclair of her rights thereto. The court found that Mrs. Driscoll had no right in and to the property.

There is evidence that Mrs. Driscoll paid certain sums of money to Mr. Auclair to apply on the purchase price, although that evidence is not very convincing. She testified that as part of the consideration for the purchase of parcel No. 1, she purchased an automobile for \$513.50 for Mr. Auclair but kept title in herself, but that she was letting Mr. Auclair use it. Under the circumstances of the case the trial court had the right to believe or disbelieve the testimony produced. The finding that there was no consideration for the deed and that Mrs. Driscoll took title to the property with full knowledge of the claimed fraud has evidentiary support.

The judgment refusing to quiet Mrs. Driscoll's claimed title in and to parcel No. 1 in action No. 3410 is affirmed. The portion of the judgment in action No. 3409 awarding Parcel No. 2 (the mining property) to Mrs. Auclair is reversed. The remaining portion of the judgment granting a decree of divorce and awarding the balance of the community property (Parcel No. 1 and the community personal property) to Mrs. Auclair is affirmed. Respondent to recover costs.

BARNARD, P. J., and MARKS, J., concur.



72 Cal.App.2d 747

In re THOMPSON.
Cr. 1951.

District Court of Appeal, Third District,
California.
Jan. 29, 1946.

Criminal law ⇨ 1202(1)

The inclusion in judgment and commitment of conviction in Wisconsin for larceny of \$35 as one of three prior convictions was erroneous. Pen.Code, § 644.

Proceeding in the matter of the application of Clarence E. Thompson, for a writ of habeas corpus against Robert A. Heinze, warden of the California State Prison at Folsom.

Judgment in favor of petitioner.

Clarence E. Thompson, in pro. per.

Robert W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Petitioner is imprisoned in the State Prison at Folsom after conviction in Kings County, California, in November, 1936, of assault with intent to commit murder, and assault with a deadly weapon. The information upon which he was convicted charged three prior convictions, one of them being for larceny in Wisconsin in November, 1918. On his arraignment defendant admitted the three priors, and after his conviction on the main charge was found to be an habitual criminal and sentenced to imprisonment in the State Prison, the judgment reciting three prior convictions.

In his petition before this court he alleges that in June, 1942, on motion of the District Attorney of Kings County, the Superior Court of that county made and entered an order that petitioner had two prior convictions instead of three as stated in said commitment, and that a copy of such order had been furnished to the prison officials, but that same had been disregarded by the State Board of Prison Directors. He further alleges that the crime of larceny of which he was convicted in the state of Wisconsin was larceny of but \$35, a crime which was not then and is not now one which comes within the provisions of section 644 of the Penal Code of California, and that petitioner was improperly charged and sentenced as one with three prior convictions. He does not contend that he is now entitled to his release by reason of the error aforesaid, but asserts that with the benefit of credits earned and granted to him, he has served the minimum term of imprisonment required by law and is entitled to parole consideration by the Adult Authority, which consideration is being denied him because of the aforesaid judgment and commitment.

It is conceded by respondent that petitioner's contention regarding the prior

conviction in Wisconsin is correct; and a copy of the information filed in that state shows that the crime charged was the larceny of but \$35. Respondent also concedes that such prior conviction was improperly considered by the Superior Court of Kings County in sentencing petitioner. See *People v. McChesney*, 39 Cal.App.2d 36, 102 P.2d 455; *In re Howard*, 69 Cal. App.2d 164, 158 P.2d 408; *In re Connell*, 68 Cal.App.2d 360, 156 P.2d 483; *People v. Hayes*, 3 Cal.App.2d 59, 39 P.2d 213; *In re Taylor*, 64 Cal.App.2d 47, 148 P.2d 143; *People v. Pace*, 2 Cal.App.2d 464, 38 P.2d 202.

In view of the foregoing we hold that the inclusion of the Wisconsin larceny prior conviction as one of the three priors mentioned in the judgment and commitment was erroneous, that petitioner has only two prior convictions against him, and that the Adult Authority should act in conformity herewith in determining the eligibility of petitioner for parole and/or for termination of sentence.

PEEK and THOMPSON, JJ., concur.



FONG CHUCK v. CHIN PO FOON et al. *
Civ. 12890.

District Court of Appeal, First District,
Division 1, California.

Feb. 4, 1946.

Hearing Granted April 1, 1946.

1. New trial ⇨117(2)

A motion for new trial may be filed before entry of judgment but it may not be filed properly prior to signing and filing of findings. Code Civ.Proc. § 659.

2. Appeal and error ⇨91(1)

The District Court of Appeal, an intermediate appellate court, is bound by the decisions of the Supreme Court.

3. New trial ⇨117(2)

The filing of notice of intention to move for a new trial prior to signing and filing of findings of fact was premature and ineffectual for any purpose. Code Civ. Proc. § 659

* Subsequent opinion 176 P.2d 795.

4. New trial ⇨117(2)

Where premature notice of intention to move for new trial has been filed, the party involved may later file a seasonable notice. Code Civ.Proc. § 659.

5. New trial ⇨139

The parties by stipulation can waive the necessity of filing of notice of intention to move for a new trial and agree to argue such a motion made orally. Code Civ.Proc. § 659.

6. New trial ⇨139

Where defendants' notice of intention to move for a new trial was filed prematurely but within ten days allowed for filing motion defendants orally presented and argued their motion and plaintiff opposed the motion without making objection based on premature filing of notice, or to oral presentation of motion, plaintiff waived necessity of filing seasonable written notice of intention and was estopped from raising the point that a second notice of intention was not filed. Code Civ. Proc. § 659.

7. New trial ⇨155

The 60-day limit within which trial court may pass on motion for new trial starts to run from date of filing and serving notice of intention to move for new trial and not from date of notice of entry of judgment if the first date is earlier. Code Civ.Proc. § 662.

8. New trial ⇨155

A determination under statute permitting trial court in passing on motion for new trial to set aside findings and judgment and enter judgment for the other side must be made within the 60-day time limit prescribed for determination of motions for new trial. Code Civ.Proc. § 662.

9. Courts ⇨114

Courts of record on their own motion or upon motion of either party ex parte or on notice have inherent power to correct nunc pro tunc or otherwise clerical errors in their records in order that such records shall speak the truth.

10. Courts ⇨116(6)

Judicial errors may not be corrected as clerical errors but it is for trial judge in first instance to determine whether error is clerical or judicial, and his determination in absence of clear showing to the contrary is final, and the judge may rely on his mem-

ory and in such cases his recollection is conclusive.

11. Courts ⇐116(3)

If trial judge makes up his mind as to disposition of a pending matter and so informs the clerk, clerk's failure to enter order on that date is a "clerical" and not a "judicial error" and may be corrected.

See Words and Phrases, Permanent Edition, for all other definitions of "Clerical Error" and "Judicial Error".

12. Appeal and error ⇐1011(1)

In determining correctness of order of trial court correcting a clerical error, conflicts in testimony must be disregarded.

13. New trial ⇐164

The court cannot grant motion for new trial and then order judgment entered for the other side, but the proper procedure is to deny motion for new trial and at same time and as part of such ruling to grant alternative relief provided by the statute. Code Civ.Proc. § 662.

14. Courts ⇐116(3)

Where defendants' notice of motion for new trial was filed on June 15, 1944, and on August 15, 1944, an order was filed setting aside judgment for plaintiff and ordering judgment for defendants, court on October 24, 1944, properly denied plaintiff's motion to strike the order of August 15th and made an order to correct the minutes to show that order entered August 15th was entered August 14th within 60 days from date of motion for new trial. Code Civ.Proc. § 662.

15. Brokers ⇐106

A complaint alleging that defendants who owned realty on certain date gave broker written authority to sell the realty for a certain sum, and that plaintiff agreed to purchase and defendants refused to sell, and which did not plead estoppel or ratification, did not state a cause of action for specific performance. Civ.Code, §§ 1624, 2309.

16. Brokers ⇐94

A broker's written authority to list property for sale is insufficient to confer authority to enter into a binding contract of sale. Civ.Code, §§ 1624, 2309.

17. Brokers ⇐94

A broker's authority under written listing of realty is to secure a purchaser, and unless writing expressly so provides broker

cannot enter into a contract of sale so that where broker is authorized "to sell" he merely has authority to find a purchaser and cannot bind owner by contract of sale if no such power is expressly conferred. Civ.Code, §§ 1624, 2309.

18. Brokers ⇐94

A letter authorizing brokers to quote realty at certain price merely conferred authority upon brokers to seek a purchaser with no legal authority to bind seller to a buyer, and hence purchaser was not entitled to specific performance of contract on basis of such letter.

19. Brokers ⇐103

A vendor's "quoting" of a higher price for realty could not be a ratification of a broker's purported contract to sell at a lower price.

Appeal from Superior Court, San Francisco County; Sylvain J. Lazarus, Judge.

Action by Fong Chuck against Chin Po Foon and others for specific performance of an agreement to purchase real estate. From a judgment denying specific performance, from an order purporting to correct clerical errors, and from an order refusing to set aside and strike from the files an order directing judgment to be entered for defendants, plaintiff appeals.

Affirmed.

Prior opinion, 162 P.2d 642.

J. H. Sapiro, of San Francisco, for appellant.

J. H. Brill, of San Francisco, for respondents.

PETERS, Presiding Justice.

A rehearing was granted in this case in order to give further consideration to a jurisdictional point first raised by plaintiff on the petition for rehearing—namely, that the motion for a new trial was premature, and for that reason all subsequent proceedings based thereon were void. The point becomes of crucial importance because, after first ordering judgment for plaintiff, the trial court in passing on the motion for a new trial, pursuant to the provisions of § 662 of the Code of Civil Procedure, ordered judgment for defendants. It is this last judgment, from which the present appeal is taken, that plaintiff urges is void because the motion for a new

trial upon which it is based was prematurely filed. If plaintiff is correct, then the original judgment for plaintiff must stand, and, since defendants have not appealed from that judgment, the judgment for plaintiff, which, as a matter of law we believe and have heretofore held to be erroneous, would become final. The point need not be labored that such a miscarriage of justice should not be permitted if there is any sound legal ground upon which it can be avoided.

The following dates disclosed by the record are important to the discussion of the present point:

May 25, 1944—judgment ordered for plaintiff.

June 13, 1944—hearing on findings; findings settled and ordered redrafted in accordance with rulings then made.

June 15, 1944—notice of intention to move for a new trial served and filed.

June 16, 1944—findings actually signed and filed and judgment entered.

June 19, 1944—written notice of entry of judgment served and filed.

June 23, 1944—motion for a new trial argued and submitted.

Thereafter, the trial court, within the time permitted by law, granted judgment for defendants, and plaintiff appeals.

The contentions of plaintiff are, that since the notice of motion for a new trial was served and filed the day before the findings were signed and filed, it was filed prematurely, and that all proceedings based on such motion are void. This point was never raised before the trial court, and was not raised in this court until the petition for rehearing.

The problem centers around the proper interpretation of § 659 of the Code of Civil Procedure. It provides: "The party intending to move for a new trial must, either before the entry of judgment or within ten (10) days after receiving written notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial, designating the grounds upon which the motion will be made and whether the same will be made upon affidavits or the minutes of the court or both. Said notice shall be deemed to be a motion for a new trial on all the grounds stated in the notice. The time above specified shall not be extended by order or stipulation."

[1] The first question is, What is the earliest date a motion for a new trial may

be filed? Obviously, since the 1923 amendment to the section, it may be filed before the entry of judgment. The cases subsequent to the adoption of that amendment have held that it may not be filed properly prior to the signing and filing of the findings. *Root v. Daugherty*, 201 Cal. 12, 255 P. 181; *Frye v. Pacific Freight Lines*, 27 Cal.App.2d 748, 81 P.2d 1027; *In re Estate of Barker*, 207 Cal. 112, 276 P. 992; *Reeve v. Jahn*, 9 Cal.2d 244, 70 P.2d 610; *Middleton v. Finney*, 214 Cal. 523, 6 P.2d 938, 78 A.L.R. 1104; *In re Estate of Green*, 25 Cal.2d 535, 154 P.2d 692.

The second question is, What is the legal effect of a premature filing? In *Root v. Daugherty*, supra, 201 Cal. at page 14, 255 P. at page 181, it is held that "proceedings for a new trial taken prematurely are a nullity and ineffectual for any purpose. * * * We are of the opinion, therefore, that proceedings on motion for a new trial instituted by the filing of a notice of intention prior to the signing and filing of the findings of fact and conclusions of law are premature and ineffectual for any purpose." The other cases cited, supra, reaffirm that rule. In the *Frye* case, supra, after reaffirming that rule the court states (27 Cal.App.2d at page 750, 81 P.2d at page 1028): "It is argued by respondents that although the notice was premature, appellants waived the defect by a failure to object. The argument is without merit." The rule of this case has been criticised, 27 Cal.L.Rev. 225.

The two most recent cases where these harsh rules have been applied are *City of Los Angeles v. Cole*, Cal.App., 162 P.2d 306, and *Tabor v. Superior Court*, Cal.App., 162 P.2d 869. Hearings have been granted in both cases.

[2,3] Whatever our views may be as to the correctness of the rules under discussion, as an intermediate appellate court, we are bound thereby. For this reason we start the discussion of this phase of the case with the holding that the filing of the notice of intention to move for a new trial on June 15, 1944, was premature, and for that reason void and ineffectual for any purpose.

[4-6] This holding, however, is not decisive of the problem here involved. In the present case there is one fact present not present in any of the other cases so far as the opinions therein disclose. That fact is that within ten days after receiving written notice of the entry of judgment (June

19, 1944), the motion for a new trial was heard and argued (June 23, 1944). It is well settled that where a premature notice has been filed, the party involved may later file a seasonable notice. *The Yamato v. Bank of Southern California*, 170 Cal. 351, 149 P. 826; *Middleton v. Finney*, 214 Cal. 523, 6 P.2d 938, 78 A.L.R. 1104. In the present case no such subsequent notice was filed, but within the ten-day period set forth in the section the moving party orally presented and argued his motion, and the plaintiff defended the judgment and opposed the motion. Plaintiff at that time made no objection based on the premature filing of the notice of motion, nor did he object to the oral presentation of the motion. Had objection then been made defendants could then have filed a proper motion. There would seem to be no doubt but that the parties by stipulation can waive the necessity of the filing of the notice of motion and agree to argue such a motion made orally. That appears to have been the exact situation involved in *Re Estate of Green*, 25 Cal.2d 535, 154 P.2d 692. If the parties can stipulate to waive the necessity of the filing of the notice of intention to move for a new trial, they can also agree to hear the motion where such agreement appears by conduct as well as where it appears by words. In the present case when the motion came up for argument on June 23, 1944, the defendants' counsel could have objected to the notice of motion filed June 15th and could have refused to participate in the discussion of the motion. But this he did not do. Without objection he discussed and argued the motion. Did he, by his conduct, not mislead defendants' counsel to his injury? Had he then objected, defendants' counsel could then have filed a new and timely notice of intention to move for a new trial. By participating in the argument and discussion did he not waive the necessity of the filing of a second notice? If the parties can waive the filing of the notice of intention by express oral agreement, as was done in *Re Estate of Green*, supra, they can also waive the necessity of such a filing by their conduct. Under the circumstances here present plaintiff must be held to have waived the necessity of the filing of the written notice of intention, and is now estopped to raise the point that a second notice of intention was not filed. Any other rule would make a mockery of justice. The rule involved while "jurisdictional," is also "procedural."

We should not permit the procedural tail to wag the appellate dog. For these reasons we are satisfied that under the facts of this case the court had jurisdiction to pass upon the motion for a new trial.

On the merits we are satisfied that this case was properly disposed of by the opinion heretofore filed. We therefore adopt that opinion as the present opinion of this court on the issues presented. It reads as follows:

"Plaintiff appeals from a judgment denying him specific performance of an agreement to purchase real estate, from an order purporting to correct clerical errors, and from an order refusing to set aside and strike from the files an order directing judgment to be entered for defendants. The following table of dates discloses the problems involved on the appeals from the two orders:

May 25, 1944—conclusion of trial; judgment ordered for plaintiff.

June 15, 1944—notice of motion for new trial served, and filed.

June 16, 1944—findings and conclusions signed and judgment entered decreeing specific performance of contract.

June 23, 1944—motion for new trial argued and submitted.

August 15, 1944—61 days after service of notice of motion for new trial an order was filed setting aside the findings and judgment and ordering judgment for defendants.

September 15, 1944—judgment for defendants filed.

October 24, 1944—court denied plaintiff's motion to strike order of August 15, 1944, and made an order purporting to correct the minutes to show that the order actually entered August 15th was entered August 14th, on the ground that August 14th was the date the order was actually made.

"Plaintiff contends that the trial court had no power thus to correct the minutes under the facts disclosed by the record. This argument is based on the following premises:

[7] "1. The 60 day time limit within which a trial court may lawfully pass on a motion for a new trial starts to run from the date of filing and serving notice of intention to move for a new trial and not from the date of notice of entry of judgment if the first-mentioned date is earlier. This premise is entirely sound. *Rubens v. Whittemore*, 2 Cal.App.2d 575, 38 P.2d

153; *Iske v. Stockwell-Kling Corp.*, 128 Cal.App. 192, 17 P.2d 203. Under this rule the time within which the trial court lawfully could pass upon the motion for a new trial expired on August 14, 1944.

[8] "2. A determination under § 662 of the Code of Civil Procedure, which section permits a trial court in passing on a motion for a new trial to vacate and set aside the findings and judgment and enter judgment for the other side (*Clarke v. Fiedler*, 44 Cal.App.2d 838, 113 P.2d 275; *Spier v. Lang*, 4 Cal.2d 711, 53 P.2d 138; *Wyman v. Monolith Portland C. Co.*, 3 Cal.App.2d 540, 39 P.2d 510), must be made within the 60 day time limit prescribed for the hearing and determination of motions for a new trial. This premise is likewise sound. *Gustafson v. Blunk*, 4 Cal.App.2d 630, 41 P.2d 953; *Knight v. Paulton*, 125 Cal.App. 688, 14 P.2d 94; see discussion 8 Cal.Jur.Supp. p. 545, § 130b.

"3. The order by which the court directed that the original findings and judgment be set aside and judgment entered in favor of defendant was signed and filed August 15, 1944. This was too late, being the 61st day from the serving and filing of notice of intention to move for a new trial. Thereafter, when plaintiff moved to set aside this order on the ground that it had been filed too late, the court, on October 24, 1944, entered its order correcting the clerical error to make it read made and filed August 14, 1944, and expunging the August 15th date from the files. This order recites that on August 14th the court had determined to enter judgment in favor of defendant and so informed the clerk and directed the clerk to enter such an order, but the clerk, through mistake and inadvertence, did not enter such order until the 15th, but that the motion was actually determined on the 14th. The court thereupon denied the motion to set aside the original order. The appellant urges that under the facts the court had no power to make the challenged orders of October 24, 1944. This basic premise is unsound.

[9-12] "It is well settled that courts of record, on their own motion or upon motion of either party, ex parte or on notice, have inherent power to correct, nunc pro tunc or otherwise, clerical errors in their records in order that such records shall speak the truth. Judicial errors may not, of course, be so corrected. However, it is for the trial judge in the first instance to de-

termine whether the error is clerical or judicial, and his determination, in the absence of a clear showing to the contrary, is final. In making such determination many times the facts are completely within the knowledge of the trial judge. He has a right to rely on his memory, and in such cases his recollection is conclusive. *Carpenenter v. Pacific Mut. Life Ins. Co.*, 14 Cal.2d 704, 96 P.2d 796; *Livesay v. Deibert*, 3 Cal.App.2d 140, 39 P.2d 466; *King v. Emerson*, 110 Cal.App. 414, 288 P. 1099, 294 P. 768; *Keller v. Cleaver*, 20 Cal.App. 2d 364, 67 P.2d 131; *Bastajian v. Brown*, 19 Cal.2d 209, 120 P.2d 9; *Serpa v. Davidson*, 51 Cal.App.2d 619, 125 P.2d 603. It is now also well settled that if the trial judge makes up his mind as to the disposition of a pending matter and so informs the clerk, the failure of the clerk to enter the order on that date is a clerical and not judicial error and may be corrected. *Keller v. Cleaver*, 20 Cal.App.2d 364, 67 P.2d 131; see, also, *Livesay v. Deibert*, 3 Cal. App.2d 140, 39 P.2d 466. These rules apply to the facts here presented. Disregarding conflicts in the record created by the testimony of the clerk, and disregarding conflicts in the judge's own testimony, as we must (*Bastajian v. Brown*, 19 Cal.2d 209, 120 P.2d 9), the evidence supports the findings contained in the October 24th order. The trial judge stated that he knew that August 14th was the last day he could act; that late in the afternoon of that day he called in the clerk and discussed the matter; that he first told the clerk he had decided to grant the motion for a new trial, and then told the clerk he had decided to order judgment entered in favor of defendants. He was positive in his recollection that on the 14th he told his clerk that he had decided to set aside his original findings and judgment and order judgment for defendants; that there was no doubt that he had made up his mind and signified his intention to his clerk on the 14th.

[13, 14] "Plaintiff contends that reading the judge's statements as to his recollection as a whole and giving due consideration to the clerk's testimony, all that appears is that on the 14th the trial judge had determined to grant the motion for a new trial and was then in doubt as to whether he could enter judgment for defendants, which doubt he did not resolve until the 15th. It is urged that while the court perhaps could have corrected its order in October to grant the motion for a new trial

it had no power to then order judgment for defendants. It is the law, as already pointed out, that when a motion for a new trial is made the court may either grant that motion or, under § 662 of the Code of Civil Procedure, order judgment for the other side. It is also the law that the court cannot grant the motion for a new trial and then order judgment entered for the other side. The proper procedure is to deny the motion for a new trial, and, at the same time and as part of such ruling, to grant the alternative relief provided by the section. *Sparr v. Byers*, 139 Cal.App. 668, 34 P.2d 787; *Spier v. Lang*, 4 Cal.2d 711, 53 P.2d 138; *Bureau of Welfare, etc., v. Drapeau*, 21 Cal.App.2d 138, 68 P.2d 998; *Gruben v. Leebrick & Fisher*, 32 Cal.App. 2d Supp. 762, 84 P.2d 1078. It is true that the clerk testified that on the 14th the trial judge told him he had decided at least to grant the motion for a new trial but that he might order judgment for the defendants, but that he was in doubt about his power to do so, and requested the clerk to ask the attorney for the defendants to call on the 15th to discuss that question. He also testified that the judge did not definitely decide to exercise the power until the 15th. This evidence would have supported a finding that the trial judge did not rule on the motion until the 15th, which was too late. But that testimony did no more than create a conflict. The trial judge stated that on the 14th he had definitely decided to order judgment entered for defendants and so informed the clerk, and that he assumed it would be entered that day. It is true that during his testimony the trial judge occasionally confused the granting of a new trial with an order directing entry of judgment for the other side, but reading his testimony as a whole it supports the order of October 24th. All conflicts with the supporting testimony must be disregarded. That being so, the two orders of October 24, 1944, must be affirmed.

"On the merits, the judgment denying specific performance entered September 15, 1944, must be affirmed. The evidence shows the following facts: In October or November of 1943 the father of the owner of the property orally listed the real property in question with the licensed real estate brokers Hogan and Vest at a price of \$30,000 net. This would mean \$30,000 plus a commission of \$1,250. On January 7, 1944, the real estate firm and plaintiff, who was then a tenant in the building in question, executed a document designated as a 'Uni-

form Agreement of Sale.' This agreement recites that \$500 has been received from plaintiff on account of the purchase price of the real property in question. The conditions of sale are set forth in detail. It is signed by W. T. Hogan for Hogan and Vest, 'Agent for Seller.' Immediately under the broker's signature is the following:

"The undersigned, hereinabove designated as the purchaser, hereby agree[s] to purchase the above described property for the price and according to the conditions above specified. Subject to Approval of Seller

(Signed) Fong Chuck, Purchaser.'

"Immediately below this is a printed form of approval intended to be signed by the seller. The trial court found that this agreement of January 7, 1944, was signed by Hogan without the written authority of defendant owner. That finding is supported by the uncontradicted evidence, and is not challenged by plaintiff.

"The evidence shows that on January 8, 1944, the broker delivered to defendant owner copies of the above agreement that had been signed by the broker and plaintiff. The total purchase price stated in that agreement was \$31,250. Defendant owner signed 'Chin' in the space for approval on one of the copies but then stated that he would not sell unless the \$30,000 net also included his income tax on the transaction. He testified that he customarily signed his name 'Chin, Po Foon,' and that 'Chin' was not intended as a complete signature—that he signed 'Chin' and then discovered that his and Hogan's intentions were not clear and for that reason did not complete the signature. He also stated that he and his father told Hogan when they listed the property and when he brought the agreement to them that they would not sell unless they could invest the money received in some suitable property. Defendant owner then wrote the broker a letter admittedly drafted by Hogan and recopied by defendant owner and addressed to the broker, reading: 'In regard to the property owned by me at 822½ 824 Washington Street my father in quoting a price of \$30,000.00 net did not figure in his price the income tax which amounts to some \$2,200.00. I am now quoting to you the correct price we want for the property

\$30,000.00 net	
1,250.00 selling charge	
2,200.00 tax	
<u>\$33,450.00 total</u>	

This letter was signed by defendant owner and dated January 10, 1944. When it was delivered to Hogan, defendant owner and his father also discussed with Hogan prospective properties that were to be purchased by defendant owner if the sale went through, and Hogan gave defendant's father the addresses of three such properties, none of which were acceptable to defendant owner.

"On January 11th the plaintiff re-executed the contract above referred to, changing the price to \$33,450, and inserting the words 'I hereby increase my offer to Thirty Three Thousand Four Hundred and Fifty (\$33,450.00).' Hogan took the re-executed document to defendant owner telling plaintiff he would get the seller's signature. Defendant owner then refused to approve or to go through with the sale.

[15-17] "The complaint in this action simply alleges that defendants own the property, that on January 11, 1944, the defendants gave Hogan written authority to sell the property for \$33,450, that plaintiff agreed to buy and defendants refused to sell. No estoppel or ratification is pleaded. It seems quite clear that the complaint does not state a cause of action (*Thompson v. Scholl*, 32 Cal.App. 4, 161 P. 1006), and that under the evidence the findings in favor of defendants are amply supported. There is no allegation or proof that defendants ever executed an agreement for the sale of the real property or that the broker had written authority to execute a contract of sale on the defendants' behalf. All that the pleadings and the proof show is that on January 10th the broker had written authority to list the property for sale. That is not sufficient to confer authority to enter into a binding contract of sale. Under §§ 2309 and 1624 of the Civil Code the authority of an agent to enter into a contract on behalf of his principal to sell real property must be in writing. The law is clear that a broker's authority under a written listing of real property is simply to secure a purchaser, and unless the writing expressly so provides, he has no authority to enter into a contract of sale. Thus where the broker is authorized 'to sell' he merely has authority to find a purchaser and he has no authority to bind the owner by a contract of sale, if no such power is expressly conferred. These principles are elementary and have frequently been stated by the courts. See many cases collected and commented on 4 Cal.Jur. p.

565, § 13; 3 Cal.Jur.Supp. p. 175, § 13. It must be remembered that we are not here dealing with cases involving the broker's right to his commission. Normally, the commission is earned when the broker produces a purchaser ready, able and willing to buy. But whether Hogan earned his commission on this deal is not involved in this case, and we refrain from expressing any opinion thereon. We mention the point only because most of plaintiff's cases deal with the rights of the broker. Those cases are not in point.

[18] "It is perfectly clear that when the property was orally listed with the brokers in 1943 they had no valid authority at all, in the absence of some facts, not here contended to exist, constituting an estoppel. On January 7, 1944, when Hogan signed the uniform agreement of sale as agent for the seller and accepted the \$500 deposit from the buyer, it is equally clear that, then having no written authority at all, he had no legal right to bind the sellers to anything. That is admitted by plaintiff. Moreover, this so-called agreement obviously was an offer to buy inasmuch as it expressly provided it was subject to approval of the seller. So much is clear. This document provided for a selling price of \$31,250. This was presented by the broker to the defendant owner for his approval. He started to write his name thereon, but before he had completed his signature, refused to go on with the transaction. So far it is clear, and plaintiff admits, no contract at all had been consummated. At that moment the sellers could have lawfully refused to sell to plaintiff or to any one else. Then defendant owner, at Hogan's dictation and request, signed the letter of January 10th. That letter is the key to the entire case. What does it provide? It is addressed to the brokers and simply authorizes them to quote the property at \$33,450. It is obvious that if an authorization 'to sell' does not empower the broker to enter into a contract to convey, then an authorization 'to quote' the property confers no such authority. All that the letter of January 10th did was to list the property with the brokers at the fixed price. When Hogan received this letter he had written authority to seek a purchaser but no legal authority to bind the seller to a buyer.

[19] "This legal relationship was not changed by what happened on January 11th. On that date the prospective purchaser was

shown the letter of January 10th and thereupon re-executed the documents of January 7th with the new purchase price of \$33,-450 inserted, and with the statement 'I hereby increase my offer to Thirty Three Thousand Four Hundred and Fifty (\$33,-450.00)' likewise written on the face of the document. This document still contained the provision that it was subject to the approval of the seller, which approval was never given. Legally the document constituted and the plaintiff designated it an offer to buy. That offer never having been accepted, and there being no facts pleaded or proved to constitute an estoppel, no contract of sale was ever entered into between plaintiff and defendants. Nor did the letter of January 10th constitute a ratification of what the agent had done on January 7th. It seems too clear to require citation of authority that the 'quoting' of a higher price could not be a ratification of a purported contract at a lower price."

For the foregoing reasons the orders and judgment appealed from are affirmed.

WARD, J., and ATTERIDGE, J. pro tem., concur.



PEOPLE v. ZEGRAS et al. *
Civ. 7201.

District Court of Appeal, Third District,
California.

Feb. 4, 1946.

Rehearing Denied March 4, 1946.

Hearing Granted April 1, 1946.

1. Venue ⇨7

Where obligation sued upon is quasi *ex contractu*, growing out of a statutory requirement to use due diligence in controlling a fire, place of performance of that obligation is deemed to be in county where expenses were incurred by Department of Forestry in extinguishing fire, and State has option to bring suit in that county, notwithstanding that defendants may reside elsewhere. St.1931, p. 1644; Code Civ. Proc. § 395.

* Subsequent opinion 172 P.2d 883.

2. Fires ⇨2

The statute creating liability in persons, who negligently set fires or permits them to spread to other properties, for repayment of damages and expenses incurred by individuals or State is valid. St.1931, p. 1644.

3. Venue ⇨7

Action by the State to recover expenses incurred by Department of Forestry in extinguishing a fire in Napa county, which defendants were alleged to have either negligently set or negligently permitted to be set and escape to other property, was founded on an implied contract which every person enters into with the State to observe the laws, regardless of whether a tort may have been involved, and State had option to bring action either in county where fire occurred or in county of defendants' residence. St.1931, p. 1644, §§ 1, 3; Code Civ. Proc. § 395.

4. Venue ⇨7

The effect of 1939 amendment to section of Code of Civil Procedure pertaining to venue was to enlarge rights of plaintiff, so as to give him a choice of venue in either county where contract is to be performed or in county where a defendant resides. Code Civ.Proc. § 395.

5. Venue ⇨7

Where defendants, residents of Alameda county, negligently set or negligently permitted a fire to spread to other properties in Napa county with result that Department of Forestry incurred expense in extinguishing fire, State's action to recover such expense was one for a civil liability for a "debt" growing out of breach of an implied contract to exercise due care with respect to fire, which due care was to be exercised in county where fire was started, hence the State properly brought action against defendants in Napa county. St. 1931, p. 1644, §§ 1, 3; Code Civ.Proc. § 395.

See Words and Phrases, Permanent Edition, for all other definitions of "Debt".

6. Action ⇨16

The nature of an action must be determined by the gravamen ascertained from the complaint taken as a whole.

7. Fires ⇨8

The fire liability law creates an implied contract on the part of persons who

set a fire or permit it to be set, that they will exercise due care to control it and to prevent it from spreading to other property, and such persons, in performance of their acts in lighting or controlling fire, are bound to observe statutory requirements in that regard, the manner of their performance being a necessary part of their employment. St.1931, p. 1644.

Appeal from Superior Court, Napa County; Mervin C. Lernhart, Judge.

Action by the People against John Zegras and others, to recover expenses incurred by Department of Forestry in suppressing a fire alleged to have been negligently set by defendants or by them negligently allowed to be set on their property and permitted to spread to other properties. From an order denying defendants' motion for a change of place of trial from Napa county to Alameda county, defendants appeal.

Affirmed.

L. R. Weinmann and A. G. Grant, both of Oakland, N. F. Coombs, of Napa, and A. C. McClellan, of Oakland, for appellants.

Robert W. Kenny, Atty. Gen., and James O. Reavis and Ariel C. Hilton, Deputy Attys. Gen., for respondent.

THOMPSON, Justice.

[1] The defendants have appealed from an order denying their motion for a change of the place of trial from Napa County to Alameda County, in which they reside. The only question involved is whether the suit is based on an obligation to reimburse the State of California for expenses incurred by its Department of Forestry, pursuant to an act of the legislature creating a liability against persons or their agents for negligently setting fires, or for a lack of diligence in preventing them from spreading to other properties. Stats.1931, p. 1644, 1 Deering's Gen.Laws, p. 1080, Act 2586. If the obligation is quasi ex contractu, growing out of a statutory requirement to use diligence in controlling a fire, and the place of performance of that obligation is deemed to be in Napa County where the expenses were incurred in extinguishing the fire, then the plaintiff had the option under Section 395 of the Code of Civil Procedure to bring the suit in that county, and the court properly denied defendants' motion for a change of venue.

The complaint is couched in two counts. The first cause alleges that the defendants negligently set fire to designated real property in Napa County, covered with timber, brush and grass, and that the Department of Forestry of the State of California incurred an expense of \$1,713.98, in fighting and suppressing the fire, which expenses, after demand therefor, the defendants refused to pay. The second cause alleges that the defendants negligently allowed the fire to be set on said property and permitted it to spread to other properties, and that said Department of Forestry incurred said expenses in extinguishing the fire, which indebtedness, upon demand, the defendants refused to pay.

The defendants' motion to change the place of trial to Alameda County was denied. For the purpose of this appeal it is conceded the defendants reside in Alameda County.

The "Fire Liability Law", previously referred to, creates a civil liability against "Any person who: (1) Personally or through another, * * * (2) Wilfully, negligently, or in violation of law * * *: (1) Sets fire to, (2) Allows fire to be set to, (3) Allows a fire kindled or attended by him to escape to the property, * * * of another, * * *." Section 3 of that act provides: "The expenses of fighting such fires shall be a charge against any person made liable by this act for damages caused thereby. Such charge *shall constitute a debt* of the person charged and shall be collectible by the party, or by the federal, state, county or private agency incurring such expenses *in the same manner as in the case of an obligation under a contract, expressed or implied.*" (Italics added.)

[2] Statutes creating a liability for repayment of damages and expenses incurred by individuals or the state against persons who negligently set fires or permit them to spread to other properties have been enacted and upheld in this and other jurisdictions. Richter v. Larabee, 136 Cal.App. 16, 27 P.2d 954; Osborne v. Winter, 133 Cal. App. 664, 24 P.2d 892; Jno. L. Witney, Inc. v. Sierra Ry. Co., 123 Cal.App. 430, 11 P. 2d 415; 36 C.J.S., Fires, §§ 15 and 16, page 819. The California cases last cited did not involve the question of venue or the determination of whether the actions were quasi ex contractu in nature but they do support the validity of the statutes creating such liability.

[3] The learned trial judge wrote a very able opinion in which he concludes that the liability created by the statute establishes Napa County, where the fire occurred and the service of extinguishing it was rendered, as the proper place of trial. It is not necessary to determine whether the obligation is in the nature of a penalty or not, if it is quasi contractual. It has been held that an obligation created by statute may be quasi contractual. *Journal Publishing Co. v. Drake*, 9 Cir., 199 F. 572, 575; *Stearns v. United States*, 22 Fed.Cas. page 1188, No. 13,341, 2 Paine 300; 25 C.J. 1183, § 83. Regardless of whether a tort may have been involved in the transaction on this case we assume that the action as disclosed by the allegations of the complaint, is founded on an implied contract which every person enters into with the state to observe the laws. The statute imposes a personal liability to pay the "debt" created for expenses incurred by the state in fighting and extinguishing the fire negligently set or negligently permitted to spread to other properties.

[4] Section 395 of the Code of Civil Procedure was amended in 1939, Stats. 1939, p. 2733. The effect of that amendment was to enlarge the rights of the plaintiff so as to give him a choice of venue in either the county where the contract, expressed or implied, is to be performed, or in the county where the defendant, or any defendant, resides. *Graham v. Mixon*, 177 Cal. 88, 92, 169 P. 1003, L.R.A.1918F. 1023; *Rains v. Diamond Match Co.*, 171 Cal. 326, 328, 153 P. 239.

[5, 6] The complaint in this case clearly charges the defendants with a "debt" created pursuant to the statute for expenses incurred by the Department of Forestry of the State of California in "fighting and suppressing said fire" negligently set or negligently permitted by them to spread to other properties in Napa County. That statutory obligation is quasi ex contractu. *Hays v. Bank of America*, Cal.App. 162 P. 2d 679; *Quong Ham Wah Co. v. Ind. Acc. Comm.*, 184 Cal. 26, 36, 192 P. 1021, 12 A.L.R. 1190. It is a civil liability for a debt growing out of the breach of an implied contract to exercise due care to regulate and control fires negligently started or permitted by individuals to spread to other lands. The statute contemplates that the exercise of such due care will be performed in the county where the fire is set or is negligently permitted to spread to other lands.

In the present case that implied contract was to be performed in Napa County. Section 3 of the act specifically provides that such expenses for fighting or extinguishing fires "shall constitute a debt", and that it is collectible "in the same manner as in the case of an obligation under a contract, expressed or implied." The nature of an action must be determined by the gravamen ascertained from the complaint taken as a whole. *Williamson v. Pacific Greyhound Lines*, 67 Cal.App.2d 250, 153 P.2d 990. The gravamen of this action, as indicated by the complaint, is founded on a statutory liability for expenses incurred in fighting and extinguishing a fire in Napa County which was either set or permitted by the defendants to spread to other property, as the result of a breach of an implied contract to exercise due care on their part.

Since the suit is founded on an implied contract to use due diligence to control a fire which occurred in Napa County, and that obligation was to be performed in that county, the plaintiff had the option to bring the action either in that county or in the county where the defendants reside. Code of Civ.Proc. § 395. The cited section provides that the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed. The presumption, therefore, is that the obligation was to be performed in Napa County where the fire occurred.

Section 395 provides in part: "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

[7] The statute created the implied contract on the part of the defendants in this case that if they set a fire or permitted it to be set, they would exercise due care to control it and to prevent it from spreading to other property. In the performance of their acts in lighting or controlling the fire, the defendants were bound to observe the statutory requirements in that regard. The manner of their performance was a

necessary part of their employment. Hays v. Bank of America, *supra*.

The trial court therefore properly denied the defendants' motion for a change of venue.

The order is affirmed.

PEEK, J., and ADAMS, P. J., concur.



72 Cal.App.2d 780

LAUGHLIN v. HABERFELDE et al.
Civ. 3182.

District Court of Appeal, Fourth District,
California.

Jan. 30, 1946.

Hearing Denied March 28, 1946.

1. Contracts ⇨14

No agreement exists where parties intended only to be bound by a later written agreement which was never executed.

2. Contracts ⇨33

A "contract partly written and partly oral" is, in legal effect, an oral contract, and it occurs where an incomplete writing, or one expressing only a part of what is meant, is, by oral words, rounded into the full contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract Partly Written and Partly Oral".

3. Partnership ⇨21

The clause in preliminary partnership agreement providing that a suitable partnership agreement should be written by an attorney agreeable to all parties, taken in connection with previous statement that it was intention of parties to form a partnership to carry out particular contract and to proceed immediately to that end, implied, not only that there was to be a further writing, but also that such writing was to embody terms of an existing agreement by which parties were already bound.

4. Partnership ⇨53

The intent to form a partnership may be shown by the acts of the parties as well as by direct evidence.

5. Partnership ⇨120

Where complaint alleged oral partnership agreement to operate a foundry and complete contracts held by plaintiff and alleged that performance of a partnership agreement had commenced, complaint sufficiently alleged an existing partnership for purpose of action for wrongful exclusion of plaintiff from partnership, notwithstanding allegation of existence of a preliminary written agreement providing for a future more formal contract but itself providing for immediate performance of oral partnership agreement.

6. Partnership ⇨120

Where complaint for wrongful exclusion of plaintiff from a partnership alleged that a contract for a certain amount of material for a fixed price per pound was wrongfully taken and that at that time material could be manufactured at a certain cost per pound, complaint sufficiently alleged damage capable of definite ascertainment irrespective of any prospective damage from the operation of a new business.

7. Partnership ⇨107, 108

Generally, a partner may not sue his copartners in an action at law with respect to firm transactions until an accounting has been had except when joint property has been wrongfully destroyed or converted or when one partner has been guilty of fraud or of other device defeating the rights of complaining party or where wrongful acts complained of are not only a breach of the contract but constitute a tort. Civ.Code, § 2432.

8. Partnership ⇨107

Where plaintiff contributed valuable contracts to partnership and defendants contributed capital, and thereafter defendants wrongfully excluded plaintiff from partnership, represented that partnership had terminated and renegotiated contracts, defendants' acts were not acts with respect to partnership transactions and plaintiff was entitled to sue defendants without an accounting. Civ.Code, § 2432.

9. Fraud ⇨41

Complaint alleging formation of a partnership by plaintiff's agreement to contribute valuable contracts and defendants' agreement to contribute capital, commencement of performance of partnership operations, and that at time of entering into partnership agreement defendants had no intention of performing their promises but

made them solely as a part of a conspiracy to acquire contracts owned by plaintiff and thereafter to exclude plaintiff from benefits thereof and of the partnership stated a cause of action for fraud sufficient against demurrer.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by J. N. Laughlin against George Habermfelde and others for damages for excluding plaintiff from a partnership and for declaratory relief. From a judgment of dismissal after a demurrer sustained without leave to amend, plaintiff appeals.

Reversed with directions.

Calvin H. Conron, Jr., of Bakersfield, and Conroy & Conroy and Redwine & Redwine, all of Hollywood, for appellants.

Siemon, Maas & Catalano, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

The plaintiff appeals from a judgment of dismissal after a demurrer was sustained to his third amended complaint, without leave to amend. The record shows that he asked leave to amend.

The complaint alleges that the plaintiff had entered into a contract with the Firestone Tire & Rubber Company under which he was to manufacture for that company 270,200 cast steel blocks weighing 18 pounds each, for which the company was to pay him 21¢ per pound or a total of \$1,021,356, and which contract was reasonably worth \$272,362; that he was also the owner of an agreement giving him the right to purchase an electric furnace for \$2,000, upon which he had paid \$500 and which furnace had a reasonable market value of \$7,800; that he also owned an agreement giving him the right to purchase an overhead crane for \$1,500, which crane then had a reasonable market value of \$3,500; and that on or about July 9, 1942, he and the defendants obtained the consent of the Firestone Tire & Rubber Company, and the Ordnance Department of the United States Army, that they should enter into a partnership for the purpose of performing the Firestone contract above referred to.

It is then alleged that on or about July 9, 1942, when all of the above-described contracts were in full force and effect, plaintiff and defendants entered into an oral copartnership agreement for the purpose of

constructing and operating a steel foundry in Bakersfield and for the purpose of performing said Firestone contract as well as manufacturing castings for general sale; that the plaintiff agreed to and did contribute to said copartnership the Firestone contract and the contracts for the purchase of the electric furnace and crane; that the plaintiff further agreed to supervise the construction and operation of the foundry; that the defendants agreed to supply capital not exceeding \$150,000 for the purpose of constructing said foundry according to plans supplied to the parties by a named construction engineer; and that the parties further agreed that the capital advanced by the defendants would be first returned to them and thereafter the profits would be divided one-half to the plaintiff and one-half to the defendants.

It is then alleged that a "written memorandum covering said agreement in part" was executed on or about July 9, 1942, reading as follows:

"Preliminary Agreement

"It is the intention of Ed Habermfelde, George Habermfelde and Clarissa Reavis and J. N. Laughlin to form a partnership to assume the contract made between Laughlin Steel Co. and Firestone Tire & Rubber Co. and proceed immediately to make arrangements to procure buildings to house the operation. The contract shall be assigned to a *fictitious* company to be named Habermfeld Laughlin Steel Co., said name to be filed in the manner prescribed by law.

"A suitable partnership agreement shall be written by an attorney agreeable to all parties. Ed Habermfelde, George Habermfelde and Clarissa Reavis and J. N. Laughlin shall divide the profits 1/2 to J. N. Laughlin and half to Ed Habermfelde, George Habermfelde and Clarissa Reavis. No profits to be paid out until George Habermfelde, Ed Habermfelde and Mrs. Clarissa Reavis have received all of the money advanced after deducting all taxes and all other expenses.

"O. K. Ed Habermfelde

"O. K. George Habermfelde

"O. K. J. N. Laughlin".

It is then alleged that on or about July 9, 1942, the parties entered into the performance of said partnership agreement; that the copartnership acquired the electric furnace and overhead crane; that it secured the consent of the Firestone Tire &

Rubber Company, and the Ordnance Department of the United States Army, to the performance of the Firestone contract by the copartnership; that it acquired a lease of certain land and undertook and commenced the construction of a foundry; that on or about August 10, 1942, the defendants conspired each with the other to, and did, convert the entire assets of the partnership to their own use and benefit; that they ejected plaintiff from the premises and prevented him from further supervising the construction and operation of the foundry; that they have since, to the wrongful exclusion of the plaintiff, continued in wrongful operation thereof; and that on or about August 18, 1942, the defendants wrongfully represented to the Firestone Tire & Rubber Company that this copartnership was terminated, that they retained the facilities with which to perform the Firestone contract, that plaintiff had no such facilities and could not perform the same, and that they thereby induced the Firestone Tire & Rubber Company to cancel the Firestone contract and issue to the defendants a contract substantially identical therewith.

It is then alleged that on or about August 17, 1942, the defendants gave the plaintiff written notice that they would not proceed further to carry out the terms of said partnership and since that time they have continued the partnership business for their own use and benefit, have completed and operated the foundry, have used all of the contributions of the plaintiff, have excluded the plaintiff from the business, and have converted the partnership property to their own use without paying anything to the plaintiff; that the reasonable cost of manufacturing the blocks provided for in the Firestone contract was at that time 9.8¢ per pound or a total cost of \$476,632; and that the reasonable anticipated net profit from the performance of said contract was \$544,724.

It is then alleged that had defendants performed the agreement of partnership and fulfilled the Firestone contract as made with plaintiff he would have realized a profit of approximately \$272,362 therefrom, that the plaintiff has been damaged in that amount, and that in addition thereto plaintiff has been damaged \$200,000 by being deprived of his interest in said partnership and business.

A second cause of action realleges all of these matters and further alleges that

at the time of entering into said partnership agreement the defendants had no intention of performing their promises but made the same solely as a part of a conspiracy to acquire these properties owned by the plaintiff, and thereafter to exclude him from all benefits from them and the partnership.

The third cause of action alleged the existence of a controversy between the parties with respect to the existence and effect of the agreement and arrangement between them.

The prayer was for damages in the sum of \$472,362, and for declaratory relief.

A general and special demurrer as to each cause of action was filed. The court sustained the demurrer giving as reasons therefor, with respect to the first and second causes, that no partnership contract was alleged since it was agreed that a formal contract was to be later drawn, that if a partnership did exist the remedy "would be a dissolution and accounting", and that no facts were pleaded from which damages could be ascertained. The demurrer to the third cause of action was sustained on the authority of *Columbia Pictures Corp. v. De Toth*, Cal.App., 154 P.2d 420 (that case was overruled in the Supreme Court, see same case, 161 P.2d 217).

The first question presented is whether this complaint sufficiently alleges the existence of a partnership agreement between these parties. The respondent contends, and the trial court accepted that view, that there was no such agreement. It is argued that it must be implied that the preliminary contract was drawn up after the oral contract was made, that any oral agreement was merged therein and it constitutes the only agreement between the parties, that it provides for the execution of a later partnership agreement, and that it follows that no partnership was ever launched. It is further argued that in any event the allegations of the complaint are too uncertain in that there is a failure to allege the amount to be contributed, the size, character or location of buildings to house operations, the size and capacity of equipment, the terms and conditions of the partnership agreement which was to be prepared, what the advances were to cover, whether the appellant was to acquire any interest in the operative properties and equipment, and when the division of profits was to commence. Also, that there are no sufficient allegations of damage, but only

allegations as to prospective profits from a new business, with no experience on which such profits could be determined, and that, in any event, damages are asked twice for the same thing.

[1-4] It has been held, in many cases, that no agreement exists where it appears that the parties intend only to be bound by a later written agreement which is never executed. But where no such an intention appears a different result may obtain. "A contract partly written and partly oral is in legal effect an oral contract. 'It occurs where an incomplete writing, or one expressing only a part of what is meant, is, by oral words, rounded into the full contract'". 6 Cal.Jur. 227. The clause in the preliminary agreement here in question providing that "A suitable partnership agreement shall be written by an attorney agreeable to all parties", taken in connection with the previous statement that it is the intention of the parties to form a partnership to carry out the Firestone contract and to proceed immediately to that end, implies not only that there shall be a further writing but that this shall be one embodying the terms of an existing agreement. The intent to form a partnership may be shown by the acts of the parties as well as by direct evidence. *Lyon v. MacQuarrie*, 46 Cal.App.2d 119, 115 P.2d 594. In *Lusher v. Silver*, 70 Cal.App.2d 586, 161 P.2d 472, 473, it is said: "In the last analysis the *fact* of partnership depends upon the intention of the parties. To determine this intent not only the words of the agreement itself, but the actions and conduct of the parties may be considered." "Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorandum thereof." Am.Law Inst. Restatement, Contracts, Vol. 1, par. 26. "* * * the mere intention to reduce an oral or informal agreement to writing, or to a more formal writing, is not of itself sufficient to show that the parties intended that until such formal writing was executed the parol or informal contract should be without binding force." 122 A.L.R. 1226. In *Clarke v. Fiedler*, 44 Cal.App.2d 838, 113 P.2d 275, 280, where the parties had entered into an agreement but had agreed that the contract would later be reduced to writing, the court said: "In all the cases cited by respondent it appears

from the facts thereof that the parties therein understood that their agreement was not to become binding upon any of them until evidenced by the written form; and under those circumstances, of course, their understanding does not become a binding agreement until it is reduced to writing and signed by the parties to it. However, where, as in the instant case, the contract is of such a nature that the law does not require it to be in writing, and it is conceded that a contract of partnership may be oral, and where the terms of the contract are definitely agreed upon and complete, then the fact that contemporaneously with the making of their full and complete oral agreement, they decide to evidence the same by a written instrument, the force and effect of the oral agreement is not thereby impaired or interfered with. We believe this rule to be sound and that it should be so held in the present case."

In *Sterman v. Ziem*, 17 Cal.App.2d 414 62 P.2d 160, 162, the court said:

"That a partnership may be created by the agreement or conduct of the parties, either expressed or implied, has often been recognized. *Stenian v. Tashjian*, 178 Cal. 623, 174 P. 883; *Niroad v. Farnell*, 11 Cal. App. 767, 106 P. 252; 20 Cal.Jur. 681.

"In *Niroad v. Farnell*, *supra*, the rule is stated in the syllabus which is borne out by the text, 'the voluntary association of partners may be shown without proving an express agreement to form a partnership; and a finding of its existence may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners, and acted as such.'"

[5,6] It is here alleged that these parties entered into an oral copartnership agreement for the purpose of operating a foundry and for the purpose of performing the Firestone contract; that the plaintiff agreed to and did contribute to the partnership this Firestone contract with two other contracts; that the defendants agreed to supply capital to construct the foundry according to certain designated plans; that it was agreed that the amount advanced by the defendants should be returned to them and thereafter the profits divided in a definite manner; and that the parties actually entered into the performance of the partnership agreement in a number of definite respects. While a preliminary agree-

ment was executed by some of the parties which provided for a later more formal agreement, this agreement in itself provided that the parties should proceed immediately to carry out the purpose for which the partnership was formed. Under these circumstances, it can neither be held that the preliminary written agreement must alone be considered nor that it indicates that nothing should be done until a more formal agreement was executed. Under the authorities, including those to which we have referred, we think an existing partnership was sufficiently alleged for the purposes of this action. The uncertainties, to which the respondent refers, are as to matters which are either sufficiently pleaded or which are evidentiary in character. Nor can it be said that damages are not sufficiently alleged. Among other things, it is alleged that a contract for a certain amount of material for a fixed price per pound was wrongfully taken, and that at that time said material could be manufactured at a certain cost per pound. If these facts are true, some damage can be definitely ascertained irrespective of any prospective damage from the operation of a new business. While proof of these facts may be another matter we are not here concerned with that.

[7] The next question presented is whether, assuming a partnership relation, the only remedy available is through an action for dissolution and accounting. The respondents rely on the general rule that a partner may not sue his copartners in an action at law with respect to firm transactions until an accounting has been had. It is argued, in effect, that any possible claim of the appellant for damages for any breach of the partnership agreement, assuming there was such an agreement, must be raised and considered only in an action for an accounting. They cite such cases as *Rassaert v. Mensch*, 17 Cal.App. 637, 120 P. 1072, and *Bremner v. Leavitt*, 109 Cal. 130, 41 P. 859, which follow the general rule that damages for wrongful acts in connection with carrying on a partnership business should be sought in connection with an accounting. They also rely on *De Rigne v. Hart*, 94 Cal.App. 209, 270 P. 1013, which not only states the general rule "that partners cannot sue one another at law in respect to any of the business of the partnership", but adds the statement "or to recover damages from the one or the other of the copartners for a breach

of the partnership agreement." The facts are not fully stated in that case and it does not appear that the statement last quoted does not relate, as suggested by the cases cited in support thereof, to the ordinary breach of some duty in connection with the carrying out of the partnership agreement. It does not clearly appear that it was intended to apply this statement to a situation where the breach in question consists of an actual tort outside of and apart from the partnership agreement, and one which results not only in the destruction of the partnership but in the complete conversion of all of its assets.

While the general rule is well established a different rule, or at least an exception to the general rule, has been quite generally recognized and has been indicated and applied in several cases in this state. The general rule is peculiarly applicable to claims for damages arising out of the manner in which a partnership business has been conducted, and to breaches of such agreements as such. The reason for the rule is thus stated in 20 Cal.Jur. at page 759: "The reason is that until an accounting is had it cannot be known whether the partner suing may not in fact be indebted to the partnership, or that the other members may not also be creditors of the firm, or that there may not be outstanding firm debts entitled to preference over the debt due the partners themselves and sufficient to exhaust the firm assets."

These reasons are less forceful where the wrongful acts complained of are not only a breach of the contract but constitute a tort, and this is especially true where the tort is of such a nature that it not only terminates the partnership but wrongfully destroys it, and where the erring partner converts to his own use its entire assets. In 58 A.L.R. at page 626, a number of situations are set forth as exceptions to the general rule. Among these exceptions are:

"(7) When the joint property has been wrongfully destroyed or converted.

"(8) When one partner has been guilty of fraud * * * or by other device defeating the rights of the complaining party."

Section 2432 of the Civil Code, adopted in 1929 as a part of the uniform partnership act, recognizes this distinction by giving the innocent partner a right to damages in addition to his right to an account-

ing, and with no express limitation as to the form of the action in which the additional right may be enforced.

In *Crosby v. McDermitt*, 7 Cal. 146, a partnership was formed and the plaintiffs furnished \$1,000 and the lumber for building a mill. The defendants converted the money and the lumber to their own use and refused to complete the contract. The plaintiffs sued for damages. On appeal, the defendants claimed that one partner could not sue another at law for any wrongful act done in the course of the partnership. The court held that this objection did not apply in such a case, that the wrongful acts of the defendants had dissolved the partnership, and that, in any event, the plaintiffs were entitled to maintain an action for damages under such peculiar circumstances.

In *Moropoulos v. C. H. & O. B. Fuller Co.*, 186 Cal. 679, 200 P. 601, 605, a partnership was formed for the operation of a dairy on leasehold premises. One partner was ousted by the others and the leasehold premises, which were the basis of the partnership business, were assigned to another. The action was one for damages on the ground that the defendants and the plaintiff's partner had conspired to and had fraudulently appropriated and destroyed the partnership business. A judgment of dismissal, after demurrer sustained, was reversed, the court holding that while the plaintiff might have brought an action for restoration he "also had the right to submit to this wrongful appropriation and conversion of the partnership business and assets by the defendants and his partner Karales, and to bring his action for the damages personally suffered." In *Wilson v. Brown*, 96 Cal.App. 140, 273 P. 847, 849, a partnership was formed for the purpose of buying and subdividing land. While the action subsequently brought was for an accounting, among other things, it was contended on appeal that no personal judgment should have been rendered until the partnership had been settled and its assets disposed of. While the court stated that this was the general rule it also stated: "Where, as in this case, some of the partners have excluded another and have appropriated the partnership property to their own use, the latter may treat the matter as a conversion and, without any accounting or disposition of the former partnership assets, sue the offending part-

ners and recover against them a personal judgment in the amount of his damage."

In *Johnstone v. Morris*, 210 Cal. 580, 292 P. 970, the defendant filed a cross-complaint for fraud in misrepresenting certain facts in buying out his interest in a partnership. The plaintiff contended on appeal that the action was based on a partnership relation, that it was in effect an action in accounting between partners, and that no jury should have been allowed. While the court reaffirmed the general rule that an action at law may not be maintained between partners with respect to partnership transactions, even after dissolution, it recognized and applied the exception that where there is fraud by one partner in selling out to another partner the purchaser may elect to rescind and sue for an accounting in equity or, at his option, may affirm and sue at law for any damage suffered. The court quoted from a West Virginia case (*Crockett v. Burleson*, 60 W.Va. 252, 54 S.E. 341, 6 L.R.A., N.S., 263) where, under similar circumstances, the court said: "The gravamen of the action in this case is the alleged tort—the alleged personal wrong done to one partner by another, as to which there can be no partnership relation. The late partnership is in no way concerned. It cannot be conceived that there is anything in the former partnership relation which prevents the maintenance of this action, brought for damages for the alleged deceit." [210 Cal. 580, 292 P. 972.]

[8] While the facts in the instant case are somewhat different the basic principles are essentially the same and, under the authorities above cited, it must be held that this case comes within one of the exceptions to the general rule and that the trial court was in error in concluding that this action for damages could not be maintained separate and apart from an action for an accounting. In a very real sense, the acts of which the appellant complains were not acts "with respect to partnership transactions". While the formation of the partnership furnished the opportunity, the acts constituting the tort were entirely outside of and apart from the partnership business.

While, in ruling on the demurrer, the court's attention seems to have been largely directed to the questions as to whether the allegations of the complaint were sufficient to show a partnership and, if they were,

whether an action for damages could be maintained, and while this complaint might be improved in certain respects, it does not appear that there is any such uncertainty in its general allegations or with respect to its allegations as to the damage suffered as would entirely preclude the appellant from any recovery. Insofar as the complaint is concerned, a good cause of action is sufficiently alleged.

[9] It is unnecessary, under the circumstances, to particularly consider the additional allegations of the second and third causes of action. As against the demurrer, sufficient fraud is alleged in the second cause of action and if, as respondents argue, the third cause of action adds nothing to the others no harm is done.

The judgment is reversed, with directions to overrule the demurrer.

MARKS and GRIFFIN, JJ., concur.



In re ABDALE'S ESTATE. *
RANDALL v. DEPARTMENT OF INSTITUTIONS OF CALIFORNIA et al.

Civ. 15047.

District Court of Appeal, Second District,
Division 3, California.

Jan. 29, 1946.

Rehearing Denied Feb. 27, 1946.

Hearing Granted March 28, 1946.

1. Descent and distribution ⇨14

The statute providing that any portion of intestate's estate which had been separate property of previously deceased spouse should, in the event that intestate had neither spouse nor issue, descend to children of previously deceased spouse, was applicable even though the separate property of previously deceased spouse was joint tenancy property which originally was the separate property of intestate. Probate Code, § 229.

2. Husband and wife ⇨266

A husband's gift to wife by creating joint tenancy in realty which husband acquired before marriage, was not "community property", but the interest of hus-

band and of wife in the realty was the "separate property" of each. Civ.Code, §§ 162-164.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property" and "Separate Property".

3. Descent and distribution ⇨14

A wife's half-interest in realty which husband acquired before marriage and which he thereafter placed in joint tenancy with wife, was wife's separate property which, on wife's death, passed to husband as surviving joint tenant, and on husband's death without spouse or issue, such half-interest descended to wife's son by a former marriage, under succession statute. Civ.Code, §§ 162-164; Probate Code, §§ 200, 220-229.

4. Descent and distribution ⇨14

The statute providing that if any portion of intestate's estate which had been separate property of previously deceased spouse should, in event that intestate left neither spouse nor issue, descend to children of previously deceased spouse, did not mean that all the estate of intestate should go to the children of a predeceased spouse, but only such portion thereof as had been the separate property of the predeceased spouse. Probate Code, § 229.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of William Abdale, deceased, wherein Charles Raymond Randall filed a petition to determine heirship, opposed by the Department of Institutions of the State of California, as guardian in the estate of Alfred Abdale, incompetent, and others. From an order, the guardian and others appeal.

Order affirmed as modified.

Robert E. Hatch, of San Francisco, for appellant Department of Institutions.

Brandenburger & White, of Sacramento, for appellants Dorothy Frood Abdale and others.

Joseph J. Goodman, S. Arion Lewis, Jr., and Harold R. Spence, all of Los Angeles, for respondent.

DESMOND, Presiding Justice.

The only question involved in this appeal is whether the probate court of Los

* Subsequent opinion 170 P.2d 918.

Angeles County, acting upon a petition to determine heirship, correctly decreed that the respondent, Charles Raymond Randall, was entitled under section 229 of the Probate Code to take all the property left by William Abdale when he died intestate.

Section 229 is found in Division II of our Probate Code having to do with "Succession," defined by section 200 as "the acquisition of title to the property of one who dies without disposing of it by will." Section 229, so far as pertinent to this case, reads as follows: "If the decedent leaves neither spouse nor issue, and the estate or any *portion thereof* was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead or in a joint tenancy between such spouse and the decedent, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation * * *." (Italics ours.)

Mr. Abdale acquired real estate in Los Angeles County prior to 1921. On August 13, 1929, he married Anna Marie Van Lund Randall Becker. The real estate which was his before that marriage constituted his only asset; as such, it was his separate property. It appeared from the testimony in the case that he had retired before his marriage and had no gainful occupation thereafter, so no question of community property arises. On December 15, 1930, Mr. Abdale, his wife joining, executed a grant deed of the real estate to a "dummy" who immediately thereafter and on the same date deeded it back to William Abdale and Anna Marie Abdale, as joint tenants with right of survivorship. Mrs. Abdale died on February 14, 1941, and her husband, the surviving joint tenant, was once again the sole owner of that property. He died on February 2, 1943, without issue. He had sold the real estate above mentioned shortly before his death and it was stipulated by counsel that the money and securities which comprised all of his estate constituted a transmutation from the real estate. The appellants are all of the blood relatives and next of kin of William Abdale. The respondent is the only issue of Anna Marie Abdale, being her son by a prior marriage. He was not a blood relative of the decedent, William Abdale.

CAL.REP.165-166 P.2d-13

[1-4] The appellants, in contending that section 229 of the Probate Code is not applicable, point out that under the ordinary rules of succession they would be entitled to inherit the estate, Probate Code, secs. 220-227, and argue that the respondent has not brought himself within two exceptional rules of succession, namely, sections 228 and 229, Probate Code. They state that section 229 would be applicable only if the property were first the separate property of the predeceased spouse [Anna] before it became joint tenancy property; that it has no application where, as in the instant case, it was originally the separate property of William, the surviving spouse of Anna. They argue that such an interpretation of the statute would give proper effect to the purpose of the legislature in its enactment of the laws which later became crystallized in sections 228 and 229 of the Probate Code; namely, a return of property to the members of the family from which it came originally. The construction for which they contend would require an interpolation in section 229 which we have no authority to make. But, giving the statute its natural effect as written, we believe that appellants are entitled to participate in the estate in a proper portion. It appears that Mrs. Abdale received her interest as joint tenant in the real estate which her husband had acquired before marriage as a gift from him. Such a gift, under California law, is not community property. It is separate property, and that was the character of Mrs. Abdale's interest in the real estate while she lived (see Civil Code, secs. 162, 163 and 164). Her husband, of course, had an interest equal to hers in the same property while the joint tenancy continued and his interest was also separate property. "Upon the creation of the joint tenancy ownership, each owned their interest therein as separate property." Estate of Harris, 1937, 9 Cal.2d 649, at page 659, 72 P.2d 873, at page 878. When Mr. Abdale's wife died her interest passed to him as survivor. It would be proper, therefore, under the provisions of section 229 to distribute to the respondent a share of the estate equal to the *portion* which Mrs. Abdale had at one time owned as her separate property, namely, a one-half interest. As we read section 229, it does not mean necessarily that all the estate of which a person may die possessed, leaving no will, spouse or issue, shall go to the children of a prede-

ceased spouse, but only such "portion thereof" as was the separate property of the latter. In the instant case that portion, as we have seen, was limited to not more than a one-half interest.

The order of the probate court, therefore, is modified in such manner as to determine that Charles Raymond Randall is heir to one-half of the estate of William Abdale, the other one-half to be distributed to the other heirs, appellants, as their interests may appear.

As so modified the order is affirmed.

SHINN and WOOD, JJ., concur.



72 Cal.App.2d 721

JOHNSON v. JOHNSON.

Civ. 15042.

District Court of Appeal, Second District,
Division 2, California.

Jan. 29, 1946.

1. Divorce ⇨298(1)

The paramount consideration in determining custody of a child in a divorce case is welfare of child, and feelings and desires of parents are not to be considered except as they may be found to affect interest of child.

2. Divorce ⇨303(2)

To justify a modification of an order in a divorce case for custody of a minor child, there must be a change of circumstances, arising after original decree was entered, which must be such as to make a modification of former custodial order advisable from the consideration of welfare of the child.

3. Divorce ⇨303(3)

On application to modify an order in a divorce case for custody of a minor child, court proceeds on new facts considered in connection with those formerly established.

4. Divorce ⇨303(3)

Where custody of minor child has been decreed to one parent, such parent cannot be deprived of custody for any alleged un-

fitness unless it be shown that he or she is so unfit as to endanger child's welfare, and unless evidence is clear that child's welfare and best interests will be directly promoted by change.

5. Divorce ⇨303(3)

All presumptions are in favor of reasonableness of original divorce decree awarding custody of a minor child to one of the parents, and burden rests on other parent to prove that conditions have so changed as to justify modification of custodial order.

6. Divorce ⇨303(2)

Where right of custody in father was determined by interlocutory divorce decree, which found, in effect, that father was a fit and proper person to have custody, order could not be modified without a showing that father was no longer fit.

7. Divorce ⇨303(3)

Where interlocutory divorce decree awarded custody of minor child to father, and evidence on mother's application for change of custody established that mother had remarried, if such marriage was legal, and had a home in another state, but disclosed no other change of circumstances and did not indicate that father was unfit, or that child's welfare would be enhanced by granting its custody to mother, evidence was insufficient to support order changing custody of child from father to mother. Civ.Code, § 197.

8. Divorce ⇨298(1)

In a divorce action, the right of a mother to custody of a minor child is not superior to that of father except that a child of tender years should be given to mother, other things being equal and it appearing that such award is for best interest of child. Civ.Code, §§ 138, 197.

9. Divorce ⇨303(3)

Uncontradicted evidence of mother's rapid change of affection from one man to another after she deserted husband was not indicative that she was a proper person to have custody of a child of tender years so as to warrant taking custody from father, to whom custody was awarded by interlocutory decree of divorce. Civ.Code, §§ 138, 197.

10. Divorce ⇨303(3)

Where mother, after submitting herself to jurisdiction of California divorce

court and after entry of interlocutory decree of divorce against her, secured a Nevada decree and immediately thereafter remarried, on mother's application to California court for change of custody of minor child which had been awarded to father, uncertainty of mother's marital status was to be considered even though validity of her Nevada marriage was not brought into question at the hearing.

11. Divorce ⇨303(3)

On an application in a divorce case for a change of custody of minor child, trial court is required to exercise a wide discretion, but such discretion is not unlimited.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Clifford Lewis Johnson, Jr., against Mary Geraldine Johnson for divorce, wherein plaintiff secured an interlocutory decree and was awarded the custody of the minor child of the parties. From a subsequent modification order awarding custody of the child to defendant, plaintiff appeals.

Reversed.

Krag & Sweet and James B. Ogg, all of Alhambra, for appellant.

Respondent, in pro. per.

WILSON, Justice.

By an interlocutory decree of divorce the minor child of the parties was awarded to appellant. Subsequently, upon respondent's application, the court made an order awarding custody of the child to her. From the latter order this appeal is taken.

The original complaint seeking a divorce and custody of the child was filed in August, 1943. The parties became reconciled and lived together until early in 1944, when respondent left the home of the parties, this being the third time she had done so. Appellant filed an amended complaint in March, 1944, in which he prayed for a divorce and the permanent custody and control of the minor child. Respondent filed an appearance and a consent that judgment be entered against her as prayed. In April, 1944, an interlocutory decree of divorce was entered wherein the care, custody, and control of the child was awarded to appellant, with the right of "reasonable visitation" by respondent. Approx-

imately one year later respondent filed an application for a modification of the interlocutory decree, alleging that since said decree was entered conditions and circumstances surrounding the parties and upon which the original order was based had materially changed in several particulars and asked that the custody of the child be awarded to her. After a hearing the court made an order that respondent should have the exclusive care, custody and control of the child, subject to the right of appellant to visit her, and authorizing respondent to take the child with her to Las Vegas, Nevada. The modifying order was made by a judge other than the one who rendered the interlocutory decree.

There is no evidence whatsoever sustaining any of the allegations that circumstances and conditions had changed except that respondent had remarried and that she and her new husband (if the marriage is not void) had a home in which the child could be maintained. The evidence discloses that when respondent deserted appellant on the last occasion she went to a hotel to reside although, as she testified, she could have gone to her mother's home. Shortly thereafter she went to Texas, where she met an army officer and from there she went to Nevada for the purpose of obtaining a divorce in order to marry him. Upon her arrival in Nevada she became acquainted with a railroad employee and a courtship almost immediately began. Notwithstanding the fact that by her appearance in her husband's divorce action in Los Angeles she had submitted herself to the jurisdiction of the California courts, she commenced an action in Nevada for a divorce. An interlocutory decree was granted in the instant case to appellant on April 24, 1944. The Nevada decree in favor of respondent was granted on May 1, 1944, and on the same day she and her present husband were married.

[1-4] The paramount consideration in determining the custody of a child is the welfare of the child. The feelings and desires of the parents are not to be considered except as they may be found to affect the interests of the child. To justify a modification of an order for custody of a minor child there must be a change of circumstances arising after the original decree was entered (*Olson v. Olson*, 95 Cal.App. 594, 597, 272 P. 1113; *Foster v. Foster*, 8 Cal.2d 719, 726, 68 P.2d 719), and until a change of circumstances occurs which makes a modifi-

cation of the former custodial order advisable from the consideration of the welfare of the child, the court will refuse to make any modification thereof. In re Inman, 32 Cal. App.2d 130, 134, 89 P.2d 421; Washburn v. Washburn, 49 Cal.App.2d 581, 587, 122 P.2d 96. On an application to modify an order for custody the court proceeds on new facts considered in connection with those formerly established. Crater v. Crater, 135 Cal. 633, 634, 67 P. 1049. Where custody has been decreed to one parent he cannot be deprived of custody for any alleged unfitness unless it be shown that he is so unfit as to endanger the child's welfare, and before the child's life may be unsettled by an order for change of custody the evidence must be clear and convincing that the child's welfare and best interests will be directly promoted by the change. Washburn v. Washburn, supra, 49 Cal.App.2d at page 588, 122 P.2d 96. No evidence was proffered to show that appellant is or ever was unfit to care for the child or that the latter's welfare would be enhanced by granting its custody to the mother who would, by the terms of the order appealed from, be permitted to remove the child to Nevada.

[5,6] All presumptions are in favor of the reasonableness of the original decree and the burden was on respondent to prove that conditions had so changed as to justify the modification of the order for custody. Gavel v. Gavel, 123 Cal.App. 589, 591, 11 P.2d 654; Prouty v. Prouty, 16 Cal.2d 190, 193, 105 P.2d 295. The right of custody in appellant having been determined by the interlocutory decree, which found in effect that he was a fit and proper person to have custody, the order cannot be modified without a showing that he is no longer fit. In two letters written by respondent after the separation she stated that appellant was a fit person to have the child and that the latter was properly cared for. That respondent was willing that the custody of the child remain with appellant and that she considered him a fit and proper person is further indicated by the fact that the decree which she procured in Nevada provided that the child "be left with defendant" (plaintiff and appellant here).

[7] We are not advised by findings of fact on what ground the court acted, or in what particular, if any, the court deter-

mined that circumstances had changed since the entry of the interlocutory decree. In the absence of findings we have examined the entire record in order to ascertain whether respondent has shown a sufficient change of conditions to sustain the order under review. There is no conflict in the evidence. There is no showing of the existence of any fact or circumstance that was hidden or concealed at the time the original order was made. The record is devoid of evidence indicating any change of circumstances save the single fact that respondent has remarried and has a home in Nevada. This is not sufficient to warrant the order.

[8,9] The right of a mother to custody of a minor child is not superior to that of the father. Civil Code, sec. 197. In actions for divorce the court, in awarding custody, is to be guided by what appears to be for the best interests of the child, and *other things being equal*, a child of tender years should be given to the mother. Civil Code, sec. 138. Respondent has failed to show her own fitness for the responsibility of caring for the child. Her conduct intermediate her leaving appellant and her remarriage as shown by uncontradicted evidence, does not indicate that she is a proper person to have custody of a child of tender years.

[10] The permanence of the home which she claims to have established may well be doubted. The validity of her marriage in Nevada was not brought into question at the hearing, but the uncertainty of her marital status must be taken into consideration. By reason of her having entered her appearance in the instant action the court had jurisdiction to enter its decree. The validity of the decree entered in the Nevada case which was filed after the California court had acquired jurisdiction of respondent is not beyond question.

[11] In such cases as this the trial court is required to exercise a wide discretion, but its discretion is limited by the rules of law herein set forth. The court abused its discretion in modifying the existing order in the absence of evidence either of changed conditions or of appellant's unfitness.

Order reversed.

MOORE, P. J., and McCOMB, J., concur.

72 Cal.App.2d 742

In re RILEY'S GUARDIANSHIP.

RILEY v. HAWKS.

Civ. 14951.

District Court of Appeal, Second District,
Division 3, California.

Jan. 29, 1946.

1. Guardian and ward ☞25

A judgment refusing to remove minor's guardian was not res judicata of subsequent removal proceeding, where ground urged in first proceeding was guardian's unfitness and ground urged in second proceeding was that guardianship was no longer necessary, and where second petition pleaded circumstances arising after first hearing. Probate Code, § 1580, subs. 3, 8.

2. Parent and child ☞2(4)

Before court can deprive mother of right to minor's custody and give minor into charge of strangers, there must be a finding that mother is unfit to have minor's custody.

3. Guardian and ward ☞25

A probate court retains continuing supervisory jurisdiction over guardianship matters, and removal of guardian on statutory grounds rests within broad discretion of court. Probate Code, § 1580.

4. Guardian and ward ☞25

On finding that minor's mother was a fit and proper person to have custody of minor and that guardianship was no longer necessary, probate court properly removed guardian and restored custody of minor to mother. Probate Code, § 1580, subd. 8.

5. Guardian and ward ☞18

On affirmance of judgment removing minor's guardian, questions raised by appeal from judgment vacating guardian's appointment became moot. Probate Code, § 1580.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the guardianship of June Clyde Riley, a minor, on the petition of Era Blocker Riley for the removal of Josephine Hawks, guardian, and for the vacation of the guardian's appointment. From judgments vacating the guard-

ian's appointment and removing the guardian, the guardian appeals.

Appeal from judgment vacating appointment dismissed and judgment removing guardian affirmed.

Emanuel & Klein and A. Arnold Klein, all of Los Angeles, for appellant.

Herlihy & Herlihy and Katherine Adams Stoll, all of Los Angeles, for respondent.

DESMOND, Presiding Justice.

Josephine Hawks, guardian of the minor, June Clyde Riley, appeals from "(a) The Judgment and Order Removing Guardian, Revoking Letters of Guardianship, Terminating Guardianship and Restoring Custody of Child to Mother; (b) The Judgment and Order Vacating, Annulling and Setting Aside Order Appointing Guardian, and Revoking Letters of Guardianship."

On November 23, 1943, appellant was appointed by Hon. Thomas C. Gould, Judge of the Superior Court of Los Angeles County, guardian of the person of June, then aged seven years and having no estate. The appointment was made with the consent of June's mother, Era Blocker Riley, because she and the child wished that June might attend the Thirty-Second Street School in the city of Los Angeles. Mrs. Riley had been unable to find living quarters near that school. Appellant, who lived in that particular school district, had known June and her mother in Oklahoma prior to her marriage to Raymond Riley, the present stepfather of the child. She had become interested in June because of her precocity and offered to let the little girl live with her so she could attend the Thirty-Second Street School. Mrs. Riley testified that prior to her signing the consent and nomination of the appellant, the latter had said that such action "would be better for her to enroll June in school; that she didn't have authority to do that; that it would be no different, it was just a paper that she could take June to school and enroll her in school."

Approximately four months later and on March 16, 1944, Mrs. Riley sought the removal of appellant and in her petition alleged that the guardian was "*incapable of suitably performing her duties as guardian*" because she was not related to the minor by blood or marriage, she was an unmarried woman approximately 48 years of age, that she did not own a home or real property,

that she had no regular or steady source of income and that no financial advantage was to be gained by her acting as guardian. The petition further alleged that at the time the mother consented to the appointment she was unrepresented by counsel and had no "comprehension or understanding of the legal consequences of such act, and was acting under a mistake of law and fact as to the purport of her consent and of the appointment of Josephine Hawks as Guardian of the person of said child." The prayer merely asked that "Josephine Hawks be removed as the Guardian of the person of the minor herein." Simultaneously with the filing of this petition for removal, another petition [not included in the record] was filed by the aunt and uncle of the minor, Mr. and Mrs. Louie Blocker, asking that they be appointed guardians in the place of Miss Hawks, which request was accompanied by a consent signed by the mother. These two petitions, together with objections thereto, came on for hearing before Judge John Beardsley, and on April 12, 1944, he rendered judgment in favor of the guardian, the judgment reading, in part, that the mother "take nothing against Josephine Hawks, Guardian for said minor June Clyde Riley, by her petition for removal of said guardian, and that said petition be and the same is hereby denied." The court also, at the same time, dismissed the petition of Louie and Dorothy Blocker. No findings were made in these proceedings, the same having been waived by all parties. Almost immediately thereafter and in the month of April, appellant removed June from Los Angeles County and placed her in a school at Ojai, and in the following month of August petitioned the court for an order authorizing her to remove her ward to the State of Vermont for the purpose of attending the Hickory Ridge School at Putney. This petition came on for hearing simultaneously with two filed by Mrs. Riley, one asking the court to vacate the order by which appellant was appointed, the other seeking her removal as guardian.

This second petition for removal alleged as a ground therefor that there was "no necessity for a guardianship" since the mother of the child and her stepfather were "well able to care for, educate and provide for the said child." This petition also realleged the circumstances pertaining to the appointment, stating that June's mother had no comprehension or understanding of the legal consequences of her

act and was acting under a mistake of law and fact, all as set forth in the original petition for removal. In addition, it alleged that the guardian was "incapable of suitably performing her duties" as guardian since she had "demonstrated an unreasonable and unjustified antagonism" towards the members of June's family in failing and refusing to permit the mother and other members of the family to see her or to permit June to visit with her family. Similar allegations appeared in the petition to vacate. The guardian filed general denials to both these petitions and alleged that the mother was "not a suitable, fit or proper person to have the custody and care of said minor child" and that it would "be for the best interest of said minor child that the guardianship now existing remain in full force and effect," and, in addition, raised the affirmative defense of *res judicata* based upon Judge Beardsley's order of April 12, 1944.

Pursuant to stipulation entered into between counsel for the parties, the three petitions were consolidated and heard by Judge Thomas C. Gould, who, as previously stated, made the original appointment. He found in favor of the mother on her petitions. Findings of fact and conclusions of law were filed and judgments entered accordingly.

The court's findings on the second petition for removal were that the mother had executed the consent "with the understanding that the proposed guardianship would be temporary in nature," that she "could have custody of her child whenever she wished," and that she was "not an unfit or improper person" to have custody of her child, the court concluding therefrom that it was no longer necessary that the minor be under guardianship and that "the Petition of Era Blocker Riley for Removal of Josephine Hawks as Guardian of the Person of the above named Minor Child should be granted, and the Objections of Josephine Hawks to said Petition should be overruled and the Letters of Guardianship heretofore issued to the said Josephine Hawks should be revoked, and the guardianship of the above named Minor Child should be terminated and custody of said child restored to Era Blocker Riley, her natural mother."

[1] As one of her grounds of appeal appellant urges that the trial court erred in failing to make a finding on the issue of *res judicata*, there being "ample and suf-

ficient evidence on that issue of *res judicata* to support a finding in Appellant's favor." She argues that the issues presented in the second petition for removal and the petition to vacate "were identically the same" as those determined by the court's order of April 12, 1944, and were "predicated on exactly the same allegations of fact." A careful analysis of the first petition for removal and the second petition for removal, however, clearly indicates not only that the two petitions were based upon different "causes" for removal, but that certain facts pleaded in the second petition, subsequently established by the evidence, were based upon circumstances which had arisen after the hearing on the first petition, namely, the refusal of the guardian to permit the child to visit her parents or the parents to visit her, the "unreasonable and unjustified antagonism" on the part of the guardian towards members of the minor's family, the removal of the minor out of the county to a school in Ventura County, which act prevented the mother, then pregnant, from visiting with her child, and the request of the guardian to remove the minor from the State of California. These were new matters which occurred after the first hearing. "The doctrine of *res adjudicata* cannot apply to successive applications for guardianship of minors to the extent of precluding the court, upon the later application, from a consideration of such circumstances as may have occurred since the rendition of the prior order." *Guardianship of Snowball*, 1909, 156 Cal. 240, 242, 104 P. 444, 445; *Guardianship of Case*, 1943, 57 Cal.App.2d 844, 847, 135 P.2d 681. The ground urged for removal of the guardian in the first petition was based upon subdivision 3, section 1580 of the Probate Code, i. e. that the guardian was incapable of suitably performing her duties, while the principal ground urged for removal in the second petition was based upon subdivision 8 of that section, "When it is no longer necessary that the ward should be under guardianship." The question of the mother's fitness was never in issue at the hearing on the first petition for removal, since there was then pending also the petition of Mr.

and Mrs. Blocker to be appointed guardians in the place and stead of Josephine Hawks, which petition had the consent and approval of the mother. It is apparent, therefore, that at that time the mother was not seeking custody of the child.

[2-4] Appellant takes the position that Judge Beardsley, having made no specific findings upon that hearing, found by implication that "Respondent, even though the child's parent, was not a fit and proper person to have her custody." But it has been established that before a court "can deprive a mother of her right to the minor's custody and give her into the charge of strangers, there must be a finding that the mother is an unfit person to have the custody of her child." *Stever v. Stever*, 1936, 6 Cal.2d 166, 170, 56 P.2d 1229, 1231. Since the probate court retains continuing supervisory jurisdiction over guardianship matters, the removal of a guardian for any of the reasons specified in the code, Prob. Code, § 1580, rests within the broad discretion of the court, and where, as in the instant case, the court found that the mother was a fit and proper person and concluded that the guardianship was no longer necessary, the court properly removed the guardian and restored the custody of the child to her mother.

[5] Under these circumstances, it is unnecessary to discuss the points which have been raised by appellant, and which we have considered, in connection with the appeal from the court's decision on the petition to vacate. The questions raised by that appeal have become moot, in our opinion, in view of our determination to affirm the judgment of removal. The ultimate objects sought under the petition to vacate were the same as those accomplished by the petition for removal, namely, termination of the guardianship and restoration of the custody of the minor child to her mother.

The appeal from the judgment vacating the appointment of appellant as guardian is ordered dismissed. The judgment removing her is affirmed.

SHINN and WOOD, JJ., concur.

72 Cal.App.2d Supp. 880

PEOPLE v. BAILEY.**No. Cr. A. 2146.**

Appellate Department, Superior Court,
Los Angeles County, California.

Jan. 23, 1946.

1. Statutes ⇨165

Where two legislative enactments punish exactly the same act, they are in conflict and the one latest in point of time will prevail.

2. Statutes ⇨165

A later statute prescribing a different punishment for an offense repeals the former statute by implication.

3. Automobiles ⇨316

Section 499b of the Penal Code, penalizing as a misdemeanor the temporary taking of automobiles, or other vehicles, is not impliedly repealed by section 503 of the Vehicle Code, penalizing as a felony the taking of automobiles, since section 503 is limited to cases where an automobile is driven or taken in absence of the owner, while section 499b is not so limited, and since the specific intent made an element of the felony created by section 503 need not be present in the misdemeanor made by section 499b. Pen.Code, § 499b; Vehicle Code, § 503, St.1939, p. 1481.

4. Automobiles ⇨339

The statute penalizing as a misdemeanor the taking of automobiles or other vehicles for purpose of temporarily using or operating the same creates the misdemeanor offense of taking an automobile without the owner's consent, although no intent to deprive the owner of title or possession motivates the taking; the words "purpose" and "intent" being synonymous. Pen.Code, § 499b.

See Words and Phrases, Permanent Edition, for all other definitions of "Purpose" and "Intent".

5. Automobiles ⇨351

In order to charge taking of automobile as a misdemeanor, it should be made clear that a misdemeanor and not a felony had been committed by charging that there was a taking, without owner's consent, either in his presence or with purpose of temporarily using or operating the vehicle but not with intent to deprive owner of his

title to or possession of automobile. Pen. Code, § 499b.

6. Automobiles ⇨351

Complaint, charging unlawful taking of automobile as misdemeanor under section 499b, alleging that defendant did willfully and unlawfully without permission of owner thereof take automobile for purpose of temporarily using and operating same was defective on ground that it did not allege that taking was either in owner's presence or that defendant did not intend to deprive owner of his title or possession of automobile. Pen.Code, § 499b.

7. Indictment and Information ⇨148

In criminal prosecution, an oral demurrer to complaint should not be dignified by a ruling upon its merits in view of statute authorizing only filing of written demurrer. Pen.Code, § 1428.2.

8. Indictment and Information ⇨151

In criminal prosecution, if demurrer to complaint is in writing and it is proper to sustain it without leave to amend complaint, proper order is one dismissing the action and discharging defendant if he is in custody. Pen.Code §§ 1428.2, 1428.3.

9. Criminal law ⇨1167(5)

Where defect in complaint was one in form only and, while not merely technical, was one that could be remedied by an amendment, order sustaining defendant's oral demurrer and discharging defendant was required to be reversed with directions to arraign defendant on his plea and permit him to file a demurrer if so advised. Pen.Code, §§ 1428.2, 1428.3.

Appeal from Municipal Court of City of Los Angeles; Irvin Charles Taplin, Judge.

John W. Bailey was charged with unlawful taking of automobile under section 499b, Penal Code. From an order sustaining an oral demurrer to the complaint and discharging defendant, the State appeals.

Reversed with directions.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for appellant.

Frederick M. Hall, City Public Defender, and A. A. Golden, Deputy City Public

Defender, both of Los Angeles, for respondent.

PER CURIAM.

The defendant was charged with a violation of Section 499b, Penal Code of the State of California, a misdemeanor, in that on or about September 30, 1945, within the City of Los Angeles, he did wilfully and unlawfully, without the permission of the owner thereof, take an automobile for the purpose of temporarily using and operating the same. An oral demurrer to the complaint was interposed by the defendant upon the ground that the complaint did not state a public offense for the reason that section 499b of the Penal Code has been repealed by implication by the enactment of section 503 of the Vehicle Code of the State of California, St.1939, p. 1481. The demurrer was sustained and the defendant discharged. From this final termination of its case, without a trial, the People have appealed. We are of the opinion that it was error to discharge the defendant; that an amendment to the complaint may be made which will state a public offense under section 499b, and that the People should have been given an opportunity to do so.

Section 499b was enacted in 1905 and has been but once amended when in 1935 the word "aircraft" was added. It now reads as follows: "Any person who shall, without the permission of the owner thereof, take any aircraft, automobile, bicycle, motorcycle, or other vehicle, for the purpose of temporarily using or operating the same, shall be deemed guilty of a misdemeanor * * *."

The Vehicle Act of the State of California, as enacted in 1923 (Statutes of 1923, p. 517), contained section 146 which was the predecessor of the present section 503 of the Vehicle Code, the latter having been passed in 1935 and amended in 1939. The pertinent parts of section 503 are as follows: "Any person who derives or takes a vehicle not his own, without the consent of the owner thereof and in the absence of the owner, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, * * * is guilty of a felony * * *."

[1,2] It is readily apparent that a striking similarity exists in the wording

and coverage of sections 499b and 503. If the provisions of section 503, being subsequent in point of time, completely overlap those of section 499b, then the latter is repealed by implication and can no longer be regarded as in force. "Where two legislative enactments punish exactly the same act they are in conflict. [Citing cases.] Where two statutory provisions are in irreconcilable conflict, the one latest in point of time will control. [Citing cases.] A later statute prescribing a different punishment for an offense works a repeal of the former one by implication." *People v. Lewis* (1934), 4 Cal.App.2d Supp. 775, 778, 37 P.2d 752.

[3,4] A critical analysis of the two sections leads to the conclusion that, although there is a considerable overlapping of their provisions, and so in part a conflict, their identity is not so complete that section 499b is entirely repealed by section 503, or by any of its predecessors. Disregarding aircraft and bicycles, which are the subject of section 499b's solicitude, but are not mentioned in section 503, and limiting our attention to automobiles, which are covered by both sections, and with which the complaint before us was concerned, we find the two sections do differ in at least two material respects. Section 503 is limited to cases where an automobile is driven or taken in the absence of the owner. Section 499b is not so limited; it applies, whether the taking was in the owner's absence or presence. The felony of section 503 is not committed, furthermore, unless the taking, or driving, was with the specific intent to deprive the owner of title or possession (*People v. Zervas* (1943), 61 Cal.App.2d 381, 384, 142 P.2d 946; *People v. Gibson* (1944), 63 Cal. App.2d 632, 637, 146 P.2d 971), while section 499b makes it a misdemeanor to take an automobile, without the owner's consent, although no intent to deprive the owner of title or possession motivates the taking. The section itself requires this interpretation, and it is recognized in the course of the argument in *People v. Neal* (1940), 40 Cal.App.2d 115, 117, 118, 104 P.2d 555, and *People v. Zervas*, just cited. In the opinion in the Neal case, the statement appears, and it is quoted in the Zervas case, "that specific intent is not an element in the violation of [section 499b of the Penal Code]." We interpret this, in the light of the facts and the subjects which were under discussion, as meaning no more than

that the specific intent made an element of the crime created by section 503 need not be present in the act made an offense by the Penal Code section. A specific intent is essential to constitute the misdemeanor of section 499b, and it serves further to distinguish the two sections. To be a misdemeanor, the taking must be for the purpose, that is, with the intent, for the words are synonymous (*People v. Tate* (1925), 316 Ill. 52, 146 N.E. 487, 489; *Carey v. United States* (8 Cir., 1920), 265 P. 515, 516; 33 C.J. 168; 51 C.J. 102; *Webster's New International Dictionary*, 2d Ed.) "of temporarily using or operating the same."

[5] One who takes an automobile in the presence of the owner, therefore, with the intention of temporarily using or operating it, without the owner's consent, violates section 499b, Penal Code, but not section 503, Vehicle Code. Moreover, whether the taking is or is not in the owner's presence, if the purpose of the taking is not to deprive the owner either of its title or of its possession, but is temporarily to use or operate it, without his permission, the taking is a misdemeanor, not a felony. A car left in a garage while the owner makes an overnight trip to San Francisco could be taken and operated without any intention of depriving the owner of the possession which he had temporarily surrendered, or of the title which was not jeopardized, so that the provisions of the statutory law which would be offended would be those of section 499b and not those of section 503.

[6] The complaint in this case, framed with section 499b in mind, would be sufficient if a bicycle or an aircraft were the object declared to have been taken, for no complication arises with respect to either of those machines because of the overlapping provisions of section 503. Where, as in this case, it is desired to charge that an automobile was taken, the effect of section 503 upon section 499b makes more meticulous pleading of the facts necessary if it is desired to charge that a misdemeanor was committed. The situation is analo-

gous to that considered by this court in *People v. Lewis* (1934), 4 Cal.App.2d Supp. 775, 779, 37 P.2d 752, where we had the same problem of the partial repeal of a Penal Code section by a section of the Vehicle Code. Here, as there, we note that as a matter of fact the great majority of those who violate the provisions of either section do so under conditions which make the crime a felony. In charging the less frequently committed and minor crime, therefore, it should be made clear that it was a misdemeanor and not a felony that had been committed. This may be done by charging that there was a taking, without the owner's consent, either (1) in his presence, or (2) with the purpose of temporarily using or operating the same but not with intent to deprive the owner of his title to or possession of the automobile.

[7-9] Although the complaint in this case is, for the reasons stated, defective, the order made, following the attack upon it, was erroneous for several reasons. In the first place, we interpret the record as showing that the attack was made by an oral demurrer. The statute (section 1428.2, Penal Code) authorizes the filing of a written demurrer; an oral demurrer should not be dignified by a ruling upon its merits. If the demurrer were in writing, however, and it were proper to sustain it without leave to amend, the proper order would be one dismissing the action as well as discharging the defendant, if he were in custody. Section 1428.3, Penal Code. As we have seen, however, the defect in the complaint was in form, and while not merely technical, was one that could be remedied by an amendment. The order, therefore, should have permitted an amendment. No doubt the People could waive such amendment, but it does not appear that they did so.

For the reasons given, the order appealed from is reversed, with directions to the trial court to arraign the defendant for his plea, permitting him to file a written demurrer if he be so advised.

SHAW, P. J., and BISHOP and KINCAID, JJ., concur.

27 Cal.2d 529

VEGA AIRCRAFT v. INDUSTRIAL ACCIDENT COMMISSION et al.**L. A. 19305.**

Supreme Court of California, in Bank.

Jan. 29, 1946.

1. Workmen's compensation ⇨940

The fact that a corporation's business is carried on in many departments both day and night does not insulate the corporation from responsibility under Workmen's Compensation Act for increased compensation for serious and willful misconduct of a supervisory employee to whom it has delegated general discretionary power of direction of a relatively small but integrate department during one shift. St.1937, p. 281, § 4553.

2. Workmen's compensation ⇨1674

In compensation proceeding for injuries sustained by experimental department employee when plug used in testing airplane engine radiators for leaks blew out, evidence indicating that assistant foreman had general discretionary power of direction and control of experimental department on swing shift sustained finding that misconduct complained of was that of an executive managing officer or general superintendent within compensation act provision for increased compensation. St. 1937, p. 281, § 4553.

3. Workmen's compensation ⇨939

"Serious and willful misconduct" within provision of Workmen's Compensation Act authorizing additional compensation for injuries resulting from serious and willful misconduct of managing officer is conduct which employer knew, or should have known, was likely to result in serious injury or which evinced reckless disregard for safety of employee. St.1937, p. 281, § 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious and Willful Misconduct".

4. Workmen's compensation ⇨1674

In compensation proceeding involving question of employer's liability for increased compensation to experimental department employee injured when plug used in testing airplane radiator engine for leaks blew out, evidence sustained Commission's finding that existence of danger, which, by use of reasonable precautions, could have been largely, if not entirely

eliminated was known by employer and that substantially nothing was done to guard against such danger and that employer's conduct was serious and willful misconduct which was proximate cause of injury. St. 1937, p. 281, § 4553.

5. Workmen's compensation ⇨1939

The question whether serious and willful misconduct of employer caused employee's injuries is essentially one of fact, and if there is any substantial evidence to support findings of Commission, its award will not be disturbed. St.1937, p. 281, § 4553.

6. Workmen's compensation ⇨772

In compensation proceeding involving question of employer's liability for increased compensation to experimental department employee injured when plug used in testing airplane engine radiator for leaks, blew out, negligence if any, of employee in failing to replace broken wire with new safety wire and in getting in path of the plug was not material to the inquiry. St.1937, pp. 269, 281, §§ 3600, 4553.

7. Workmen's compensation ⇨1743

In compensation proceeding, where sole act on which employee relied as constituting serious and willful misconduct entitling employee to increased compensation and on which evidence was introduced was putting a plug in radiator duct although it was known by employer that the plug was faulty and would likely blow out, finding of Commission that injury was proximately caused by serious and willful misconduct of employer was sufficient because it could be made certain by reference to the record. St.1937, p. 281, § 4553.

Proceeding by Vega Aircraft, a corporation, to review an order of the Industrial Accident Commission awarding William E. Nielsen increased compensation for personal injuries.

Award affirmed.

Syril S. Tipton, of Los Angeles, for petitioner.

E. A. Corten and R. C. McKellips, both of San Francisco, for respondents.

SCHAUER, Justice.

Petitioner, Vega Aircraft, a corporation, seeks annulment of an award of increased

compensation made by respondent Industrial Accident Commission in favor of respondent William E. Nielsen. Section 4553 of the Labor Code, St.1937, p. 281, provides that "The amount of compensation otherwise recoverable shall be increased one-half where the employee is injured by reason of the serious and wilful misconduct of any of the following: * * * (c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof." The commission found that the "injury was proximately caused by the serious and wilful misconduct of the employer." Petitioner contends that there is not sufficient evidence that the conduct complained of was that of an executive, managing officer, or general superintendent, or was serious and wilful misconduct, or was the proximate cause of injury. It further argues that the quoted finding is insufficient and amounts only to a conclusion of law. We have concluded that petitioner's contentions cannot be sustained.

At the time Nielsen was injured he was employed in the experimental department of Vega. He worked an overtime shift; that is, he started work with the swing shift at 4:30 p.m., the swing shift went off at 12:30 a.m., and he worked with the graveyard shift until 5:30 a.m. One Brown, who, at the time Nielsen started to work in the experimental department, was a group leader (swing shift) and Nielsen's immediate superior, assigned Nielsen to the work of testing an airplane-engine radiator for leaks and instructed him as to the method of testing and the use of the apparatus furnished for such work. A few days before Nielsen was injured Brown was made a supervisor in the same department.

The method of testing was as follows: To one of the two openings of the experimental radiator was attached a duct at the end of which was a rubber hose. A disc of plywood three-quarters of an inch thick and about six inches in diameter, with a bolt in the center, was inserted in the hose as a plug and a metal band was clamped around the neck of the hose to keep the plug in place. To the other opening of the radiator was attached a duct through which air was forced into the radiator under a pressure of 15 to 20 pounds per square inch. At the time Nielsen was assigned to the work of testing the radiator such testing

had been in progress for "one or two weeks." During this period and prior to the injury the plug had blown out "several" times (twice to the knowledge of the witnesses; on other occasions according to conversations which the witnesses had heard) with such force that it traveled from 30 to 60 feet upward and 75 to 100 feet horizontally. No one was hit by the plug on these occasions. After the first blowout the plug was beveled. The purpose of this change in design, according to the testimony of petitioner's chief safety engineer, was to make the metal clamps hold the plug more securely. After the plug blew out again, safety wire was fastened around the bolt of the plug and onto the adjusting bolts of the clamp.

At the time he assigned Nielsen to the work, Brown instructed him to wrap safety wire about the plug-bolt and clamps as an extra precaution and stated that the plug had previously broken the wire when it blew out. Nielsen had worked on the radiator for about a week and had performed the test above described three or four times prior to the night of the 19th to 20th of January, when he was injured. On the evening of January 19, while he was working on the radiator, the wired plug blew out, broke the wire, "flew approximately 30 feet in the air and on an angle of about 60 degrees from the bench—about 30, 35 feet in the air * * * [and] horizontally across the department about 75 to 100 feet," and struck a railing which surrounded the office of the assistant foreman of the department, one Hauck. Hauck came to the railing and, according to the testimony of Nielsen and a fellow employee, said, "Blow it higher the next time." Hauck denied that he made such statement.

Brown testified that just before he left work at 12:30 a.m. on January 20 he warned Nielsen to "Be sure and put the wire on and not to get in front of the plug." Nielsen testified that he did not recall being told not to go in front of the plug. The safety engineer testified that Nielsen "wouldn't have to be in front of the plug to get hit" (meaning, apparently, not directly in front).

Nielsen also testified that after Brown and Hauck left work one Roberts, group leader (graveyard shift), "looked at the mechanism that was on the radiator and remarked what a poor condition and what a poor outfit it was for holding the air

pressure in the radiator * * * and said, 'You better wire this a little bit better.' And I did wire it a little bit better."

Just before he was injured, Nielsen testified, he "put the clamps on and plugged up the ducts with apparatus and filled it with air pressure. That's the last thing I remember. * * * I don't remember putting the air pressure—I don't remember who put the air pressure into the ducts. * * * The last thing [I] remember was putting in the plugs and putting on this piece of broken wire." (The safety wire in use at the time Nielsen was injured had been previously broken and twisted together again.) The plug blew out and struck Nielsen in the face. As a result of the injuries sustained the right eye some months later was necessarily enucleated.

The evidence as to who initiated and carried out the measures intended to make the equipment safe is as follows: Brown testified that, after the plug blew out despite its changed design, he discussed with his immediate superior, Hauck, and with Nielsen methods of preventing another blowout and they determined to use the safety wire; that he did not discuss the problem with the department foreman, one Coverly, or with the safety engineer; "they were on the day shift and I was on the swing shift; I didn't see them but very seldom." As stated above, Roberts, group leader on the graveyard shift, also discussed the problem with Nielsen and advised the use of safety wire. Hauck, assistant foreman and Brown's immediate superior, testified that he knew the plug had blown out on two previous occasions; that after each of these blowouts additional precautions were taken. The chief safety engineer testified that after the first blowouts occurred he discussed the situation with Coverly, foreman of the experimental department, and with "one or two supervisors" but he did not examine the equipment; that the design of the plug was changed and the safety wire was added in attempts to meet the problem; and that he did not know that the safety wire had broken on any occasion previous to Nielsen's injury.

Hauck, as stated, was assistant foreman. "On the swing shift he was in charge of the department. His superior, on days, was Mr. Coverly," who "was supreme so far as the shop was concerned." Hauck's own testimony that on the swing shift he "was in complete charge of the department"

makes it appear that he was invested with general discretionary power of direction and control of the experimental department on that shift. (See *Bechtel etc. Corp. v. Industrial Acc. Comm.*, 1944, 25 Cal.2d 171, 174, 153 P.2d 331, and cases there cited.)

[1,2] This court, in the *Bechtel* case, supra, has recently rejected the view that any employee who has authority to give orders to other employees is necessarily, by virtue of such authority, an executive or managing officer or general superintendent. We must now reject the view that because a corporation's business is carried on in many departments, both night and day, the corporation is insulated from responsibility for the serious and wilful misconduct of a supervisory employee to whom it has delegated general discretionary power of direction of a relatively small but integrate department during one shift. The showing made here meets the test declared in the *Bechtel* case.

[3,4] Serious and wilful misconduct is conduct which the employer knew, or should have known, was likely to result in serious injury or which evinced reckless disregard for the safety of the employee. (*Parkhurst v. Industrial Acc. Comm.* (1942), 20 Cal.2d 826, 829-830, 129 P.2d 113, and cases there cited.) The commission did not exceed its jurisdiction (the legally sustainable import of the evidence) by impliedly finding that Hauck should have known that the plug probably or at least possibly, would again blow out with great force, that he failed to take reasonable action to substantially alleviate the danger, and that in so doing he evinced a reckless disregard for the safety, not only of Nielsen, but also of the other employees of the department.

Although Hauck testified that, so far as he knew, the plug had not blown out after it was wired until the occasion on which Nielsen was injured, it appears from other testimony that the plug was wired when it blew out and struck Hauck's office a few hours before the injury occurred. After the inadequacy of the plug as then arranged was thus forcibly demonstrated to Hauck, he did nothing whatsoever to protect the workers. So far as appears, he left work without informing the assistant foreman in charge of the department on the graveyard shift of the danger incident to the use of the plug. The inadequacy of the precautions of beveling and wiring the

plug was obvious to Roberts, group leader on the graveyard shift, who "remarked what a poor condition and what a poor outfit it was." Yet the only attempt at additional precaution was Roberts' suggestion, adopted by the employee, to wire the plug "a little bit better." Further wiring, in the circumstances, could well have been found to be a precaution not reasonably commensurate with the danger incident to the blowing out of the plug. And even the suggestion to "wire it a little bit better" apparently came from a minor supervisory employee.

Petitioner argues that the evidence shows that "the very work being done was of an experimental nature. No custom had been established as to how the work was to be done. - It was a procedure of trial and error." The evidence indicates that in production departments certain radiators were tested under air pressure of 12 pounds per square inch, using an unwired metal plug designed for such purpose because "they do it all the time"; in testing other radiators, smaller than the one on which Nielsen was working, water rather than air pressure was used. The safety engineer testified that no standard technique had been developed for the testing work which Nielsen did. We fully realize that to require an employer, in order to avoid responsibility for wilful misconduct, to, in effect and under all circumstances, ensure the safety of employees engaged in experimental work would tend to limit research and development, and we imply no such requirement. But we are satisfied that the evidence here is sufficient to warrant the commission's conclusion that the existence of a danger which, by the use of reasonable precautions, could have been largely, if not entirely, eliminated was demonstrated to petitioner and that substantially nothing was done to guard against such danger.

[5,6] The evidence above summarized supports the finding that the injury was proximately caused by the omission of the petitioner to provide a secure plug. "It is well settled that the question whether serious and willful misconduct of the employer caused the employee's injury is essentially one of fact, and that if there is any substantial evidence to support the findings of the commission its award will not be disturbed." (Parkhurst v. Industrial

Acc. Comm. (1942), *supra*, 20 Cal.2d 826, 831, 129 P.2d 113, 116.) The negligence, if any, of Nielsen in failing to procure new safety wire and in getting in the path of the plug, is not material to this inquiry. (Labor Code, § 3600, St.1937, p. 269; *Western Pac. R. Co. v. Industrial Acc. Comm.* (1924), 193 Cal. 413, 421, 224 P. 754; *Associated Indem. Corp. v. Industrial Acc. Comm.* (1941), 18 Cal.2d 40, 44, 112 P.2d 615; *Smith v. Industrial Acc. Comm.* (1941), 18 Cal.2d 843, 850-851, 118 P.2d 6.)

[7] Petitioner relies upon *Taylor v. Industrial Acc. Comm.* (1940), 38 Cal.App.2d 75, 80-81, 100 P.2d 511, 514, wherein it is declared that a finding that "Said injury was caused by the serious and wilful misconduct of the employer" * * * is totally inadequate, and does not amount to a finding at all. It is a mere conclusion of law. Findings should be so framed that the defeated party can specify intelligently the particulars in which they are not supported by the evidence, where such point is made. * * * The findings must disclose the theory upon which they are grounded when the issue is controverted." In the *Taylor* case, however, as pointed out in *Dawson v. Industrial Acc. Comm.* (1942), 54 Cal.App.2d 594, 600, 129 P.2d 479, 483, "Several distinct acts were alleged and relied upon by the petitioners as proof of wilful misconduct" and the finding "left an uncertainty as to what particular alleged acts or conduct were deemed to constitute wilful misconduct." In the instant case the sole act on which the employee relies as constituting serious and wilful misconduct and on which evidence was introduced is, as alleged in his claim for increased compensation, "putting a plug in the radiator duct * * * although it was known by said employer that the plug was faulty and would likely blow out." The finding is sufficient because it can be made certain by reference to the record. (*Ethel D. Co. v. Industrial Acc. Comm.* (1934), 219 Cal. 699, 708, 28 P.2d 919; *Dawson v. Industrial Acc. Comm.* (1942), *supra*.)

For the reasons above stated the award is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

27 Cal.2d 536

CALIFORNIA SHIPBUILDING CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.**L. A. 19329.**

Supreme Court of California, in Bank.

Jan. 29, 1946.

1. Workmen's compensation ⇨1674

In proceeding involving employer's liability for increased compensation to employee injured when he stepped through an unguarded vent hole of a ship being constructed, evidence supported finding that shipwright foreman was a managing officer or general superintendent whose omission to guard vent holes in violation of safety order was attributable to employer. St.1937, p. 281, § 4553.

2. Workmen's compensation ⇨940

A shipwright foreman invested with general discretionary power of direction and control of an integrate department or division of employer's business was a "managing officer" or "general superintendent" within provision of compensation act authorizing additional compensation for injuries resulting from serious and willful misconduct of managing officer or general superintendent. St.1937, p. 281, § 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "General Superintendent" and "Managing Officer".

3. Workmen's compensation ⇨1674

In compensation proceeding involving employer's liability for increased compensation to employee who stepped through unguarded vent hole on a ship being constructed, evidence sustained implied finding of Commission that employer had delegated to a shipwright foreman general discretionary control of a substantial unitary portion of its shipbuilding operations, notwithstanding employer may have had many employees in positions of higher rank than that of the shipwright foreman. St.1937, p. 281, § 4553.

4. Workmen's compensation ⇨1939

Where evidence is susceptible of conflicting inferences, the finding of the Industrial Accident Commission, whether for or against workmen's compensation claimant, is final and it is duty of Supreme Court to uphold such finding. St.1937, p. 281, § 4553.

5. Workmen's compensation ⇨1674

In compensation proceeding involving employer's liability for increased compensation to employee injured when he stepped through unguarded vent hole on a ship under construction, evidence sustained Commission's finding that injury to employee was proximately caused by serious and willful misconduct of employer in not providing guard rail required by safety order, even though the condition was temporary. St.1937, p. 281, § 4553.

6. Workmen's compensation ⇨939

A provision of Workmen's Compensation Act authorizing increased compensation for injuries resulting from serious and willful misconduct of executive managing officer or general superintendent of corporate employer, is not limited to misconduct relating to physical plant of employer and its fixed and unchanging conditions but applies to operation of the plant and to conditions produced and constantly being changed by acts of employees. St.1937, p. 281, § 4553.

7. Workmen's compensation ⇨941

Ship and boat building safety orders of Industrial Accident Commission requiring each manhole and tank top opening to be provided with a guard, contemplates that precautions of guarding holes shall keep pace with construction of ship.

8. Constitutional law ⇨301**Workmen's compensation ⇨1935**

The Industrial Accident Commission may properly adopt the recommendation of rehearing referee on basis of his report and without itself reviewing the record, and such procedure does not violate due process. St.1937, pp. 193, 293, 294, §§ 115, 5310, 5315.

EDMONDS, J., dissenting.

Proceeding under the Workmen's Compensation Act by California Shipbuilding Corporation, employer, to review an order of the Industrial Accident Commission awarding increased compensation to Raymond L. Baker, employee, for personal injuries.

Affirmed.

Thelen, Marrin, Johnson & Bridges and Gardiner Johnson, all of San Francisco, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondents.

SCHAUER, Justice.

Petitioner, California Shipbuilding Corporation, seeks annulment of an award of increased compensation made by respondent Industrial Accident Commission in favor of respondent Raymond L. Baker. The award is based upon the proposition declared by section 4553 of the Labor Code, St.1937, p. 281, that "The amount of compensation otherwise recoverable shall be increased one-half where the employee is injured by reason of the serious and wilful misconduct of any of the following. * * * (c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof." The commission found that the injury to Baker "was proximately caused by the serious and wilful misconduct of the employer in that a proper guardrail [around a vent hole] was not provided for the protection of employees in accordance with Section 1827 of the Ship and Boat Building Safety Orders of the Industrial Accident Commission." Petitioner contends that it was not shown that the misconduct which caused the injury was on the part of an executive, managing officer, or general superintendent of petitioner corporation; that the omission to guard the vent hole was a temporary condition not chargeable to petitioner; and that it was denied procedural due process by respondent commission's action on its petition for rehearing. We have concluded that such contentions cannot be sustained.

Section 1827 of the Ship and Boat Building Safety Orders requires that "each manhole, tank top opening, [etc.] * * * shall be provided with a guard that will not have to be removed to give access to or through the hole. These guards shall be kept in place." It was stipulated that petitioner had knowledge of the safety order.

Baker was injured when he stepped through an unguarded 16-inch vent hole (one of two such unguarded holes) in a flat (in this case a section of steel about 28 feet long and 20 feet wide, prefabricated for setting into the ship as a part of a tank top or deck) on the ship on which he was employed as a burner. The accident occurred at about 9:30 p. m. on June 23, 1943. Baker was standing on the flat, discussing a burn with a fellow worker and awaiting a call for his services. He knew that he was near the hole. When he heard a call for a burner, he started to answer it, "didn't take inventory," and stepped into the hole. Dim-

out regulations were in effect and the flat was so dark that the hole was not visible.

The flat had been placed at an angle by the day crew. At 4:30 p. m. the swing shift came to work. Truman Aubrey, foreman of the forepeak shipfitters on the swing shift, testified that under his direction the flat was picked up with a crane and straightened. Aubrey then observed that there were no guardrails about the two vent holes in the flat. The operation of straightening the flat was completed at about 5:30 or 6 p. m. About fifteen or twenty minutes thereafter, while it was still light, Aubrey saw one Garcia, a shipfitter, stepping into one of the holes and caught Garcia so that he did not fall. Aubrey then notified Raymond Phillips, shipwright foreman, whose duty it was to see that openings were guarded, that rails should be placed about the holes in the flat.

Phillips testified that before 8 p. m. on June 23 Aubrey notified him that guards were required for the flat. "I sent a man down to get the guard rails. The guard rails were kept underneath the way at that time. Why they were not there at that time, I don't know, for they weren't. Then I had to send a tracer after them, and then they had to go through a lift order [for a crane] to come up there on." The man sent to get the guards reported that they were "stacked up in the gantry way, waiting for a lift." "The gantry crane was busy on other lifts, from my experience, and not knowing this particular one, not paying particular attention to that, but I have seen them, they couldn't come on up in one night, with the lifts they had ahead of them. * * * The cranes were all busy." Thereafter one Hartrider notified Phillips that "We have got to hurry up and get something in those holes. Baker has already went in one of them." Phillips then obtained a guard rail from a hold of the ship and set it up over the opening where Baker had been injured. Phillips was asked, "What was your normal procedure after a flat had been landed, to then call for the lifting up of the guard rails, so that they could be put in place?" and answered, "The normal procedure on that would be like you say, but I didn't follow that procedure, and there is a lot of those we couldn't find, and we are out on a very stiff schedule, and my men were usually snowed under at that time, and it was my job to set the flat. Then, after I get the flat set, the fitters go

to work on it. Up until that time, it is not very much going over it. So, when my men go up to set the flat, we take care of the rails."

[1] Baker's immediate superior, the foreman of the burners, was not connected with responsibility for the injury but the following evidence supports the implied finding that shipwright foreman Phillips was a "managing officer, or general superintendent," whose omission to guard the vent holes in violation of the safety order is attributable to petitioner corporation: Aubrey testified that Phillips "was responsible at that time for seeing that those holes were covered * * * for putting those guard rails up." Phillips testified that "My job is to set every piece of steel in the boat for center line elevation, declivity, forward and aft—anything pertaining to that," and, as above stated, that "we take care of the rails." The extent of Phillips' power of controlling and carrying on the operation of putting up guards is further indicated by the fact that, after he was notified of Baker's accident, Phillips on his own initiative and with the help of one of the men under him obtained a guard by means which conformed neither to the "normal procedure" nor to the procedure which he testified he followed (also, apparently, of his own initiative) when his men were "snowed under."

[2,3] It thus appears that Phillips was invested with general discretionary powers of direction and control of an integrate department or division of petitioner's business, namely, compliance with section 1827 of the Ship and Boat Building Safety Orders and the setting of every piece of steel in the ship under construction on Way 5 in petitioner's Terminal Island yard. If petitioner's facilities were so limited that it could build only one ship at a time, it would be quite obvious that the person who had control over those portions of the business could properly be found, on evidence otherwise the same as that here presented, to be a managing officer or general superintendent. (See cases collected in *Bechtel etc. Corp. v. Industrial Acc. Comm. (1944)*, 25 Cal.2d 171, 174-176, 153 P.2d 331.) The fact that petitioner may have other ways and many employees in positions of higher rank than that of Phillips, cannot change the fact (impliedly found by the commission on sufficient evidence) that petitioner delegated to Phillips general discretionary control of a substantial unitary portion of its

shipbuilding operations. See *Vega v. Industrial Acc. Comm., Cal.Sup.*, 165 P.2d 665.) As in *California Shipbuilding Corp. v. Industrial Acc. Comm. (1944)*, 64 Cal.App.2d 622, 628, 149 P.2d 432, so far as appears, if Phillips was not the managing officer in immediate charge of compliance with the safety order, then no one was.

The decision of this court in *Bechtel etc. Corp. v. Industrial Acc. Comm. (1944)*, supra, 25 Cal.2d 171, 153 P.2d 331, 332, does not, as petitioner urges, compel an annulment of this award. That decision does not purport to narrow the previous judicial interpretations of the meaning of the terms "executive, managing officer, or general superintendent." The supervisory employee Sweet, whose status was there in controversy, was foreman of the crew of one truck crane only; he "received orders all day long"; he was in charge of a single specifically designated operation but not of an integrate division of his corporate employer's business. The only evidence as to the extent of his authority tended to show that he had no general discretionary powers of direction or control of a substantial and integrate part, branch, division, or department of his employer's business. Thus he was a minor supervisory employee, as distinguished from "an executive, managing officer, or general superintendent."

Petitioner relies on the statement in *Central Cal. Ice Co. v. Industrial Acc. Comm. (1944)*, 66 Cal.App.2d 339, 341, 345, 152 P.2d 33, that the chief engineer who had charge of the operation of an ice plant was not an executive, managing officer, or general superintendent. Such statement was unnecessary to the decision, for the evidence did not show that the matter complained of amounted to serious and wilful misconduct, and the action of this court in denying a hearing in the case did not constitute approval of such statement. Insofar as it conflicts with our holding herein it is disapproved.

[4] Petitioner calls to our attention the proceeding entitled *Carpenter v. California Shipbuilding Corp. (1945)*, Ind. Acc. Comm. Claim No. L.A. 76-787, wherein the supervisory employee whose status was in question was a rigger foreman of petitioner and the commission found that the applicant's injury was not proximately caused by the serious and wilful misconduct of petitioner. That the commission found for petitioner in that case does not, of course, affect our decision in this case. Where the evidence

is susceptible of conflicting inferences the finding of the commission, whether for or against the applicant, is final and it is our duty to uphold such finding.

[5] Petitioner urges that the omission to guard the vent hole was not serious and wilful misconduct chargeable to petitioner because it was a temporary condition on a partially built ship under the constantly changing conditions of construction and because petitioner had provided the rails and Phillips had located them and was attempting to get them lifted at the time of the accident. Petitioner relies upon the language quoted in *Chain v. Industrial Acc. Comm.* (1933), 135 Cal.App. 260, 264, 26 P.2d 856, 857, from *Saxe Operating Corp. v. Industrial Acc. Comm.* (1929), 197 Wis. 552, 222 N.W. 781, 782: "In the case of a physical plant, the employer is chargeable with notice of the conditions that prevail in the plant which generally remain fixed and unchanging. But he cannot know in advance of the conditions which may be produced by the negligent or inadvertent acts of his employees." The appellate court in the *Chain* case did not rely on the quoted language in its stated grounds of decision (page 267 of 135 Cal.App., page 859 of 26 P.2d)—which include "the reason that it does not appear from the evidence that there was any violation of the safety orders"—and such quoted language refers to negligence or inadvertence, not wilful misconduct. In the present case it cannot be disputed that the safety order was violated, and the evidence, as hereinafter discussed, is not as a matter of law insufficient to sustain the finding that such violation amounted to serious and wilful misconduct rather than merely to negligence or inadvertence.

[6,7] Petitioner's contention that section 4553 of the Labor Code authorizes an increased award only for misconduct relating "to the physical plant of the employer, its fixed and unchanging conditions, and not to the operation of the plant or to conditions produced and constantly being changed by the acts of its employees," cannot be sustained. If it were, then employers engaged in construction work could escape liability for serious and wilful misconduct by showing that the conditions under which an injured employee worked were constantly being changed by other employees. It is apparent that the safety order here in question contemplates that the precaution of guarding holes shall keep pace with the construction of the ship. (Cf. *Hoffman v.*

Department of Industrial Relations (1930), 209 Cal 383, 388, 287 P. 974, 68 A.L.R. 294, 297; *California Shipbuilding Corp. v. Industrial Acc. Comm.* (1944), *supra*, 64 Cal. App.2d 622, 628, 149 P.2d 432. In the multiple construction of ships of the type here involved the setting of flats with open vents was in one sense not a changing condition; it was a condition which recurred in the construction of every ship.

The lack of guards no doubt was, as petitioner emphasizes, a temporary condition. But it will be remembered that there was evidence from which it could be inferred that delay in installing guards was a not unusual occurrence in relation to the regularly recurring condition requiring such guards. The testimony of shipwright foreman Phillips that his crew did not install the rails as soon as a flat was straightened and workers started to go over it, but waited until they set the flat, relates, not to the single occasion on which Baker was injured, but to procedure during a period when the workers were under the pressure of "a very stiff schedule." And even though, as Phillips testified, comparatively few workers went over the flat before it was set, there were five or six men on it, exposed to the danger of the two unguarded vent holes, at the time Baker was injured. Furthermore, shipfitter foreman Aubrey testified that when he came to work at 4:30 p. m. he notified the gantry crane foreman that he wanted the flat straightened; that "at the start of each shift, [the gantry cranes] usually have a few emergency lifts, but as soon as he got through with those, he came on up"; and that at about 5:30 or 6 p. m., which was twenty or twenty-five minutes after the crane first picked up the flat, the work of straightening it was completed. Shipwright foreman Phillips, on the other hand, testified that ordinarily the gantry cranes "couldn't come on up [with the guards] in one night, with the lifts they had ahead of them." The commission may well have considered it significant that a crane was obtained quite promptly to straighten the flat so that workers could go over it, but not to lift the guards which should have been installed to protect such workers.

[8] Petitioner contends that it "has been denied procedural due process of law by the respondent commission's action in disposing of its petition for a rehearing without having considered any statement of the evidence."

The commission, as it is authorized to do (Labor Code, §§ 115, 5310, St.1937, pp. 193, 293), referred the petition for rehearing to a referee (not the referee who heard the evidence). The rehearing referee prepared and furnished the commission with a report which briefly states the contentions of petitioner, the general facts (in the form of findings rather than a summary of the evidence) interspersed with his conclusions, and his recommendation that rehearing be denied. This report was filed by the commission with its order denying rehearing. Assuming, as petitioner asserts, that the commissioners followed their frequent practice of adopting the referee's recommendation without reading the petition for rehearing or the transcript of the evidence, such procedure did not violate due process. "When the commission adopts the facts found and the decision recommended by the one who is authorized to and does hear the evidence, then the commission is not required to review the record. An entirely different situation would be presented if the commission, disregarding and setting aside the findings and recommendation of the referee, undertook, without a review of the evidence, to appraise the same and make determinations based thereon. Such is not the case here presented." (Taylor v. Industrial Acc. Comm. (1940), 38 Cal. App.2d 75, 82, 100 P.2d 511, 515.) Similarly, the commission may properly adopt the recommendation of the rehearing referee on the basis of his report and without itself reviewing the record. (Labor Code, § 5315, St.1937, p. 294; California Shipbuilding Corp. v. Industrial Acc. Comm. (1944), supra, 64 Cal.App.2d 622, 630, 149 P.2d 432, certiorari denied 324 U.S. 843, 65 S.Ct. 675.) There is nothing inconsistent in such procedure with the doctrine that "he who decides must hear," announced in Morgan v. United States (1936), 298 U.S. 468, 481, 56 S.Ct. 906, 912, 80 L.Ed. 1288, 1295, relied upon by petitioner. The Supreme Court there pointed out (page 479 of 298 U.S., page 911 of 56 S.Ct., page 1294 of 80 L.Ed.) that "The Assistant Secretary, who had heard, assumed no responsibility for the findings or order, and the Secretary, who had not heard, did assume that responsibility."

For the reasons above stated the award is affirmed.

GIBSON, C. J., SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

EDMONDS, Justice.

In my opinion, the record in this case includes no substantial evidence tending to show, as stated by Mr. Justice Schauer, "that Phillips was invested with general discretionary powers of direction and control of an integrate department or division of petitioner's business." He was the "shipwright foreman, Way 5" and a part of the work assigned to the crew working under his direction was to place rails around holes in the flats after the steel was set in place. At the time of the accident, the evidence shows, Phillips had been notified that the flat through which Baker fell was in place and that the guard rails had not been put up. He sent for rails which were not obtained before the accident occurred. The evidence, therefore, is that the crew which ordinarily set guard rails as soon as a flat was in place neglected to do so, that its foreman was notified, that he sent for the rails and that they were not installed in time to avoid Baker's fall.

These facts show that Phillips was one of the foremen in charge of a group of men constructing the ship on Way 5, but without the "general discretionary powers of direction" of the employer's business which this court has repeatedly declared is necessary in order to impose liability for serious and wilful misconduct. *Bechtel etc. Corp. v. Industrial Acc. Comm.*, 25 Cal.2d 171, 153 P.2d 331; *Gordon v. Industrial Acc. Comm.*, 199 Cal. 420, 249 P. 849, 58 A.L.R. 1374; *E. Clemens Horst Co. v. Industrial Acc. Comm.*, 184 Cal. 180, 193 P. 105, 16 A.L.R. 611; *Green v. Industrial Acc. Comm.*, 130 Cal.App. 337, 19 P.2d 1029. Every foreman and supervisory employee has some discretionary power of direction, but as the court specifically pointed out in the *Bechtel* case, "the legislature has refrained from making the employer liable for the misconduct of every person exercising authority on the employer's behalf." [25 Cal.2d 171, 153 P.2d 332.]

Undoubtedly, at the time of the accident, there were dozens of foremen working on the ship under construction in Way 5, each charged with responsibility for seeing that certain work was performed in accordance with the directions of the employer as laid down by the General Manager and superintendent having charge of the entire activities. But the extent of the supervision of these foremen, including Phillips, was an extremely limited one. To hold that the misconduct of such a person subjects an em-

ployer to the additional liability imposed by the statute for wrongdoing, in my judgment, goes far beyond a reasonable construction of section 4553 of the Labor Code and is contrary to the rule of decision which has been stated and applied in the cases cited.



27 Cal.2d 615

**PEARSON CANDY CO., Limited, v.
WAITS et al.
L. A. 19113.**

Supreme Court of California, in Bank.
Jan. 31, 1946.

1. War ☞4

The War Labor Board does not exist as a tribunal to determine legal rights and obligations of employer and employee or to protect and enforce such rights, but merely to decide how such rights, in the board's opinion, are to be exercised in the public interest in view of the state of war, and its orders are neither enforceable nor reviewable. War Labor Disputes Act, § 7, 50 U.S.C.A. Appendix, § 1507; Executive Order Jan. 12, 1942, No. 9017, 50 U.S.C.A. Appendix, § 1507 note.

2. War ☞4

If a justiciable controversy arises under a contract made in the process of collective bargaining, the parties are not precluded from seeking relief in a court of competent jurisdiction on the ground that the National War Labor Board has assumed jurisdiction of the controversy. War Labor Disputes Act, § 7, 50 U.S.C.A. Appendix, § 1507.

3. Courts ☞361

The definition by the federal courts of the National Labor Relations Board's jurisdiction and the effect of its decisions are controlling, rather than state court decisions thereon. War Labor Disputes Act, § 7, 50 U.S.C.A. Appendix, § 1507; Executive Order Jan. 12, 1942, No. 9017, 50 U.S.C.A. Appendix, § 1507 note.

4. Trade unions ☞8

Any right of employer to rescind a closed shop contract with union was waived by its failure to give prompt notice of its

election to rescind, by its adherence to the contract for seven years, and by its failure to avail itself of its right to terminate it. National Labor Relations Act, § 8(3), 29 U.S.C.A. § 158(3); Civ. Code, § 1691.

Appeal from a judgment of the Superior Court of Los Angeles County. Henry M. Willis, Judge. Affirmed.

Action by Pearson Candy Company, Ltd., against E. R. Waits and others, for declaratory judgment as to the rights of the parties under a closed shop agreement, wherein defendant filed a cross-complaint. From a judgment dismissing the complaint, plaintiff appeals.

Affirmed.

Prior opinion, 154 P.2d 913.

Russell E. Parsons, of Los Angeles, for appellant.

David Sokol, of Los Angeles, for respondents.

TRAYNOR, Justice.

Plaintiff is a candy manufacturer engaged in interstate commerce. On October 27, 1941, plaintiff and defendant union signed a closed shop agreement to remain in force until April 30, 1942, and from year to year thereafter unless terminated by either party upon written notice at least thirty days before April 30th of any year. None of plaintiff's employees was a member of the union before the execution of the agreement, but all of them joined thereafter. Neither of the parties ever gave the notice required by the agreement for its termination.

In October, 1942, plaintiff rejected the union's demand that it discharge nine employees who had lost good standing in the union, and in January, 1943, defendant union initiated proceedings in the National War Labor Board to determine whether the agreement governed the conditions of employment in plaintiff's business. On May 25, 1943, the Tenth Regional Board of the National War Labor Board, after a hearing, issued a directive order "that the parties to this case comply with the terms of the contract of October 27, 1941, until such time as it shall have been terminated in accordance with its provisions, or by agreement of the parties, or until the contract shall have been held invalid by the final decision of a competent tribunal. This Board, while not expressly deciding that it

is without jurisdiction to determine the legality of the contract, concludes, for reasons of policy, that the determination of legality should be made by the National Labor Relations Board or other tribunal of competent authority, the issues in dispute being meanwhile resolved through the Board's direction that the contract shall be observed." Plaintiff's petition to the National War Labor Board for review of this order was denied on July 16, 1943.

On August 25, 1943, plaintiff brought this action for declaratory relief, asking that the closed shop agreement be declared invalid as in violation of the National Labor Relations Act. On September 8, 1943, before the case was tried, the National War Labor Board assumed jurisdiction over the dispute under section 7 of the War Labor Disputes Act of June 25, 1943, 50 U.S.C.A. Appendix § 1501 et seq., "being of the opinion that the said labor dispute has become so serious that it may lead to a substantial interference with the war effort." The proceedings resulted in a directive order reading in part: "the National War Labor Board hereby decides the dispute and orders that the terms and conditions of employment to govern the relations between the parties shall be those set forth in their collective bargaining agreement dated October 27, 1941." While these proceedings were pending, the trial court dismissed plaintiff's action for lack of jurisdiction over the controversy. Plaintiff appeals.

The question is presented at the outset whether a state court has jurisdiction to determine the validity of the closed shop contract after the National War Labor Board has issued a directive order that the employment in plaintiff's business shall be governed by that contract.

[1-3] The National War Labor Board was created by the President's Executive Order No. 9017, 50 U.S.C.A. Appendix § 1507 note, following an agreement by representatives of labor, and industry that there would be no strikes or lock-outs during the war. The executive order provides: "Whereas, as a result of a conference of representatives of labor and industry, which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no

strikes or lock-outs, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for the peaceful adjustment of such disputes. * * * If not promptly settled by conciliation, the Secretary of Labor shall certify the dispute to the Board, provided, however, that the Board in its discretion after consultation with the Secretary [of Labor] may take jurisdiction of the dispute on its own motion. After it takes jurisdiction, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration under rules established by the Board." The nature of the orders of the board under the President's Executive Order was defined in a letter of Chairman Davis of the board to a member of the Conference Committee of the House of Representatives and the Senate when section 7 of the War Labor Disputes Act of June 25, 1943,* which has taken the place of the President's executive order, was under consideration. In this letter Chairman Davis stated that the record of compliance with the board's orders "indicates that no legal change in the status of the Board's orders determine the dispute, and for this purpose is necessary. These orders are in reality mere declarations of the equities of each industrial dispute, as determined by a tripartite body in which industry, labor, and the public share equal responsibility, and the appeal of the board is to the moral obligation of employers and workers to abide by the no-strike, no-lockout agreement and in conformance therewith to carry out the directives of the tribunal created under that agreement." It was therefore recommended in the letter that the board's orders "should remain without specific legal sanctions." (89 Cong.Rec. 5794-5795.) This letter led to the abandonment of proposed amendments that would have changed the nature of the board's orders. See the review of the consideration of the bill by Congress in *Employers' Group, etc., Carriers v. National War Labor Board*, 79 U.S.App.D.C. 105, 143 F.2d 145, 148. In the light of this history of the War Labor Disputes Act of June 25, 1943, the following statement in *Baltimore Transit Co. v. Flynn*, D.C., 50 F.Supp. 382, 387, with respect to the status of the board under the

* This section provides that the board shall "decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements)

governing the relations between the parties, which shall be in effect until further order of the Board." 50 U.S.C.A. Appendix § 1507.

President's Executive Order is therefore still pertinent: "[The National War Labor Board] does not exist as a tribunal to determine the legal rights and obligations of employer and employee, or to protect and enforce such rights, but merely to decide how such rights, in the Board's opinion, are to be exercised in the public interest in view of the state of war. * * * The function of the Board is to give expression of its views of the moral obligation of each side to the controversy, as members of society, to agree upon a basis for cooperation in the public interest. The jurisdiction and power of the Board to direct parties to do what it deems they should do in such interest is not limited by their constitutional or legal right to refuse to do it." Thus, the board's orders, whether rendered before or after the War Labor Disputes Act, rest simply on an appeal to the moral obligation of the parties and are neither enforceable nor reviewable. *Employers Group, etc., Carriers v. National War Labor Board*, 79 U.S.App.D.C. 105, 143 F.2d 145, 148; *National War Labor Board v. Montgomery Ward & Co.*, 79 U.S.App.D.C. 200, 144 F.2d 528, 530; *National War Labor Board v. United States Gypsum Co.*, 79 U.S.App.D.C. 239, 145 F.2d 97; see *National Labor Relations Board v. Walt Disney Productions*, 9 Cir., 146 F.2d 44, 48. It is clear, therefore, that if a justiciable controversy arises under a contract made in the process of collective bargaining, the parties were not precluded from seeking relief in a court of competent jurisdiction on the ground that the National War Labor Board has assumed jurisdiction of the controversy: "The National War Labor Board is not, under the law, vested with judicial functions, nor does it have power to enforce its determinations, called 'directives,' upon the parties to a controversy before it. It is not a substitute for the courts, and the pendency of a controversy before it is not a bar to a suit in the courts. This limitation upon its powers is recognized by it, for in its statement of its public policy respecting awards, dated September 10, 1943, it said: 'The Board's determination of the matter will constitute a final adjudication unless and until a tribunal of competent jurisdiction issues rulings contrary to those of the Board. The action of the Board in no way prejudices the right of a party to appeal to a Court of competent jurisdiction for a judicial declaration of the rights and obligations flowing from the award. The

Board's order will be made expressly subject to discontinuance should a Court render a decision contrary to the conclusions of the Board.'" *Oil Workers Inter. Union v. Texoma Nat. Gas Co.*, 5 Cir., 146 F.2d 62, 65. It is unnecessary to determine whether the state cases (*Appeal of Frank Foundries Corp. (In re Creager)*, 323 Ill. App. 594, 56 N.E.2d 649; *International Ass'n of Machinists v. State*, 153 Fla. 672, 15 So.2d 485; *International Brotherhood of Papermakers v. Wisconsin Employment Relations Board*, 245 Wis. 541, 15 N.W.2d 806) on which defendants rely are distinguishable, for the definition by the federal courts of the board's jurisdiction and the effect of its decisions are controlling in any event.

[4] Plaintiff contends that the closed shop contract should be declared invalid on the grounds that it was coerced into signing the contract and that under section 8(3) of the National Labor Relations Act, 29 U.S.C.A. § 158(3), it was an unfair labor practice for plaintiff to enter into a closed shop agreement with a labor organization that did not represent a majority of its employees.

The evidence shows without conflict that plaintiff accepted the benefits of the contract and that it failed to exercise its right to terminate the contract before the renewal dates. Thus any right that plaintiff might have had to rescind the contract was waived by its failure to give prompt notice of its election to rescind, by its adherence to the contract for several years, and by its failure to avail itself of its right to terminate it. *Civ. Code*, § 1691, *Neet v. Holmes*, 25 Cal.2d 447, 458, 154 P.2d 854; *Toomey v. Toomey*, 13 Cal.2d 317, 320, 89 P.2d 634; *Sanders v. Magill*, 9 Cal.2d 145, 155, 70 P.2d 159; *Evans v. Duke*, 140 Cal. 22, 26, 73 P. 732; *Clanton v. Clanton*, 52 Cal.App.2d 550, 555, 126 P.2d 639.

Since the relief sought by plaintiff must be denied in any event, it is not necessary to consider whether the exclusive jurisdiction of the board to prevent any person from engaging in an unfair labor practice, *National Labor Relations Act* § 10(a), 29 U.S.C.A. § 160(a) precludes state courts from declaring contracts invalid on the ground that they involve unfair labor practices under the National Labor Relations Act. See *Franks Bros. Co. v. National Labor R. Board*, 321 U.S. 702, 704, 64 S.Ct. 817, 88 L.Ed. 1020; *International Assn. of*

Machinists v. National Labor R. Board, 311 U.S. 72, 82, 61 S.Ct. 83, 85 L.Ed. 50; National Labor Relations Board v. Walt Disney Productions, 9 Cir., 146 F.2d 44, 48.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.



27 Cal.2d 890

CITY OF LONG BEACH, Appellant, v. **Walter H. LENTZ et al.**, Respondents (**Hyrum C. ENGLAND**, Intervener and Respondent).

L. A. 19485.

Supreme Court of California.

Feb. 1, 1946.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action for declaratory relief.

Judgment for defendants affirmed.

Irving M. Smith, City Atty., and Clifford E. Hayes, Deputy City Atty., both of Long Beach, for appellant.

Walfred Jacobson and John F. McCarthy, both of Long Beach, as amici curiae, on behalf of appellant.

Joseph A. Ball, of Long Beach, for respondent.

Kenneth Sperry and James C. Webb, both of Long Beach, for intervener and respondent.

PER CURIAM.

Plaintiff city has appealed from a judgment declaring that it is obligated by its charter to pay the pension claims of certain members and former members of its police and fire departments and that it is under a duty to appropriate and make available sufficient funds to pay all pensions due and which may become due in the future.

The facts are substantially the same as in *England v. City of Long Beach*, ante, Cal.Sup., 163 P.2d 865, except that here certain of the employees are still employed by the city although they served for a period of twenty years prior to the repeal of the entire pension plan, effective as of March 29, 1945. The city concedes, however, that all of the persons involved herein have vested rights which were not destroyed by the repeal.

The problem thus presented has been fully determined by our decision in the *England* case, where it was held that the pension payments directed to be made by subdivision 2 of section 187 of the charter, as amended in 1925 and 1931, St.1925, p. 1333, St.1931, p. 2785, constitute general obligations of the city and are not limited in the manner urged by the city. The declaratory relief granted in the present case is entirely in accord with that decision.

The judgment is affirmed.



27 Cal.2d 621

RIVIECCIO v. BOTHAN.

S. F. 17042.

Supreme Court of California.

Feb. 1, 1946.

As Modified Feb. 25, 1946.

1. Action ⇐6

In widow's action for declaratory relief to have divorce decree set aside for extrinsic fraud, evidence that service of summons in divorce action against alleged widow was obtained by publication and mail, that husband was familiar with streets of city to which summons was mailed, that he knew where wife resided, and that he had addressed letters in such manner that they reached her, justified finding that husband gave the fictitious street address to which summons was mailed with fraudulent intent of withholding from wife notice of the divorce proceedings.

2. Judgment ⇐375

A willful misstatement of the defendant's address in an affidavit for publication of summons is "extrinsic fraud" which justifies setting aside judgment resulting from proceedings of which defendant did not have notice.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

3. Judgment ⇐386(7)

A court may purge its own records and set aside a judgment at any time when it appears that the court has been imposed upon by extrinsically fraudulent acts, regardless of whether property rights are involved.

4. Action ⇐6

Action for declaratory relief wherein alleged widow sought to have divorce de-

cree set aside for extrinsic fraud and among other things alleged that husband was killed in accident arising out of and in course of his employment, could be maintained as against contention that a suit in equity to set aside a divorce decree cannot be maintained after death of one spouse unless it appears that divorce decree, or subsequent action to set it aside, involves some property right in which surviving spouse is beneficially interested, since a property interest was involved in that claims for death benefits might be made under the Workmen's Compensation Act.

5. Action ⇨63

The existence of laches in bringing an action is determined by the trial court in light of the facts of the particular case.

6. Action ⇨6

In action for declaratory relief wherein alleged widow sought to have divorce decree set aside for extrinsic fraud, evidence of alleged widow that before and after the divorce proceeding, husband had lulled her into belief that he was still a devoted husband, that she later lost trace of him, but constantly made inquiries of relatives and friends as to his whereabouts and continued to write but received no response, and that she was separated from him by many miles and was in ill health, supported finding that she was not guilty of laches in instituting action.

7. Bastards ⇨12

Under statute, a child born prior to the invalid marriage of the parents would be legitimate. Civ.Code, §§ 85, 215.

8. Workmen's compensation ⇨452

A child born prior to the invalid marriage of its parents would have any rights that a legitimate child would have in a death benefit granted to deceased father's dependents under the Workmen's Compensation Act. Civ.Code, §§ 85, 215; St. 1937, pp. 268, 285, §§ 3501, 4703.

9. Action ⇨6

An action by alleged widow against second wife of deceased husband for declaratory relief wherein alleged widow sought to have divorce decree set aside for extrinsic fraud did not affect legitimate status of child of second wife and decedent, born prior to their marriage, and hence child was not an indispensable party. Civ.Code, §§ 85, 215.

10. Workmen's compensation ⇨433

The right of decedent's second wife to share in a death benefit under the Workmen's Compensation Act, would not depend on validity of her marriage, in the event Industrial Accident Commission determined that she was dependent for her support upon decedent and in good faith lived in his household as his wife. St. 1937, p. 285, § 4704.

11. Workmen's compensation ⇨436

In passing upon claims of alleged widow of deceased employee from whom she had been divorced, and in determining whether to assign any part of the compensation award to any one or more of the dependents in accordance with their respective needs, the Industrial Accident Commission could consider the fact that the alleged widow lived separately from the deceased and was not supported by him for a period exceeding 12 years. St.1937, p. 285, § 4704.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Robert L. McWilliams, Judge.

Action by Anna Riviuccio against Edna Bothan, for declaratory relief, wherein plaintiff sought to have a final decree of divorce set aside. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 156 P.2d 73.

Lemuel Dalton Sanderson, of San Francisco, for appellant.

Leon Prescott and Charles Bagby, both of San Francisco, for respondent.

TRAYNOR, Justice.

Giovanni Riviuccio died on December 23, 1940, in Oakland from injuries received in an accident while driving a truck of his employer. Plaintiff contends that she is his widow and in this action for declaratory relief prays that a final decree of divorce entered in his favor by the Superior Court of San Francisco be set aside.

The decedent married plaintiff in Quincy, Mass., on August 6, 1924. They lived together, first in Quincy and later in Italy. In March, 1928, plaintiff returned to Quincy with the consent of her husband. He stayed in Italy because he did not have a permit to re-enter the United States. It was agreed, however, that he would join her as soon as possible.

He went from Italy to Australia and, between 1928 and 1935, worked as a steward on ships operating between Sidney and San Francisco. At Sidney he met defendant and became the father of a child born to her in 1930. On December 19, 1932, he filed an action for divorce against plaintiff in the Superior Court of San Francisco. Summons was served by publication and mail, based on Riviuccio's affidavit that "the last known place of residence of defendant was and is Hancock and Water Streets, Quincy, Massachusetts." On the date that the order for publication was made, Riviuccio's attorney mailed a copy of the summons and complaint to "Anna Zaccordelli Riviuccio * * * at Hancock and Water Streets, Quincy, Massachusetts." Riviuccio also stated in his affidavit that he believed he had a good cause of action and incorporated his verified complaint in his affidavit. The complaint alleged: "That plaintiff and defendant separated from each other on or about the 14th day of May, 1927, when she deserted him. * * * That heretofore, to wit, more than one year last past immediately prior to the commencement of this action, defendant wilfully deserted and abandoned plaintiff, by voluntarily separating herself from plaintiff with the intention of deserting and abandoning him, against his will and consent. That said desertion now continues and has uninterruptedly continued for more than one year last past immediately prior to the commencement of this action against his will and consent." There was no appearance on behalf of the wife, and on April 5, 1933, Riviuccio was granted an interlocutory decree. The final decree was entered on April 10, 1934. On September 17, 1934, Riviuccio married defendant in Australia, and two months later he there adopted the child born before the marriage. Shortly thereafter they all came to San Francisco where they lived together until decedent's death. The trial court annulled the divorce decree and declared that plaintiff is the surviving widow of Giovanni Riviuccio. Defendant appeals.

The trial court found: "That the affidavit for publication of summons filed by Giovanni Riviuccio * * * was a fraud upon this plaintiff and upon the said Superior Court, and that the Decree of Divorce * * * was obtained by means of fraud on said Court and upon the plain-

tiff. * * * That plaintiff herein never deserted decedent and that the allegation in said complaint for divorce that plaintiff herein has deserted decedent on or about May 14, 1927 * * * is not true, and was and is wholly and wilfully false, and was known to decedent to be false and fraudulent when made by him. That said allegation of desertion * * * is wholly inconsistent with the various letters written by decedent to plaintiff from December, 1928, to September 30, 1930. * * * That Hancock and Water Streets in the City of Quincy, Massachusetts, are public thoroughfares and do not intersect; that plaintiff herein never lived on either of said streets, and that both of said streets are located at considerable distance from where plaintiff resided in said city. That said city of Quincy, at the time plaintiff herein and decedent resided therein as husband and wife, had a population of approximately 44,000; that decedent had lived in, around and about said city for a considerable period of time and was familiar with the streets and thoroughfares thereof. That at divers times after plaintiff herein returned to said Quincy, and at the time of the filing of decedent's complaint and affidavit for divorce and at the time of the entry of the Interlocutory and Final Decrees of Divorce, and for a considerable time thereafter, plaintiff and decedent were in written communication with each other, and that decedent knew where plaintiff resided and that decedent never addressed plaintiff at Hancock and Water Streets, Quincy, Massachusetts, and plaintiff never received any correspondence from any person addressed to her at Hancock and Water, or Hancock and Water Streets, Quincy, Massachusetts."

[1,2] Defendant contends that the finding of extrinsic fraud, requisite to warrant an attack in equity on a final judgment, was not supported by the evidence. In the light of the facts that Riviuccio was familiar with the streets of Quincy, Mass., that he knew where plaintiff resided, and that until September, 1930, he addressed his letters in such a manner that they reached her, the trial court was justified in finding that he gave the fictitious address with the fraudulent intent of withholding from plaintiff notice of the divorce proceedings.

It is settled that a wilful misstatement of the defendant's address in an affidavit for publication of summons is extrinsic

fraud and justifies setting aside the judgment resulting from proceedings of which defendant did not have notice. *Aldrich v. Aldrich*, 203 Cal. 433, 437, 264 P. 754; *Stern v. Judson*, 163 Cal. 726, 735, 127 P. 38; *Doyle v. Hampton*, 159 Cal. 729, 733, 116 P. 39; *Parsons v. Weis*, 144 Cal. 410, 419, 77 P. 1007; *Dunlap v. Steere*, 92 Cal. 344, 347, 28 P. 563, 16 L.R.A. 361, 27 Am.St.Rep. 143; *Wells v. Zenz*, 83 Cal. App. 137, 142, 256 P. 484; *Williams v. Williams*, 57 Cal.App. 36, 206 P. 650.

[3,4] Defendant contends that a suit in equity to set aside a divorce decree cannot be maintained after the death of one spouse unless it appears that the divorce decree or the subsequent action to set it aside involved some property right in which the surviving spouse is beneficially interested. A court, however, has authority to purge its own records and may set aside a judgment at any time when it appears that the court has been imposed upon by extrinsically fraudulent acts. *McGuinness v. Superior Court*, 196 Cal. 222, 234, 237 P. 42, 40 A.L.R. 1110; *Tomb v. Tomb*, 120 Cal.App. 438, 442, 7 P.2d 1104; *Britton v. Bryson*, 216 Cal. 362, 369, 14 P.2d 502; *Aldrich v. Aldrich*, supra, 203 Cal. page 437, 264 P. 754. The court's power in this respect is not dependent on whether property rights are involved. See *Tomb v. Tomb*, supra, 120 Cal.App. at page 442, 7 P.2d 1104. Moreover, a property interest is involved in this proceeding. Plaintiff's allegation that decedent was killed as the result of an accident arising out of and in the course of his employment is admitted by defendant. Claims for a death benefit may therefore be made under the Workmen's Compensation Act, and in making its award the Industrial Accident Commission will take into consideration the marital relationship of the decedent to each of the parties herein.

[5,6] Defendant also contends that plaintiff was not diligent in discovering the fraud, and that since the interests of defendant and her child have intervened, plaintiff should be barred from attacking the divorce decree. The existence of laches is determined by the trial court in the light of the facts and circumstances of the particular case. *Austin v. Hallmark Oil Co.*, 21 Cal.2d 718, 734, 134 P.2d 777; *Fry v. Board of Education*, 17 Cal. 2d 753, 761, 112 P.2d 229. The trial court in the present case found that "plaintiff

herein is not, nor has she been, guilty of laches or any lack of diligence in instituting the above entitled action." The record discloses ample evidence to support this finding. Plaintiff testified that before and after the divorce proceedings her husband lulled her into the belief that he was still a devoted husband, and that she later lost trace of him but constantly made inquiries of relatives and friends as to his whereabouts. She continued to write to her husband at the address known to her in Australia and one known to her in San Francisco, but received no response to her letters. She was separated by many miles from San Francisco and was in ill health from 1931 until 1937. See *Aldrich v. Aldrich*, 203 Cal. 433, 437, 264 P. 754.

[7] The judgment annulling the divorce decree will not make defendant's child illegitimate, nor will it necessarily entail for defendant the hardships that she envisages. The child will not be deprived of the status of a legitimate child of the decedent. Under section 85 of the Civil Code "The issue of a marriage which is void * * * is legitimate" while under section 215 of that Code "A child born before wedlock becomes legitimate by the subsequent marriage of its parents." Such statutes "remove the stain and disabilities of bastardy" (*Goodman v. Goodman*, 150 Va. 42, 45, 142 S.E. 412, 413) not only from children born after the void marriage of their parents or before their valid marriage, but also from children born, as defendant's child, before the invalid marriage of their parents. *Bates v. Meade*, 174 Ky. 545, 192 S.W. 666; *Goodman v. Goodman*, supra; *Clinton County Natl. Bk. & Tr. Co. v. Todhunter*, 43 Ohio App. 289, 183 N.E. 88; see *Carroll v. Carroll*, 20 Tex. 731, 732, 746; 84 A.L.R. 499; 6 So.Cal. L.Rev. 338.

[8] The rights of defendant's child include any rights that a legitimate child has in a death benefit that may be granted to decedent's dependents under the Workmen's Compensation Law. (Lab.Code, §§ 4703, 3501.)

[9] Since the present proceeding will not affect the child's status, it follows that the child is not an indispensable party. See *Bank of California v. Superior Court*, 16 Cal.2d 516, 521, 106 P.2d 879.

[10,11] Defendant's right to share in a death benefit under the Workmen's Compensation Law does not depend on the

validity of her marriage. Defendant will be entitled to compensation should the Industrial Accident Commission determine that she was dependent for her support upon decedent and in good faith lived in his household as his wife. *MacArthur v. Industrial Acc. Comm.*, 220 Cal. 142, 29 P.2d 846; *Harlan v. Industrial Acc. Comm.*, 194 Cal. 352, 364, 228 P. 654; *Moore Shipbuilding Corp. v. Industrial Acc. Comm.*, 185 Cal. 200, 205, 196 P. 257, 13 A.L.R. 676; *Temescal Rock Co. v. Industrial Acc. Comm.*, 180 Cal. 637, 182 P. 447, 13 A.L.R. 683; *DeFreece v. Industrial Acc. Comm.*, 26 Cal.App.2d 584, 587, 80 P.2d 129; *Louden v. Industrial Acc. Comm.*, 105 Cal.App. 65, 69, 286 P. 1045. "The dependency of the claimant is the true basis of his right to [recover] compensation rather than blood or marriage. Relationship is really only evidence of dependency." *Harlan v. Industrial Acc. Comm.*, supra, 194 Cal. at page 364, 228 P. page 659. Similarly, in passing upon any claim that plaintiff may make for compensation and in determining under section 4704 of the Labor Code whether to assign any part of its award to any one or more of the dependents in accordance with their respective needs, the Industrial Accident commission may consider the fact that plaintiff lived separately from her husband and was not supported by him for a period exceeding twelve years.

The judgment is affirmed.

GIBSON, C. J., SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.



72 Cal.App.2d 848

IN RE HOTALING'S ESTATE.
Civ. 12954.

District Court of Appeal, First District,
Division 1, California.

Feb. 5, 1946.

Hearing Denied April 1, 1946.

1. Appeal and error ⇨151(3)

Trust beneficiaries and trustees could appeal from order construing will so as to
165 P.2d—43½

reduce testator's residuary estate, which was trust corpus.

2. Wills ⇨439, 440, 441

The object of testamentary construction is to ascertain testator's intent from language of will read in light of surrounding circumstances at date of its execution.

3. Wills ⇨470

The language of a will should be liberally construed to effect testator's evident intent as expressed in will considered as a whole.

4. Wills ⇨490

Extrinsic evidence was admissible to identify property described by testator as realty located at certain city and known as "The St. George Hotel" and personalty used in operation of such hotel.

5. Wills ⇨706

Where extrinsic evidence is admissible on issue of testator's intent, interpretation of will is at least partially a question of fact, and trial court's interpretation will not be disturbed unless shown to be unreasonable, that is, unsupported.

6. Wills ⇨560(1)

The words "real property" in will include all interests in realty and convey all of testator's interest therein unless expressly limited. Probate Code, § 120.

See Words and Phrases, Permanent Edition, for all other definitions of "Real Property".

7. Wills ⇨490

Evidence supported finding that property described in will as testator's realty in certain city, known as "The St. George Hotel", and personalty used in operation of such hotel, included entire building containing hotel and various stores and not merely hotel and restaurant leased and occupied by beneficiaries when will was drawn. Probate Code, § 120.

8. Wills ⇨457

Where testator's clear intent appears, technical meaning of his words will be disregarded.

9. Wills ⇨488

Where latent ambiguity exists in will, evidence of testator's oral declarations as to his intent are admissible. Probate Code, § 105.

10. Wills ⇨487(1)

Extrinsic evidence is inadmissible to show that testator intended something other than what he said where his expression is clear and applicable to only one object or set of facts. Probate Code, § 105.

11. Wills ⇨490

Where testator's reference to "The St. George Hotel" could have referred either to entire building containing hotel and stores or to hotel only, there was a "latent ambiguity" making evidence of testator's oral declarations as to his intent admissible. Probate Code, § 105.

See Words and Phrases, Permanent Edition, for all other definitions of "Latent Ambiguity".

12. Wills ⇨572

Under devise of hotel and legacy of all personalty used in operation thereof, legacy included furniture in rooms reserved, before testator's death, for his private use.

13. Wills ⇨704

Where court found that devise of "The St. George Hotel" and legacy of personalty used in operation of such hotel included entire building containing hotel and stores, finding as to whether stores were used in operation of hotel was unnecessary.

14. Executors and administrators ⇨315(1)

A probate court was not required to insert in decree of distribution requirement that life tenant give remainderman inventory of property required by statute, since such requirement was a part of decree by necessary implication. Probate Code, § 1065.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Frederick Charles Hotaling, alias, deceased, wherein the executors petitioned the probate court for partial distribution, interpretation of a certain paragraph of the will, and for instructions. From an adverse order, the Bank of California National Association and others appeal, opposed by George Carstulovich and wife.

Affirmed.

Gavin McNab, Schmulowitz, Aikins, Wyman & Sommer, Nat Schmulowitz, and Peter S. Sommer, all of San Francisco,

for Marie Gildroy Gray and Alexander Gildroy, appellants.

Pillsbury, Madison & Sutro, of San Francisco, for Byron G. Mobbs, testamentary trustee, appellant.

John A. Grennan, of Oakland, for Bank of California Nat. Ass'n, testamentary trustee, appellant.

W. A. Breen, of San Francisco, and J. Frank Murphy, of Santa Cruz, for respondent.

PETERS, Presiding Justice.

[1] The executors of the will of Frederick C. Hotaling petitioned the probate court for partial distribution, for an interpretation of the ninth paragraph of the will, and for instructions. The appeal is taken by the testamentary trustees, and by the trust beneficiaries, Marie Gildroy Gray and Alexander Gildroy, the chief beneficiaries under the will. The executors stated at the time of trial that their position was neutral, and they did not actively participate in the trial, nor have they appealed. However, the testamentary trustees are the same persons who are executors, and respondents seem to object to their participation in this appeal. They are clearly proper parties. The trust corpus is composed of the residuary estate. The trial court's construction of the paragraph in question reduces the trust corpus. The beneficiaries and the trustees were therefore adversely affected by the order and are entitled to appeal.

The testator was a man of considerable wealth. The estate is appraised at over a million and a half dollars. His wife was dead when he executed the will, and he had no issue. He had no close blood relatives. The chief beneficiaries are Marie Gildroy Gray and Alexander Gildroy, who are the niece and nephew of his deceased wife, and who are the beneficiaries of a trust composed of the residuary estate. The will was drafted by an attorney and contains many specific bequests to friends, to distant relatives, to relatives of his wife, and to charity. It then contains the paragraph entitled "Ninth" which is the subject of the present proceeding. It reads as follows: "I hereby give, devise and bequeath to my good friends, George Carstulovich and Frances Carstulovich, his wife, as joint tenants, a life interest in and to my real property located at Santa Cruz, California, known as 'The St. George

Hotel,' together with all of the furniture, furnishings, fixtures, bric-a-brac, rugs, carpets, dishes, silverware, kitchen utensils and all other personal property of every nature and description now being used in the conduct and operation of said hotel."

It is this clause that the executors want construed. The petition alleges that there is a dispute between the various legatees over whether this devise included only the property operated as a hotel, or also included various stores occupied by several different tenants. Marie Gildroy Gray filed an unverified answer alleging that the stores were not included. The Carstulovichs contended at the trial that the entire premises were included within the life estate. The trial court agreed with the Carstulovichs.

The controversy arises because the property over which the hotel is constructed was not always in one ownership and because of the somewhat ambiguous language of the paragraph in question. At one time a person by the name of Simpson, and at another time a person by the name of Pease, owned a part of the property. The Hotaling holdings were enlarged by the purchase of the Simpson and Pease property, and since that time (1914) the entire property has been owned by the Hotalings. Located on the property is a building, or buildings, part of which is two stories high and part three stories high. All above the first floor in this structure is devoted to hotel purposes. The corridors, the wiring, the plumbing, and heating are continuous throughout the building. The structure fronts on Pacific Avenue in Santa Cruz and extends through the entire block to Front Street. A picture of the outside of the building included in the record indicates that the building has been finished as one continuous unit. On the street floor are the hotel lobby and the Saddle Rock Restaurant and various other rooms, stores and shops, all facing on Pacific Avenue.

George Carstulovich had known the testator for many years. In 1931 he leased from him the Saddle Rock Restaurant, and since 1934 has also leased the hotel. He admittedly did not lease some of the other ground floor rooms, these being leased by Hotaling directly to individual tenants. These tenants paid their rent to Hotaling and not to Carstulovich, and over their premises the Carstulovichs exercised no control.

Certain extrinsic evidence was introduced for the purpose of explaining what was intended by the clause in question. That evidence showed that when the testator made the will in July of 1943, and when he died, the only real property he owned in Santa Cruz was the property here involved. This property was assessed to Hotaling as one piece, the improvements were assessed as a unit, and his agents handled the account as one single account. A floor plan of the street level bore the designation "Hotel St. George." The various leases to the various tenants were produced as exhibits. They refer to the leased store by street number and as being located in the building variously described as "The St. George Mission Inn," "The St. George Hotel Building" or the "St. George Hotel." There is ample evidence that the entire building was commonly known and referred to as "The St. George Hotel," and that the testator frequently referred to it in that manner. In 1938, when the local paper was running a special edition, Hotaling caused to be inserted an advertisement therein containing a picture of the entire structure and carrying greetings from the "St. George Hotel Properties."

In the Carstulovich lease of 1939, the last lease executed between the parties, the premises leased are described as: "All of that certain building designated as The St. George Hotel, together with the building premises designated as The Simpson & Pease Buildings adjoining the said St. George Hotel to the North * * * and also the store fronting on Pacific Avenue known as the Saddle Rock Restaurant * * *." The lease expressly excepts "the ground floor space, together with the basement of the Simpson & Pease Buildings, extending from the South line of Frank Montara's property to the North line of the St. George Hotel property." An inventory of certain personal property is attached to the lease and it describes the furniture and furnishings leased as the "furniture, furnishings, fixtures and appliances now located in that certain hotel known as the St. George Hotel, situate in the Hotaling Building and in the Simpson & Pease Buildings now owned by Frederick C. Hotaling." Rent statements sent to Carstulovich by the agents of Hotaling each month referred to the "Hotel St. George and 67 Pacific Avenue."

[2-5] Authorities need not be cited for the fundamental proposition that the ob-

ject of testamentary construction is to ascertain the intent of the testator from the language of the will read in the light of the surrounding circumstances at the date of its execution. The language of a will always will be liberally construed to effect the testator's evident intent as expressed in the instrument considered as a whole. Appellants seem to contend that in the instant case the meaning of the language used is so clear that extrinsic evidence was inadmissible to explain its meaning. Based on this premise they urge that the proper interpretation is a question of law and not a question of fact, and cite such cases as *In re Estate of Platt*, 21 Cal.2d 343, 131 P.2d 825. However, the rule is well settled that where, as here, extrinsic evidence is admissible on the issue of intent, the interpretation is at least partially a question of fact and the trial court's interpretation will not be disturbed unless shown to be unreasonable—i. e., is unsupported.

[6] The first part of the clause in question is a devise of a life interest "in and to my real property located at Santa Cruz, California, known as 'The St. George Hotel.'" Standing alone, or interpreted with the extrinsic evidence, the only reasonable construction of that portion of the clause is that it included a life estate in the entire property. It is true that a devise of the top floor of a building is a devise of "real property," but it is equally true that the words "real property," without further limitation, are broad enough to include all interests in realty and convey all of the testator's interest therein unless expressly limited. Probate Code, § 120; see cases collected 26 Cal.Jur. p. 972, § 270; see, generally, cases collected in *Jones v. Holloway*, 183 Md. 40, 36 A.2d 551, 152 A.L.R. 938; *Gilbert v. McCreary*, 87 W. Va. 56, 104 S.E. 273, 12 A.L.R. 1179. Therefore, while it is true, as appellants contend, that if a devise is limited to the top floors of a building it is still a devise of real property, where, as here, it appears that the entire property is commonly known as the "St. George Hotel" and where it appears that was the usual way the testator referred to it, and the devise is of the real property "known" as the St. George Hotel, it seems quite clear that the whole property is included in the devise. To say the least, such is the most reasonable construction of that portion of the clause.

Appellants contend that however reasonable this interpretation may be of this

clause when read alone, when the clause is read in the light of circumstances as they existed at the time the will was drawn, and in light of the closing portions of the paragraph, but one reasonable construction is possible, namely, that the real and personal property bequests are limited to the portion of the property being operated as a hotel and restaurant. They emphasize that when the will was drawn the Carstuloviches were occupying only the hotel and restaurant under a lease expressly excluding the ground floor stores. They point out that the closing paragraph reads "together with" the personal property "now being used in the conduct and operation of said hotel." There can be no doubt that if this last quoted clause stood alone it more aptly refers to the personal property used in the conduct of the hotel as an inn than it does to the entire property. But what appellants fail to recognize is that the phrase, read as a whole, contains a latent ambiguity. A mere reading of paragraph ninth, without the extrinsic evidence, would indicate no ambiguity at all. The clause devises the real property of the testator known as the "St. George Hotel" and the personal property used therein to named legatees. On its face that is not ambiguous. But when the extrinsic evidence is considered it is quite clear that the phrase real property "known as 'The St. George Hotel'" could have referred to any one of several things. From the Carstulovich lease it would appear that there are separate buildings, one of which is known as the "St. George Hotel." From the lease and other evidence it would appear that the Saddle Rock Restaurant and the upper floors of the entire structures are known as the "St. George Hotel." From the evidence considered as a whole it appears that the entire structure is known as the "St. George Hotel." When the clause is read with these possibilities in mind it would appear that the phrase "my real property located at Santa Cruz, California, known as 'The St. George Hotel'" considered alone most reasonably refers to the entire structure, while the phrase referring to the personal property "now being used in the conduct and operation of said hotel," considered alone, would seem to refer to that St. George Hotel which was being operated as an inn. Once either interpretation is adopted the other clause is not necessarily inconsistent. If the entire property is meant, then "conduct and

operation of said hotel" can be construed to mean not the conduct of the hotel as an inn, but the conduct and operation of the entire premises. On the other hand, if the last phrase controls the first, then the reference to "real property" is not inconsistent, and but those premises used as an inn were devised.

[7] When the entire clause is read together with the extrinsic evidence it seems clear that the most reasonable interpretation of the entire paragraph is that both phrases refer to the entire structure. Certainly we cannot say that this interpretation given the paragraph by the trial court is unreasonable or unsupported. This construction does not disregard the phrase "said hotel." As already pointed out, those words could have meant the entire structure as well as those portions operated as an inn, and where the extrinsic evidence is considered that is the most reasonable construction. It is true that the ordinary meaning of the term "hotel," is an inn or hotel (Fay v. Pacific Improvement Co., 93 Cal. 253, 26 P. 1099, 28 P. 943, 16 L.R.A. 188, 27 Am.St.Rep. 198) but in this case its meaning is ambiguous.

The argument so strongly relied upon by appellants that at the time the will was made the Carstuloviches were in possession of only a part of the real property and that therefore the testator only intended to give them that portion does not seem persuasive and certainly is not conclusive. It does not necessarily or even probably indicate that the intent of the testator was to limit them to that part. They were old friends of the testator, while the appellant beneficiaries were not related to him by blood, being relatives of his wife. Other than this, their personal relationships with the testator do not appear. While an interpretation favorable to relatives is preferred (In re Estate of Hartson, 218 Cal. 536, 24 P.2d 171) the relationship here is not a close one, and the strength of that inference is dependent upon the degree of the relationship. Moreover, the inference is here rebutted by the other evidence.

Appellants lay great weight upon the terms of the Carstuloviches' lease, and point out how that lease stated in great particularity the portions of the premises demised. That fact, however, would seem to support respondents rather than appellants. It indicates that when the testator

wanted to limit the area involved he knew how to do so. The failure so to limit the area involved in the will, with the example of the lease before him, supports an inference that by the will he intended the entire structure to be included rather than only a limited portion.

In re Estate of Brown, 119 Cal.App. 195, 6 P.2d 319, 320, cited by appellant, is not in point. In that case the devise was of "the dwelling at No. 506 South street," and the size of the lot upon which the building was located was expressly stated. The devisee was occupying the premises at the time the will was made, and the testator was occupying another residence behind that at 506 South street, which was on another lot, which was not included within the size of the lot specified in the will. Clearly, only the dwelling at 506 South street and the lot specifically described by the testator passed, although the building on the next lot was connected by a shed with that in which the devisee resided. In the present case there is no such clearly expressed intent to sever the upper and lower stories.

[8] Appellant argues that where the intent of the testator to use words in their non-technical sense is clear, the technical meaning must be subordinated to the general testamentary scheme, citing In re Estate of Hollingsworth, 37 Cal.App.2d 432, 99 P.2d 599. The argument is not helpful for the reason that here no general plan as to this property appears. The trusts are composed of the residual estate. No other express reference to the Santa Cruz real property appears in the will. In order to find a testamentary scheme to give the devisees only that portion used by them as a hotel, the construction of the will must first be assumed. If a clear intent appears, the technical meaning of words will be disregarded. In re Estate of Heard, 25 Cal.2d 322, 153 P.2d 553. But in the present case no clear intent appears. The very fact that there are stores on a piece of real property owned by the testator and known as the St. George Hotel, which are not used in connection with an inn of the same name, appears only by extrinsic evidence. The whole of appellant's argument must turn on the construction of the word "hotel" as used in the last phrase of the paragraph, "now being used in the conduct and operation of said hotel." Assuming that the paragraph is to be read as a whole,

there is no more reason for giving "hotel" its technical meaning than there is for giving "real property" its technical meaning.

[9] Appellants contend that the admission of the oral declarations of the testator as to his intent was prejudicial error. Probate Code, § 105, provides, in part, that when an uncertainty arises upon the face of a will as to the application of any of its provisions, the testator's intent is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding the oral declarations of the testator as to his intent. An exception exists, however, in the case of a latent ambiguity. Where the testator's expression is clear, but applies equally to more than one object, evidence of his oral declarations is admissible to identify the property involved. In such a case the evidence is admissible not to contradict the written instrument, but simply to explain that instrument where it is capable of being interpreted as being applicable to several different things. Thus, in *Re Estate of Greenwald*, 19 Cal.App.2d 291, 65 P.2d 70, the respondent called as a witness the attorney who drafted the will, and, over objection of appellant, interrogated him as to conversations with the deceased and instructions given him by deceased during the course of the preparation of the will. The court stated that it is the settled rule in this state that where a latent ambiguity exists, such evidence is admissible. See, also, 4 Page on Wills, p. 660, § 1625, particularly at p. 669.

[10] Appellant vigorously contends that the ambiguity in the present case is patent and not latent. The terms "latent" and "patent" are confusing. Extrinsic evidence is admissible in order to determine what the testator meant by what he said and to identify the property which is the subject of the devise. Extrinsic evidence is inadmissible to show that the testator intended something other than what he said where his expression is clear and applicable to only one object or set of facts. In the present case, extrinsic evidence was clearly admissible to identify that real property "known" as the "St. George Hotel." This evidence having been admitted, the latent ambiguity is revealed—there is more than one thing that could be so described. In this case the evidence which was admitted over objection consists of testimony of the scrivener of the will as to conversations and instructions given him by the testator

prior to drawing of the will. The testimony was to the effect that the testator had often spoken of his real property in Santa Cruz as the "St. George Hotel" and that that was his expression whether he referred to the Carstulovich property or the stores, and that he never designated the property in any other way, and that when the will was being drawn he stated that "he would like to leave the St. George Hotel property" to the Carstuloviches for life.

[11] In *Re Estate of Schaetzel*, 44 Cal. App.2d 320, 112 P.2d 324, the refusal of the trial court to receive the testimony of the attorney as to decedent's instructions was said not to be error. The court in that case apparently considered the language clear and unambiguous. In this case the ambiguity was clearly latent and the oral declarations therefore admissible.

[12] Appellants next contend that the trial court erred in ordering the furniture in rooms 245 and 248 of the hotel distributed to respondents. The inventory of furniture attached to the Carstuloviches' lease excepts therefrom Hotaling's personal furniture and other effects, and in the lease itself rooms 245 and 248 were reserved for Hotaling's exclusive private use. Most of the furniture in these two rooms was of the same type as that used in other rooms of the hotel, but it was never removed from the testator's rooms nor used in any other part of the hotel during the testator's lifetime. Inasmuch as we have already held that the trial court correctly determined that the words "said hotel" refer to the entire real property, it is obvious that this furniture was used in the conduct and operation of the property as a whole. No error was committed by the trial court in reference to this property.

Appellants make a most involved argument to the effect that the trial court committed reversible error in failing to find on all of the material issues raised by the answer of Marie Gildroy Gray. The trial court found that the allegations of the executors' petition were true except as otherwise found. One such allegation thus found to be true was to the effect that the stores are occupied by tenants conducting businesses independent of the hotel business. There was no express finding that the stores were "used in the conduct and operation of said hotel." Failure to so find, according to appellants, is fatal to the

judgment. The court did find, however, that the testator intended to and did devise the entire real property described in the finding "together with the improvements, buildings, stores, storerooms and structures, thereon and therein" to the Carstuloviches.

Appellants contend that since the probate court has equitable jurisdiction it must find on probative facts material to the exercise of a sound judicial discretion. *Fairchild v. Raines*, 24 Cal.2d 818, 151 P.2d 260. The rule of that case is sound, but is not here applicable. In that case the trial court granted an injunction without finding on issues of fact set up in the answer as grounds for denying the injunction. The issue was addressed to the discretion of the trial court. In the present case the issue presented to the trial court was not one of judicial discretion. The ultimate question presented was the meaning of paragraph ninth of the will. When the trial court found that the testator intended to and did devise the entire property to the Carstuloviches it passed on the only issue before it. The trial court was not required to find on every evidentiary factor leading up to that interpretation. Once it had determined what the testator meant by paragraph ninth, findings to meet the allegations of the answer that the stores were not under the management and control of the Carstuloviches in connection with the operation of the hotel business, and that Hotaling reserved, during his lifetime, the right to collect the rentals thereof, were entirely immaterial. Findings either way on those matters would in no way affect the ultimate finding as to what was meant by paragraph ninth.

[13] The fallacy of appellants' argument is that it assumes the meaning intended by the testator by the words "said hotel." Obviously, if, as a matter of law or fact, only the hotel as an inn were intended, then a finding that the stores were or were not used in the conduct of the hotel as an inn would have been indispensable. But once the trial court determined, as it did, that "said hotel" had the broader meaning of the entire structure, a finding

on whether the stores were or were not used in the conduct and operation of the hotel became totally immaterial. The real and only issue in this case was whether extrinsic evidence was admissible to explain the latent ambiguity. Since it was admissible, and since that evidence supports the finding that the thing described was the entire property, the only issue presented was passed upon, and that finding is conclusive.

[14] The last contention of appellants is that error was committed because the trial court did not insert in the decree of distribution a requirement that the life tenant sign and deliver to the remainderman an inventory of the property as required by § 1065 of the Probate Code. There is no doubt that that section requires that the life tenant must give such an inventory to the remainderman, together with a statement that upon the decease of the life tenant the property will be delivered to the remainderman, but there is no requirement that such provision is an indispensable part of the decree of distribution. Such a provision undoubtedly could be written into the decree, but when, as here, it is omitted, it is a part of the decree by necessary implication by virtue of the Probate Code section. It is not to be assumed that where the decree shows that a portion of the estate distributed is a life estate, that the executors are going to be false to their trust and not require the receipt and declaration required by the code section. That code section makes the requirements thereof as much a part of every decree of distribution involving life estates as if written into the decree. If the executors should attempt to deliver the property to the life tenants without requiring the receipt and declaration, the court has ample powers at the suit of the remaindermen to enforce the requirements.

The order appealed from is affirmed.

WARD, J., and OGDEN, Justice pro tem., concur.

Hearing denied; TRAYNOR, J., dissenting.

**AUTRY v. REPUBLIC PRODUCTIONS,
Inc.***
Civ. 15017.

District Court of Appeal, Second District,
Division 3, California.

Jan. 29, 1946.

Rehearing Granted Feb. 27, 1946.

1. Contracts $\S$ 215(1)

Generally, a contract, under which continuous performance is of the essence, is terminated where unanticipated developments cause a prolonged period of inability of the promisee to perform and the promisor elects to terminate it upon the ground of failure of consideration.

2. Contracts $\S$ 215(1)

The fact that motion picture star entered military service, resulting in a temporary inability to carry on his work, did not of itself terminate his contract of employment, but question whether grounds for termination existed was required to be determined upon the facts under the equitable doctrine dealing with hardship of performance, rather than with impossibility.

3. Contracts $\S$ 215(1)

Temporary impossibility of such character that if permanent it would discharge a promisor's entire contractual duty, has that operation if rendering performance after the impossibility ceases would impose a hardship on promisor, otherwise such temporary impossibility suspends the duty of promisor to render the performance only the impossibility exists.

4. Contracts $\S$ 215(1)

Fact that plaintiff entered military service, thus making performance of his contract with motion picture company temporarily impossible, did not terminate the contract of employment, where performance would be possible after release from military duty and would impose no greater burden upon plaintiff than he originally assumed.

5. Contracts $\S$ 309(1)

The doctrine of "frustration" applies where performance of a contract remains possible, but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event which supervenes to cause an actual but not literal failure of consideration.

* Subsequent opinion 170 P.2d 977.

See Words and Phrases, Permanent Edition, for all other definitions of "Frustration".

6. Contracts $\S$ 215(1)

Even where there has been an interruption of performance due to wholly unanticipated events, the purposes of the contracting parties is not "frustrated" if performance may be rendered thereafter under conditions which will give to each of the parties substantially the same benefits and advantages they would have received, except for the interruption.

7. Contracts $\S$ 215(1)

Plaintiff's contract to act for motion picture company was not terminated, under doctrine of "frustration", because interrupted by plaintiff's military service, where the company did not wish to terminate the contract and it did not appear that performance of the contract after completion of military service would impose any undue hardship on plaintiff.

8. Contracts $\S$ 215(1), 300(1), 303(1)

Code provision that performance of a contract is excused when prevented or delayed by acts of public enemies had effect of excusing performance while motion picture actor was in military service, but could not be construed as terminating employment contract which could be fully performed under completion of the military service without any hardship to either party. Civ.Code, $\S$ 1511.

9. Contracts $\S$ 215(1)

Code provision that every employment is terminated by employee's "legal incapacity" to act could not be construed as terminating plaintiff's contract to act for motion picture company because of his military service, where the contract could be fully performed after completing military service without hardship to either party. St.1937, p. 260, $\S$ 2920.

See Words and Phrases, Permanent Edition, for all other definitions of "Legal Incapacity".

10. Contracts $\S$ 227

Where plaintiff's contract to act in motion pictures for defendant contained provision giving defendant option to extend the contract for yearly periods upon giving notice, plaintiff's conduct in making three motion pictures for defendant after notice should have been given that option was

exercised constituted a waiver of such notice by plaintiff.

11. Contracts ⇨25

Any promise to agree upon the terms of another contract would be void for uncertainty.

12. Contracts ⇨215(1)

A provision in motion picture actor's contract providing that in event actor entered military service the parties would agree upon their mutual rights and obligations, was properly construed as not effecting a cancellation of the contract, particularly where such provision was agreed upon after the motion picture company had refused to insert a provision that military service would of itself terminate the contract. Civ.Code, § 1511.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Gene Autry against Republic Productions, Inc., for a declaration of the rights and obligations of the parties under a contract of employment. From the judgment, plaintiff appeals.

Affirmed.

Gang, Kopp & Tyre, of Los Angeles, for appellants.

Loeb & Loeb, Finlayson, Bennett & Morrow, Milton H. Schwartz, Hubert T. Morrow, and John C. Morrow, all of Los Angeles, for respondent.

SHINN, Justice.

This is an action for a declaration of the rights and obligations of the parties under a contract of employment.

Plaintiff is by profession an actor in photoplays. Defendant engaged his services by contract entered into September 22, 1938, and by separate supplemental agreement made in May, 1942. For convenience, the contracts will be referred to in the singular. Under the original contract and certain options therein contained, and as extended by agreement, the combined terms of plaintiff's employment would have extended to March 6, 1945. Plaintiff rendered services as agreed until July, 1942. He entered the Army July 26, 1942, and at the time of trial of the action was still serving in the armed forces of the United States. He has rendered no services to defendant and has received no compensation since July, 1942. On June 17, 1944, he

served notice upon defendant that the contract was terminated and that he was no longer in its employ, basing his action upon the stated grounds that further performance of the agreement had been rendered impossible and that the purposes of the agreement had been frustrated by reason of his military service. Defendant has at all times denied that the employment has been terminated.

Plaintiff opens his brief with the statement: "The fundamental contention of appellant is that the contractual relationship between Autry, the employee, and Republic, his employer, was terminated by operation of law because performance of personal services by Autry after his enlistment in the United States Army became impossible and illegal." Defendant replies that it "recognizes that Autry has a legal excuse for failure to perform under the contracts during the period of his Army service (except as pointed out hereinafter), but contends that after such service ends, Autry is legally bound to resume and continue performance under the contracts." It is conceded that performance of the contract will be possible after plaintiff's release from the service. The precise question then is whether plaintiff's entering the service terminated the contract or only suspended its operation, so as to excuse both parties from performing during the time plaintiff remains in the service. Plaintiff maintains throughout his argument that his act of entering the Army ipso facto rendered impossible further performance under the contract, not only during the term of his military service but permanently. He does not claim that there exists an actual impossibility of performance but one which arises out of some rule of law or equity. The briefs, after a discussion of the doctrine of impossibility of performance, pass to those pertaining to cases of failure of consideration and frustration. We shall take up first the matter of claimed impossibility of performance.

This presents a simple question, as it is narrowed by the findings and by the concessions of the parties. The salient facts are the following: (1) It has been and will continue to be impossible for the parties to perform their contract, according to its terms, during the period of plaintiff's service in the Army (it is conceded that the contracts were not and will not be operative or enforceable during this period); (2) it will be possible, in fact, for both

parties to fully perform the contract according to its terms (except, of course, as to time of performance) after plaintiff has been released from military service; (3) no substantial burden has been or will be imposed upon plaintiff in connection with the performance of the services by him as an actor in photoplays produced by defendant, by reason of his service in the armed forces of the United States (there was a finding to this effect); (4) defendant has not claimed and does not claim the right to discharge plaintiff or terminate the contract by reason of his inability to continue his work during the term of his military service.

[1] The contention that entering the military service terminates a contract of employment, no matter what its terms may be, does not find support in any of the texts on the subject or in any decisions which have been cited to us or which have come to our attention. The only semblance of support for it consists of broad statements, contained in several cases cited by plaintiff, which were unnecessary to a decision of the points involved. In *Marshall v. Glanvill* (1917), 2 K.B. 87, 7 B.R.C. 621, the plaintiff, a salesman, entered the Army and was thereupon discharged from his employment, without the six months' notice required by his contract. He sued for, and was denied, damages which he claimed to have suffered by reason of his summary dismissal. In *Horlock v. Beal*, 1 App.Cas. 486, Ann.Cas.1916D, 670, suit had been brought on a note representing a seaman's wages payable to his wife while he was at sea. The ship and the seaman had been interned in Germany following the declaration of war. The employer was held to be not liable on the note. A recovery was likewise denied in *Havens v. Rochester Rope Co.*, 267 App.Div. 394, 46 N.Y.S.2d 534, in a suit by an employee for damages following his discharge by his employer because of his having entered the Navy. *State Realty Company v. Greenfield*, 110 Misc. 270, 181 N.Y.S. 511, also relied upon by plaintiff, was a case in which a lessee of offices used for the conduct of a brokerage business was held to be released from liability for rent during the term of his military service. The premises in question had been sublet by the lessor and the suit was for damages consisting of the loss sustained in the subletting. Plaintiff quotes from a concurring opinion of one of the justices in *Marshall v. Glanvill*, supra, as

follows: "The plaintiff was engaged under two contracts requiring the performance of personal services by him. The effect of his enlistment under the Military Service Act of 1916 was to sweep away the basis of the arrangement between the parties. From the middle of July, 1916, the plaintiff could not fulfill any of his duties and the defendants could not accept any of his services under the contracts. *The contracts, therefore, came to an end.* * * * Here, the parties clearly made their bargain on the footing that it would continue lawful for the plaintiff to continue to render and for the defendants to accept his services. *The rendering and acceptance of these services ceased to be lawful in July, 1916, and thereupon the bargain came to an end.* A state of war is assumed to be of such prolonged duration as *prima facie* to put an end to contracts which are conditional upon the continuance of a particular state of things which is only consistent with peace. * * * *In the present case, the plaintiff labors under a prolonged inability to perform any of his obligations under the contracts.*' (Emphasis ours.)" Observations to the same effect may be found in the other mentioned cases. In three of the cases the question was whether the promisor, who was an employer, should be required to pay the employee compensation during the term of the employee's military service, when the employee could render no services in return. In the remaining case the question was whether the lessee was bound by his lease during the term of his military service when he could not make use of the demised premises. In all of these cases the court was considering only the obligation of the defendants, promisors, during the period when the promisees could not render performance, or the promisors receive other consideration, and the real ground of the decision was, in each case, that there was a failure of consideration to the promisor and that he should not be compelled to pay for something he did not receive. The statements upon which plaintiff relies and which concerned employment contracts, must be considered in the light of the fact that the employer in each case had elected to declare a termination of the employment contract. It may be correctly said that a contract, under which continuous performance is of the essence, is terminated where unanticipated developments cause a prolonged period of inability of the promisee to perform, and the promisor

elects to terminate it upon the ground of failure of consideration. Mr. McElroy in his work on Impossibility of Performance (1941), pp. 92 and 93, mentions *Marshall v. Glanvill* and he says: "Analogous to the illness of a servant is the calling up of a servant for war service. This results in the temporary illegality of the contract of service (i. e. illegality during the period of the war), and in addition the master may be completely discharged, even in respect of the period after the war, on the principle of failure of consideration.¹ So also where the servant (or, of course, other agent) becomes an alien enemy and is interned."

[2] The cases upon which plaintiff relies are not authority for the proposition that the act of an employee in entering the military service, of itself, terminates his contract of employment. Interruption of performance of plaintiff's personal services did not end his employment. There was only a temporary inability, of indefinite duration, to carry on his work. Although conditions resulting from prolonged interruption may furnish grounds for termination of a contract, the question whether such grounds exist is one which must be decided upon the facts of the particular case, under equitable doctrines which deal not with impossibility, but with hardship, of performance. The case is to be viewed, first, as one where plaintiff's military duties have made it temporarily impossible for him to render performance but have not deprived him of the ability to fulfill his engagements after his discharge from the service.

[3] The temporary impossibility which has prevented performance by plaintiff will end in due time and the judgment of the court anticipates the occurrence of that event. The rule which governs in cases of temporary impossibility is found in the Restatement of the Law of Contracts: "Section 462. Temporary Impossibility. Temporary impossibility of such character that if permanent it would discharge a promisor's entire contractual duty, has that operation if rendering performance after the impossibility ceases would impose a burden on the promisor substantially greater than would have been imposed upon him had there been no impossibility; but otherwise such temporary impossibility sus-

pends the duty of the promisor to render the performance promised only while the impossibility exists."

Mr. Williston states the rule as follows (6 Williston on Contracts (1938 Rev. Ed.), sec. 1957, pp. 5489, 5490): "* * * If the delay caused by impossibility is excusable and is of short duration, the promisor is still held bound by his promises, except to the extent of such delay. If the impossibility persists for a length of time sufficient to go to the essence of the contract (and only in that case) the temporary non-performance on one side will justify the other party in rescinding the contract altogether. But may the promisee in spite of long delay refuse to take advantage of his excuse and demand performance of the contract as soon as it becomes possible? This depends on whether the promisor would thereby be compelled to render performance substantially different from what he contracted for. If so, he is permanently excused."

And, again, Mrs. Williston says (section 1931, pp. 5410, 5411, supra): "The true distinction is not between difficulty and impossibility. A man may contract to do what is impossible, as well as what is difficult, and be liable for failure to perform. The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor."

[4] The foregoing statements from the Restatement and from Williston are not mentioned in plaintiff's briefs, and this, obviously, for the reason that he contends that the rules pertaining to temporary impossibility have no application. But under the findings we think they are controlling. So far as the rules which pertain to impossibility of performance are concerned, the facts that performance, after plaintiff's release from military duty, will be possible, and will impose no greater burden upon him than he originally assumed, leave him under the obligation to render full performance when it becomes possible.

The briefs have a great deal to say about the doctrine of frustration. Plaintiff's argument again is that his entering the

¹ "Marshall v. Glanvill (1917), 2 K.B. 87, where, however, the decision is not ex-

pressly rested on the ground of failure of consideration."

Army completely and permanently defeated the purposes of the contracting parties. We have held against him upon that point because his inability to perform was only temporary. If completion of his services under the contract would impose upon him substantially greater burdens because of the long interruption due to the military service or, in other words, if such performance would work extreme hardship upon him, he would have a case for equitable relief under the rule quoted from the Restatement. Mr. McElroy points out, pp. xxxiii-xxxv, that the rule as stated recognizes the doctrine of frustration in cases of only temporary impossibility, in that full performance will not be required later if it would be unreasonably burdensome. He says: "The rule here is that in certain circumstances, if the delay fundamentally changes the character of performance required, having regard to the known commercial object of the promisor, the contract is 'frustrated' by the delay and the obligation to perform is therefore discharged even though the impossibility ultimately ceases. This is the proper statement of the doctrine of frustration, and, so stated, it is evidently not a mode of discharge for physical impossibility of performance but a mode of discharge for undue *delay caused by impossibility*. In short, it may be said with some measure of truth that frustration begins where impossibility ends."

[5-7] Upon the point of alleged frustration, plaintiff's argument discusses the conditions due to his military service, as if they will obtain when his term of service has expired. As long as that period lasts, performance will be impossible and to that extent the purposes of the parties will have been defeated. Plaintiff says they have been "frustrated," and so they have, for the time being. But the doctrine of commercial frustration is a principle, not a mere word. It is not applicable to conditions in which performance is rendered impossible, either temporarily or permanently. In relying upon the doctrine plaintiff must, and he does, concede that performance may yet be had, but he failed to prove that he will suffer any detriment in carrying out his contract. As stated in *Lloyd v. Murphy*, 1944, 25 Cal.2d 48, 153 P.2d 47, 50, the doctrine of frustration applies where "performance remains possible but the expected value of performance to the party seeking to be excused has been

destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration." Even where there has been an interruption of performance due to wholly unanticipated events, the purposes of the contracting parties cannot be said to have been frustrated if performance may be rendered thereafter under conditions which will give to each of the parties substantially the same benefits and advantages they would have received except for the interruption. The interference with the plans of plaintiff and defendant, due to suspension of performance of the agreement for some three and a half years, no doubt has resulted in detriment to both parties, but it does not appear that either party has suffered more than the other. Nor is that the question. The judgment is a declaration of the rights and duties of the parties under the conditions which will exist when it will be possible for plaintiff to resume his services. Each of the parties then will receive the full agreed consideration; the contract as to each will be of no less value than it was in the beginning; full performance will cause no hardship, and although accomplishment of the original purposes will have been delayed, it will not have been defeated or frustrated.

[8, 9] Plaintiff cites section 1511 of the Civil Code and section 2920 of the Labor Code, St.1937, p. 260, as enactments under which his contract was terminated by his entering the military service. The Civil Code section provides that performance "is excused by the following causes, to the extent to which they operate: * * * 2. When it is prevented or delayed by an irresistible, super-human cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary;" etc. The judgment herein gives effect to this provision of the section, in that the parties have been excused from performance to the extent that the preventing cause, namely, plaintiff's military service, prevented performance. The Labor Code section, which was taken from section 1997 of the Civil Code, provides that "Every employment is terminated by any of the following: * * * (d) The employee's legal incapacity to act as such." This provision, so far as we are advised, has not been the subject of judicial interpretation. We cannot believe that the legislature, in using the term "legal inca-

capacity," intended that it should have the effect of terminating the employment contract of every man or woman who entered the armed forces. Such a construction of that term would be unreasonable and directly contrary to the well-nigh universal sentiment and policy that those who serve in the armed forces should not be penalized as the result of such services by the loss of their positions. The interpretation of the section sought by plaintiff might convenience him, but the law, as so construed, could not fail to result in great injustice and harm. Plaintiff's employment was not terminated nor is further performance excused by virtue of either of these sections.

[10] Plaintiff further contends that defendant lost its right to demand the making of five additional pictures during the year 1942 by reason of its failure to exercise the option upon his services for the year commencing March 6, 1942. Under agreement of September 22, 1938, plaintiff's services were engaged for the period of the year July 1, 1938, to June 30, 1939, during which time he was to make ten pictures. Defendant was given four options, a, b, c, and d, to extend the contract by successive yearly periods, and plaintiff in each such extended period was to make eight additional photoplays. Each option was to be exercised by notice in writing given during each current yearly term. Option a was exercised by defendant and by agreement the term of that period was extended from June 30, 1940, to March 6, 1941. The findings were that options b, c, and d also were exercised, but that defendant did not give plaintiff written notice of its exercise of option c. The two findings mean that option c was exercised, but not by the giving of the required written notice. It was further found that during the period when option c was operative, and which commenced March 6, 1942, plaintiff made three photoplays, which were finished respectively in April, June, and July, 1942. The making of these three photoplays constituted a waiver by plaintiff of his right to receive written notice of the exercise of the option. His contention that the failure to give written notice excused him from making the five remaining photoplays within that option period is not well founded. The findings and judgment declare that plaintiff is obligated to make twenty-one additional photoplays. Thirteen of these are the five that were not made

under option c, and eight which were to be made under option d. On May 11, 1942, defendant was given an additional option under which eight more photoplays were to be made, and the finding was that defendant exercised this option.

[11,12] The contract of May 11, 1942, followed the elaborate form of the first one but it contained the following clause: "24. In the event that the artist shall be required to serve in the armed forces of the United States pursuant to the Selective Service Act, or shall volunteer for such service, the parties hereto will agree upon their mutual rights and obligations hereunder in view of such military service." Plaintiff unsuccessfully argued to the trial court, and he now contends, that the clause effected a cancellation of the existing contracts without substituting anything in their place except a promise that the parties would agree upon their mutual rights and obligations in view of plaintiff's military service. If this were a proper construction of the clause, there would exist now no enforceable agreement; the promise to agree upon the terms of another contract would be void for uncertainty. But the clause cannot be given the interpretation contended for. The court found that in negotiating the May 11, 1942, agreement, "Plaintiff requested that a provision be so drawn that in case he should be inducted into the armed forces of the United States his employment by defendant would be thereby terminated and the agreements between plaintiff and defendant would thereupon become absolutely null and void. Defendant refused to agree to the inclusion in said agreement of May 11, 1942, of said provision requested by plaintiff, whereupon the parties agreed upon and there was included in said agreement paragraph 24 as set forth hereinabove." This finding, based upon evidence which tended to prove that the parties did not intend the clause to operate so as to terminate the contract, supports the construction which the court placed upon it. Even without this finding the clause could not reasonably be understood as intended to effect a cancellation of the existing agreements. It does not say anything of the sort. A reasonable interpretation would be that the parties understood that it would be impossible to carry out the terms of the agreements while plaintiff was serving in the armed forces, but that they would endeavor to agree upon a plan of procedure that would be possible during

that period. There were negotiations after plaintiff entered the service and, according to the finding, an oral agreement for plaintiff to make additional photoplays with the consent of the Army, but plaintiff refused to make said photoplays unless modifications of the existing contracts were agreed to by defendant. Defendant did not agree to the modifications requested and no pictures were made.

Defendant alleged facts upon which it relies as the basis of an estoppel against plaintiff to claim that the contracts have been terminated, and the court found as a conclusion of law that plaintiff had waived all right to claim any discharge from the duties and obligations imposed upon him by said employment contracts and by each of them. It is unnecessary to discuss these matters. The points already decided furnish support for the judgment. No other matters of controversy over the contract are presented for decision.

The judgment is affirmed.

DESMOND, P. J., and WOOD, J., concur.



72 Cal.App.2d 844

FLINT v. BOARD OF MEDICAL EXAMINERS OF STATE OF CALIFORNIA et al.
Civ. 13051.

District Court of Appeal, First District,
Division 2, California.

Feb. 4, 1946.

Rehearing Denied March 6, 1946.

1. Appeal and error ☞787

The burden is always upon an appellant to use reasonable diligence to perfect and prosecute his appeal.

2. Appeal and error ☞787

Where some step is required by the Rules on Appeal to be taken by an officer of the court, and such officer delays unreasonably, the appellant cannot sit by indefinitely and do nothing, but he must exercise a reasonable amount of diligence to investigate any unwarranted delays and if neces-

sary take steps to see that the legal duty is performed.

3. Appeal and error ☞939

In absence of showing that, in period of over one year between date of filing of notice to prepare transcripts and time that motion to dismiss appeal was presented, appellant took any step to procure from clerk estimate of cost of preparing transcript, District Court of Appeal would not assume that clerk would willfully refuse to perform his duty in respect to the estimate if his attention had been called thereto. Rules on Appeal, rules 4(c), 5(c).

4. Appeal and error ☞627(2)

Evidence established that unexplained delay of appellant of more than a year in procuring or attempting to procure the estimate of preparing transcript required of the clerk of the superior court by Rules on Appeal was attributable to appellant's complete lack of diligence and was the fault of appellant within appeal rules making appellant responsible for delay which is the fault of the appellant, justifying dismissal of appeal. Rules on Appeal, rules 4(c, d), 5(c, d), 10(a), 42.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Thomas Flint, Jr., against the Board of Medical Examiners of the State of California and the members thereof. From the judgment, the plaintiff appeals.

Appeal dismissed.

Lionel Browne and Franklyn M. O'Brien, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and J. Albert Hutchinson and F. Walter French, Deputy Attys. Gen., for respondent.

DOOLING, Justice.

The respondents moved to dismiss this appeal for appellant's failure to perfect or present any record on appeal. The motion is supported by a certificate of the clerk of the superior court as required by Rule 42, Rules on Appeal. From this certificate it appears that judgment was entered on June 6, 1944; motion for new trial denied June 30, 1944; notice of appeal filed September 5, 1944; a preliminary stipulation under Rule 6 (b) Rules on Appeal filed September 14, 1944; notice to the clerk to prepare

clerk's and reporter's transcripts filed November 4, 1944; and that no further steps for the preparation of either record have ever been taken.

Appellant made no counter showing but at the time set for hearing the motion counsel for appellant called to the attention of the court the fact that the clerk's certificate did not show that the clerk of the superior court had ever given to appellant the notifications of his estimates of the cost of preparing the reporter's and clerk's transcripts as provided in Rules 4(c) and 5(c). Rules on Appeal. The two provisions are counterparts of one another and it will suffice to quote Rule 5(c):

"The notice (to prepare transcript) given by the appellant under the foregoing provisions of this rule shall not be effective for any purpose unless, within 10 days after notification from the clerk of his estimate of the cost of preparing the transcript * * * the appellant shall make arrangements with the clerk for the payment thereof."

Rules 4(d) and 5(d) make the time within which the transcripts shall be completed start only after the appellant has arranged for the payment of the cost of their preparation as required by Rules 4(c) and 5(c).

It is appellant's position, as stated on oral argument, that until he received the notifications of the estimates of the clerk of the cost of preparing the two transcripts no duty was cast on him by the rules to do anything, and since it is not shown that such notifications were ever given the time to prepare neither transcript has ever started to run.

[1,2] In this argument appellant overlooks the fundamental rule of appellate procedure that the burden is always upon an appellant to use reasonable diligence to perfect and prosecute his appeal. Where some step is required by the rules to be taken by an officer of the court and such officer delays unreasonably the appellant cannot sit by indefinitely and do nothing. He must exercise a reasonable amount of diligence to investigate any unwarranted delays and if necessary take steps to see that the legal duty is performed. *Caminetti v. Edward Brown & Sons*, 23 Cal.2d 511, 144 P.2d 570; *Leeper v. Ginsberg*, 58 Cal.App.2d 591, 137 P.2d 859; *Harris v. Burt*, 47 Cal.App. 480, 190 P. 1058.

[3] On the showing before us the notice to prepare the transcripts was filed on Nov-

ember 4, 1944. It is not shown that in the period of over one year between that date and the time that the motion to dismiss was presented appellant took any step of any sort to procure from the clerk the estimates provided for in rules 4(c) and 5(c); and we cannot assume, in the absence of a showing to that effect, that the clerk would wilfully refuse to perform his duty if the matter was called to his attention.

[4] While Rule 10(a) of the Rules on Appeal excuses an appellant for delays which are the fault of court officers, it makes him responsible for delay which "is the fault of the appellant." The unexplained delay of more than a year in procuring or attempting to procure the estimates required of the clerk by Rules 4(c) and 5(c) can only be attributed to appellant's complete lack of diligence and is "the fault of the appellant" within the meaning of Rule 10(a).

The appeal is dismissed.

NOURSE, P. J., and GOODELL, J.,
concur.



72 Cal.App.2d 821

**EMERY v. SOUTHERN CALIFORNIA
GAS CO. et al.**
Civ. 14930.

District Court of Appeal, Second District,
Division 3, California.

Feb. 1, 1946.

Rehearing Denied Feb. 28, 1946.

Hearing Denied April 1, 1946.

1. Appeal and error ⇨1056(1)
Evidence ⇨522
Witnesses ⇨252

In wrongful death action, testimony of actuary and charts prepared by actuary offered for purpose of showing present value of future loss of support sustained by heirs of deceased and annuity tables were admissible, if proper foundation had been laid, and exclusion thereof was prejudicial error.

2. Death ⇨95(3)

Where damages to be awarded for wrongfully causing the death of a person are compensation to designated relatives

for prospective pecuniary loss, the gross amount thereof should be reduced to its present worth.

3. Evidence ⇨571(7)

In wrongful death action, testimony of actuary and charts prepared by actuary offered for purpose of showing present value of future loss of support sustained by heirs of deceased were not conclusive evidence as to amount of damages to be awarded, but in determining amount of damages such evidence was to be considered with other elements such as health, activity, and occupation of deceased, his earning capacity, and various amounts which reasonably might be expected to be contributed by him for support over a period jury might find he would furnish such support.

4. Trial ⇨207

In wrongful death action, an instruction should be given, stating the restrictive significance of evidence regarding present worth of pecuniary loss, to effect that such evidence is not conclusive as to amount to be awarded as damages but is only one of the several elements to be considered in determining the amount to be awarded.

5. Stipulations ⇨14(11)

In wrongful death action, where objection to testimony of actuary and charts prepared by actuary regarding present value of future loss of support was argued in chambers out of presence of jury and counsel for defendant stated that he would have no objection to plaintiff's counsel using all of computations and mathematical deductions he desired as part of his argument to jury, plaintiff's counsel was justified in assuming that he could, without objection, use the computations of actuary in his argument to the jury.

6. Appeal and error ⇨1060(1)

In wrongful death action, where objection to testimony of actuary and charts prepared by actuary regarding present value of future loss of support was argued in chambers out of presence of jury and counsel for defendant stated that he would have no objection to plaintiff's counsel using all of computations and mathematical deductions he desired as part of his argument to jury, but when plaintiff's counsel, in argument to jury, referred to computation of actuary defendant's counsel objected and commented to effect that plaintiff's counsel

was guilty of reprehensible misconduct, the comment was improper and prejudicial.

SHINN, J., dissenting.

Appeal from Superior court, Los Angeles County; Jess E. Stephens, Judge.

Wrongful death action by Betty Carol Emery, administratrix of the estate of Edwin Paul Emery, deceased, against the Southern California Gas Company and others. Judgment for plaintiff, and, from the portion of the judgment which limited damages and amount payable to plaintiff, the plaintiff appeals.

Portion of judgment appealed from reversed and cause remanded with directions.

Kenneth Sperry, of Long Beach, for appellant.

Crider, Runkle & Tilson, of Los Angeles, for respondents.

WOOD, Justice.

The verdict of the jury, in this action for damages for wrongful death, was for plaintiff in the sum of 12,000, and judgment was entered in accordance with the verdict. Plaintiff appeals from that portion of the judgment "which assesses, fixes and limits the damages and the amount payable to the plaintiff."

Appellant contends that: (1) The trial court erred in refusing to receive the testimony of an actuary, and to receive annuity tables in evidence, in respect to the present value of the future loss of support sustained by the heirs of the deceased; and (2) the damages awarded were grossly inadequate in view of the undisputed evidence as to decedent's earning capacity and loss of support sustained by his heirs.

Edwin Paul Emery, the deceased, was employed at the time of his death by the Consolidated Steel Corporation as a pipe-fitter. On September 16, 1943, in the course of such employment, he was removing a gasket from a hydraulic pressure pipeline in a butadiene plant, owned and operated by defendants Southern California Gas Company and Rubber Reserve Company. While he was performing that work at a place about 16 feet above a cement floor, a large quantity of water, which was expelled from the pipe under high pressure, blew him to the floor and killed him.

Plaintiff is the widow of the deceased and brings this action as administratrix of his estate. Deceased was survived by a daughter 7 years of age, and 2 sons, 16 and 18 years of age. He had worked for Consolidated Steel Corporation approximately 7 weeks preceding his death and his monthly salary was approximately \$600. Prior to that period of employment, he was employed by the California Shipbuilding Corporation, where his salary was between \$300 and \$400 per month. Prior to that last mentioned employment he worked for a refinery about 10 years, starting with a salary of approximately \$160 per month, and receiving increases in salary until the amount thereof was between \$250 and \$300 per month. He deposited his salary checks in a joint checking account with his wife, from which account their living expenses, insurance premiums, and payments on their home were paid.

The evidence shows that deceased was a good husband and an affectionate father. Plaintiff and deceased had been married approximately 8 years at the time of his death, and the daughter was the only issue of that marriage. His two sons were the issue of a former marriage. After plaintiff and deceased were married, the two sons resided with them about one-half of the time, and the remainder of the time they resided in a boarding home, or with their grandmother, or with their mother, who had remarried. When they lived apart from plaintiff and deceased, the deceased contributed to their support each month. The funeral expenses were \$595.44. At the time of his death deceased was 39 years of age, was in good health and very active. He had a life expectancy of 28.90 years, according to the American Table of Mortality.

At the trial, counsel for plaintiff called an actuary as a witness and asked him as follows: "Are you able to state at this time what amount of money it would take, if invested at a given rate of interest, would yield a particular monthly return for a period of a specific number of years and all be used up at the end of that period?" Counsel for defendants objected to the question, stating "it is incompetent, irrelevant and immaterial" and "is not the measure of damage." The judge and the attorneys for plaintiff and defendants then went to the judge's chambers in order to discuss the objection out of the presence of the jury. In chambers, counsel for defendants stated that he amended his objection "by adding that any such computation

on the part of such actuary would not in any manner determine the measure of damage," and "it would call for a conclusion of the witness." He also said that he was not objecting to the qualifications of the witness as an actuary. Counsel for plaintiff argued that such testimony was offered to assist the jury in determining the present value of the future pecuniary loss sustained by the heirs; that the actuary, being an expert in his particular field, was able to testify as to certain facts and figures which were computations the jury could not make; that he expected to show, if permitted to further question the actuary, the amount of money which if invested at various rates of interest, namely, 3%, 4%, and 5%, would yield a monthly income of various amounts, namely, \$200, \$300, and \$400 over a period of 20 years, and over a period of 25 years, and all be used up at the ends of those particular periods. He stated further that he had a chart which had been prepared by the actuary showing the present value of income payable each month for a period of 25 years with interest compounded annually at 3%, 4%, and 5%, on monthly incomes of \$200, \$300, and \$400. He also said that he had another such chart showing that kind of information for a period of 28.90 years, the life expectancy of deceased. He exhibited those charts to the judge and offered them in evidence, but an objection was made to the offer. Counsel for defendants stated that he "*would have no objection to counsel [for plaintiff] using all of the computations and mathematical deductions he desires as a part of his argument to the jury, but when it comes to having the witness testify to such matters from the witness stand, it is bound to be misleading to the jury.*" (Emphasis added.) The court sustained the objections to the proffered testimony and the charts.

[1,2] Appellant contends, as above stated, that the court erred in refusing to receive the testimony of the actuary, and in refusing to receive the charts in evidence. The objection to the question propounded to the actuary should not have been sustained. The annuity tables or charts should have been received in evidence, assuming that a proper foundation for their admissibility had been laid. When the damages to be awarded for wrongfully causing the death of a person are compensation to designated relatives for prospective pecuniary loss, the gross amount thereof should be reduced to its present worth. 16 Amer.Jur.

p. 138. It was stated in the case of Chesapeake & O. R. Co. v. Kelly, 241 U.S. 485, at page 491, 36 S.Ct. 630, at page 632, 60 L.Ed. 1117, L.R.A.1917F, 367: "[W]hen future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only. We are aware that it may be a difficult mathematical computation for the ordinary jurymen to calculate interest on deferred payments, with annual rests, and reach a present cash value. Whether the difficulty should be met by *admitting the testimony of expert witnesses*, or by *receiving in evidence the standard interest and annuity tables in which present values are worked out* at various rates of interest and for various periods covering the ordinary expectancies of life, it is not for us in this case to say. Like other questions of procedure and evidence, it is to be determined according to the law of the forum." (Italics added.) In the case of Vicksburg & Meridian R. Co. v. Putnam, 118 U.S. 545, 7 S.Ct. 1, 30 L.Ed. 257, in discussing the admissibility of standard annuity tables to show the present value of future loss of earnings, it was said at page 554, of 118 U.S., at page 2 of 7 S.Ct.: "In order to assist the jury in making such an estimate, standard life and annuity tables, showing, at any age, the probable duration of life, and the present value of a life annuity, are competent evidence. [Citations.]" It was stated in Peters v. Kansas City Rys. Co., 1920, 204 Mo.App. 197, at page 203, 224 S.W. 25, at page 28: "annuity tables, no matter where found, if properly established and authenticated, are admissible in evidence in personal injury cases where the injury is claimed to be permanent." In upholding the admissibility of standard annuity tables to show the present value of prospective loss, it was said in McNair v. Berger, 1932, 92 Mont. 441, at page 458, 15 P.2d 834, at page 838: "And the annuity tables which are a part of the mortality tables [citing cases] * * * are subject to the same rules of admissibility." In Bruner v. McCarthy, 1943, 105 Utah 399, 142 P.2d 649, the court passed upon the admissibility of such evidence as was rejected by the trial court in the present case. In that case the court said, 105 Utah at page 415, 142 P.2d at page 656: "And last, defendants contend that it was error to admit exhibit G in evidence. This exhibit was compiled by a witness who qualified as an expert. It was compiled from Annuity Tables by McKenzie. The tables them-

selves would have been admissible in evidence along with Mortality and Annuity Tables. The witness merely, from these tables, compiled various figures to show what amount of money it would be necessary to invest at various interest rates at the present time to pay an individual \$1,200 per year, \$1,800 per year, and \$2,400 per year for thirty-five years. Since the various tables from which the witness took his data would have been admitted in evidence, we see no objection in having this witness prepare computations from these tables by way of summary. There is no contention that these figures so prepared were inaccurate or that the witness who prepared and explained them was not competent to do so." In the case of Groat v. Walkup Drayage, etc., Co., 14 Cal.App.2d 350, 58 P.2d 200, the action was for damages for personal injuries. Plaintiff therein, who was a police officer 58 years of age, would have been entitled to retire at the age of 62 upon a monthly pension, payable for life. Evidence was introduced in that case to show that plaintiff was on active duty as a police officer up to the time of the injury, and that for a number of years before the accident he had suffered from high blood pressure, arteriosclerosis, and diseased kidneys and heart. To assist the jury therein in fixing the present value of such future pension, the court admitted in evidence mortality tables showing the life expectancy of a man aged 58 years in average health to be 15.39 years, and allowed an actuary to testify that the present value of the policeman's pension based upon such expectancy was \$12,500. Said evidence was received over the objection of defendants, which objection was made on the ground that plaintiff was not a person in average health. The court therein said, 14 Cal.App. 2d at page 359, 58 P.2d at page 204: "The tables were admissible, although the evidence showed that respondent was suffering from ailments which probably would shorten his life to less than that of a person in average or ordinary health. 19 R.C.L. 217; 17 C.J. 875. The objection which goes to use of the tables, not their admissibility, was correctly handled in the instructions." The rulings of the court herein relative to the testimony of the actuary, and relative to the annuity charts, were prejudicially erroneous.

[3,4] The proposed evidence as to the present worth of future pecuniary loss was not conclusive evidence as to the amount

of damages to be awarded. In determining the amount of damages, such evidence was to be considered with several other elements, such as the health, activity and occupation of the deceased, his earning capacity, and the various amounts which reasonably might be expected to be contributed by him for support over the period the jury finds he would furnish such support. An instruction should be given, stating the restrictive significance of such evidence, to the effect that such evidence as to the present value of future pecuniary loss is not conclusive as to the amount to be awarded as damages, but is only one of several elements to be considered in determining the amount to be awarded.

When counsel for plaintiff was presenting his argument before the jury, he said that one of the principal factors to be determined by the jury was the pecuniary loss for future support sustained by the wife and children of the deceased; that in determining such loss it would not be fair to defendants to merely multiply the monthly or annual support by the number of months or years the jury believed he would have supported his heirs, because the amount of money awarded by the jury could be invested and would earn interest; that it was the jury's problem to determine the present value of such future loss, that is what amount of money, if paid now, and invested would provide his dependents with support they had lost, and all be used up at the end of the time the jury believed he would have provided such support. He then stated further in his argument: "Now this determination requires the application of mathematical calculations which are too difficult for the ordinary person such as you or I to make, but fortunately tables have been worked out by persons peculiarly skilled in this field who are known as actuaries. Now the actuaries tell us—." Whereupon counsel for defendants interrupted, stating: "Now, I don't believe in people attempting to do something indirectly which the Court has ruled that they can't do directly, and I cite that as misconduct of counsel." After some discussion between counsel, counsel for plaintiff said: "We discussed this very thing in chambers, as I recall it, your Honor, that there would be no objection to me making such calculations as I wanted to." Then counsel for defendants said: "Oh, Mr. Sperry, the matter is a matter of record; I know what was said in there. Now, as

I say, I made one statement that I have no objection to your doing one thing, but I was not talking—and you know it, about what you are talking about now. I cite it as reprehensible misconduct on the part of counsel and cite it as error." Thereupon the court said: "I think counsel should not undertake to quote anybody else. If he wants to make calculations which he suggests to the jury as merely his own argument, he may do so, but I think it is not proper to undertake to quote anybody else." Counsel for plaintiff then said: "I wasn't trying to quote any specific persons. I just said the actuaries—I mean the figures of the actuaries that have been worked out."

[5,6] Counsel for plaintiff contends that the comment of counsel for defendant to the effect that he (plaintiff's counsel) was guilty of "reprehensible misconduct" in stating, "Now the actuaries tell us—," was improperly and unjustifiably made. He argues that since such comment was a part of a statement wherein defendants' counsel objected to the argument and since the comment was followed by the ruling of the court sustaining the objection, the jury was thereby prejudiced against plaintiff's counsel and caused to disregard his argument in respect to damages. Counsel for defendants having stated in chambers, as above mentioned, "Now I would have no objection to counsel using all of the computations and mathematical deductions he desires as a part of his argument to the jury," counsel for plaintiff was justified in assuming that he could, without objection, use the computations of actuaries in his argument to the jury. Under the circumstances the comment of counsel for defendants should not have been made, and it was prejudicial to plaintiff.

The portion of the judgment from which the appeal is taken, that is, that portion "which assesses, fixes and limits the damages and the amount payable to the plaintiff," is reversed, and the superior court is directed to retry the issue as to the amount of damages only.

DESMOND, P. J., concurs.

SHINN, Justice (dissenting).

I dissent. The court properly excluded the testimony of the actuary. That testimony would have shown that it would take from \$34,000 to \$88,000, invested at 2 percent, 3 percent or 4 percent, to return

\$200, \$300, or \$400 per month for a period of 25 years or a period of 28.9 years. Plaintiff makes conflicting contentions respecting the purpose of the offer of this testimony. It is claimed that it was evidence tending to prove some fact in the case, and it is also contended that it was merely a mathematical calculation offered as an aid to the jury in the solution of a mathematical problem. I think the clear purpose of the offer was to prove the cost of an annuity that would return some amount monthly to the dependents of the decedent for the term of his life expectancy. If the law made that the basis of a recovery in a death case, the testimony of the actuary would have been evidenced as to a fact in issue. Of course that is not the basis upon which damages are fixed. If, therefore, the purpose was merely to prove the cost of an annuity, the evidence was properly excluded. Upon the other hand, if, as plaintiff also claims, the calculations of the actuary were offered in evidence merely to aid the jury in solving a mathematical problem, the testimony was properly excluded. The present value of deferred payments cannot be determined mathematically unless the date and amount of each deferred payment are known. Where they are known it is proper for a court or jury to fix the present value of the total of the deferred payments. The court may receive the testimony of experts as an aid in making the computation, just as it may resort to the use of interest tables, but the testimony is not evidence of any fact in issue. When the court uses an interpreter to translate the testimony of a witness, it is the witness, and not the interpreter, who gives the evidence. It has never been considered necessary to prove the multiplication table by experts, although their assistance in the use of it is often of value. But in the present case the calculations should not have been used at all. The impossibility of reducing anticipated deferred payments to a cash value is too clear to admit of argument. It would have been necessary for the jury to find what would have been the contribution of the decedent each month of each year from the 40th to the 67th year of his life. Manifestly impossible.

Let us analyze plaintiff's contentions a bit further. The jury, it is said, was deprived of evidence which would have enabled it to fix the present value of deferred payments. What is the consequence?

It could only be that after determining the total of the amounts that would have been received by the dependents, the jury failed to reduce the same to its present value, or, in other words, that the verdict was larger than it would have been if the jury had applied the mathematics used by insurance companies in fixing the amounts to be charged by them for annuities. The reduction to present value of the total of deferred payments is something which is of interest to the debtor, not the creditor. This is shown by the statement of plaintiff's attorney that "it would not be fair to defendants to merely multiply the monthly or annual support by the number of months or years the jury believed he would have supported his heirs, because the money could be invested and would earn interest," etc. In my opinion, it would be a serious mistake to even suggest to a jury that they should make an effort to fix the present value of deferred payments in an action for wrongful death, where the anticipated contributions would extend over a long period of time (in the present case into the 68th year of the lifetime of the deceased), and when it would be impossible to know the exact amounts that would have been contributed and the exact period over which they would have extended. The problem involved in arriving at a just amount of the recovery in a case of this sort is one of great difficulty. The approach to it should be made as simple and direct as possible. The trial court was eminently correct in excluding the offered testimony of the actuary. Furthermore, it was stated that no objection would be made if plaintiff's attorney wished to give to the jury, in argument, his own calculations along the lines of those attempted to be proved by the actuary. This was all plaintiff's attorney had a right to do. If plaintiff would have derived any advantage from the use of the tables as evidence, it would have been an undeserved advantage.

The claimed misconduct of defendants' attorney was not misconduct at all. It was entirely proper to object to the use of the calculations as those of the actuary, which had been offered as evidence and excluded. In assigning the attempted use of the figures as misconduct, the use of the word "reprehensible" is not subject to criticism. Under the authorities, it is necessary to assign improper statements in argument as misconduct, in order to save the point. The trial judge ruled that the objection regis-

tered by counsel for defendant was well taken. Reprehensible conduct is conduct that is subject to censure. If it is not in bad faith it is not misconduct. If it is in bad faith, it is subject to censure, or reprehensible. There is no merit whatever in the claim that counsel for defendants was guilty of misconduct in the choice of words employed in the assignment of alleged misconduct of opposing counsel. Minor clashes are of frequent occurrence where counsel are alert and aware of their duties to their clients. Such passages between counsel as the one in question have never been recognized as misconduct or as justifying a reversal. I do not believe that plaintiff's attorney in his reference to the actuary acted in bad faith. But that is not the question. I am well satisfied that the attorney for defendants acted in good faith and properly in reserving the point of alleged misconduct. If there was a sting in the word "reprehensible" it was effectually removed by the statements of the court, as follows:

"The Court: I think Mr. Sperry has not intentionally overstepped any line and I am sure he wouldn't want to do that and hasn't done it intentionally, but I think any presentation that you make, Mr. Sperry, ought to be your own deductions from the evidence presented. You are at liberty to do that.

"Mr. Sperry: Am I not entitled to tell the jury what amount it would take now to yield that amount?

"The Court: As your calculation, you can make it, but I think you are not entitled to undertake to quote any authorities on that subject."

Plaintiff's announced theory, presumably, was placed before the jury during the argument. If it was given their consideration, which plaintiff's counsel told the jury it should have, the natural consequence would have been to reduce the amount of

the verdict that otherwise would have been rendered.

The main opinion does not place a reversal upon the ground of inadequacy of the damages—a far more serious question than the one adopted as ground for a reversal. The verdict of \$12,000 was small. Another jury might have returned a much larger verdict. That a verdict is small is not, in itself, a ground for reversing a judgment in order that there may be a new trial of the issue of damages. It is the duty of the trial judge, in passing upon a motion for new trial, to determine whether the verdict accords with the weight of the evidence. He exercises a broad discretion in deciding this question. A reviewing court should not disturb a verdict as to amount unless it clearly appears that it was arrived at in disregard of the evidence. This question must be decided, having in mind that the trial judge has made a careful review of the evidence and has determined that the verdict is not an unreasonable one. It is true that much larger verdicts have been sustained in comparable situations, but this is not a ground for holding that the present verdict was reached without a fair consideration of the evidence. A comparison of one verdict with other verdicts in comparable cases proves only that the verdicts of some juries are larger or smaller than those of other juries and in very substantial amounts. These are conditions which always have been and will continue to be inherent in the jury system. There is a wide diversity of view among individuals as to the value of money and the uses that should be made of it. That is why we have Tiffany's on one side of the street and Woolworth's on the other. I am of the opinion that the verdict was not so small as to require a retrial of the issue of damages. The judgment should be affirmed.

72 Cal.App.2d 734

BELDEN v. McCOLGAN.

Civ. 14878.

District Court of Appeal, Second District,
Division 3, California.

Jan. 29, 1946.

1. Taxation ¶104

A resident of California was liable both in California and New York for tax on income received in 1935 from a partnership located in New York.

2. Taxation ¶363½

Where a resident of California acting in good faith paid New York tax on income received in 1935 from New York partnership and was not notified of disallowance of credit claimed on account of such payment against income tax payable to California until time for claiming refund of New York tax had expired, taxpayer was entitled to credit claimed against California tax, though New York Tax Law provided for crediting income tax payable by a non-resident with a proportion of tax payable in state of his residence on income from New York. St.1935, p. 1117, § 25(a, b); Tax Law N.Y. § 363.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Leo V. Belden against Charles J. McColgan, as Franchise Tax Commissioner of the State of California, to recover state income taxes paid under protest. Judgment for defendant, and plaintiff appeals.

Judgment reversed with directions.

Latham & Watkins, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and John L. Nourse and James E. Sabine, Deputy Attys. Gen., for respondent.

WOOD, Justice.

This is an action to recover money paid, under protest, as state income tax.

Plaintiff, a resident of California, received income during 1935 from sources in California and from a partnership, of which he was a member, in the State of New York. In 1936 he paid an income tax to New York on the 1935 income he re-

ceived from the partnership, and he paid an income tax to California on the 1935 income he received from sources in California. In making his California return, plaintiff reported his entire income for the year 1935, and, in computing the tax, he deducted therefrom the amount of tax paid to New York. On April 1, 1939, the California Franchise Tax Commissioner (defendant), in making an additional assessment against plaintiff, disallowed the credit for taxes paid to New York. Plaintiff paid the assessment under protest on the ground that the commissioner erroneously disallowed the credit. Plaintiff reported a net income of \$52,004.88 from the partnership on his New York income tax return and computed the tax to be \$3,646.38. He reported a net income of \$156,165.90, including the partnership income, on his California income tax return and computed the tax to be \$11,204.84, after deducting the tax paid to New York.

Appellant contends that he was entitled to credit for taxes paid to New York under the provisions of Section 25(a) of the Personal Income Tax Act of California, St. 1935, p. 1117.

Respondent contends that appellant should have obtained a credit in New York for the tax he paid there, and that he is not entitled to a credit for that amount in California because he did not follow the prescribed procedure for obtaining a credit in New York.

The Personal Income Tax Act of California was enacted in 1935. It included a provision, in Section 25(a), that "Whenever a resident taxpayer of this State has become liable to income tax to another State or country upon his net income * * * derived from sources without this State, and subject to taxation under this act, the amount of income tax payable by him under this act shall be credited with the amount of income tax so paid by him to such other State or country, but such credit shall not exceed" a certain proportionate amount of the taxpayer's entire income. (The amount claimed as credit herein does not exceed that proportionate amount.) Said Act also included a provision, in Section 25(b), that "Whenever a nonresident taxpayer * * * has become liable to income tax to the State or country where he resides upon his net income * * * derived from sources within this State and subject to taxation under this act, the

amount of income tax payable by him under this act shall be credited with" a certain proportion of the tax so payable by him to the State where he resides; "provided, that such credit shall be allowed only if the laws of said State or country [where he resides] grant a substantially similar credit to residents of this State * * *."

The New York Tax Law contained a provision, Section 363, Consol. Laws N.Y. c. 60, similar to that above mentioned in Section 25(b) of the California Act. That Section 363 provided: "Whenever a taxpayer other than a resident of the state has become liable to income tax to the state or country where he resides upon his net income * * * derived from sources within this state and subject to taxation under this article, the tax commission shall credit the amount of income tax payable by him under this article with" a certain proportion of the tax so payable by him to the state where he resides; "provided that such credit shall be allowed only if the laws of said state or country [where he resides] (1) grant a substantially similar credit to residents of this state * * *."

The case was tried upon a stipulation of facts. Early in 1936, while preparing his 1935 income tax returns for California and New York, plaintiff made inquiries of several persons in California who he believed were qualified to advise him regarding the construction and application of the Personal Income Tax Act of 1935, which had been passed in June of that year and was the first enactment in California which imposed an income tax. Plaintiff was unable to obtain from said persons in California information concerning the allowability as a credit against the income taxes payable to California for 1935, of the amount of income taxes he would pay New York for that year. Before filing his California and New York income tax returns for 1935, plaintiff also discussed his tax liability with an official of the New York State Income Tax Bureau, the agency which, under the supervision of the New York State Tax Commission, is charged with the administration of the New York income tax laws—and was advised by said official that he was required by New York to file a nonresident income tax return, to report therein his income from the partnership, and pay an income tax thereon to New York; that California had a reciprocal provision in its income tax law which permitted plaintiff to credit against the income taxes otherwise

payable by him to California the amount of income taxes paid by plaintiff to New York. Plaintiff relied upon said advice and the fact that the California income tax form (No. 540) had a line thereon, under item 25, which provided that he should deduct from the tax payable to California "Income tax paid to another state or country," whereas the New York nonresident income tax form (No. 203) had no provision thereon for deducting, from the tax computed to be due, any income taxes paid to another state. Plaintiff concluded and believed in good faith that he was liable to New York for income taxes for 1935 on income from the partnership and that he could deduct the amount so paid to New York as a credit from the income taxes otherwise payable to California for 1935.

On April 15, 1936, he filed his New York income tax return, showing \$3,646.38 to be the amount of his New York tax. He paid that tax to New York. Subsequently the New York State Income Tax Bureau audited plaintiff's books, and was advised that plaintiff was a resident of California and had paid California income tax for 1935, and on the basis of said audit the New York State Tax Commission disallowed a deduction of \$700 taken by plaintiff, and on February 11, 1937, assessed an additional tax of \$56 therefor. Plaintiff paid the additional tax on February 25, 1937. Plaintiff did not file a claim for a refund of the tax paid in New York, and did not "formally" request the New York authorities to allow him credit for the taxes paid in California. No credit was allowed him by New York for taxes paid in California.

On April 15, 1936, plaintiff filed his California income tax return, showing \$14,851.22 to be the full amount of his California tax. He deducted therefrom, as a credit for taxes paid in New York, the amount of \$3,646.38, leaving a balance of \$11,204.84 due to California. He paid that balance to California. On April 1, 1939, the California Franchise Tax Commissioner disallowed the credit of \$3,646.38 taken as credit for taxes paid to New York. On May 29, 1939, plaintiff filed a written protest against the disallowance of the credit for the New York tax. On June 27, 1940, the California commissioner, by his notice of action on protest, affirmed the disallowance of the credit for New York tax. On August 22, 1940, plaintiff paid the additional tax of \$3,646.38 and interest amounting to \$946.73 to California under

protest. On October 14, 1940, plaintiff filed with the California commissioner a written claim for refund of the amounts paid under protest, plus the additional \$56 New York required him to pay. It was also stipulated that if plaintiff is entitled to recover herein the judgment should be for the principal sum of \$3,702.38 (being the \$3,646.38 and \$56) and \$946.73 interest, with interest on the total amount of \$4,649.11 at 6% per annum from the date of payment thereof, and for costs. When the California commissioner notified plaintiff on April 1, 1939, that he had disallowed the credit for taxes which had been paid to New York, it was then fifteen days before the expiration of the three years within which the California commissioner could assess an additional tax; and it was then too late, under the New York law, for plaintiff to claim a refund of the tax paid in New York.

Articles 482 and 483 of the New York Personal Income Tax Regulations, during the year 1935 and prior and subsequent thereto, provided that a nonresident taxpayer who is liable to income tax in the state where he resides upon the income derived in New York shall be credited with the amount so paid in the state of residence on the New York income, provided the laws of the state of residence grant a similar credit to residents of New York who are subject to income tax under its laws. Those articles provided further that when such credit is sought for income taxes paid to other states the income tax form must show all the information called for therein, and a claim for credit must be attached to and filed with the return; and that when the tax commissioner receives proof that any other state allows a substantially similar credit that fact will be announced from time to time by ruling of the commission. On November 3, 1938, the Tax Commission of New York ruled that residents of California were entitled to credit against the New York tax on account of their California tax on income from sources in New York. On December 20, 1935, a requirement to file a copy of the return filed with other states was added to Section 483.

[1] Plaintiff was liable both in California, the State of his residence, and in New York, the State where his partnership business was located, for tax on the income obtained from the New York partnership. See *People of New York ex rel. Cohn v.*

Graves, 300 U.S. 308, 57 S.Ct. 466, 81 L. Ed. 666, 108 A.L.R. 721.

Although plaintiff was liable in California for a tax on the New York income, Section 25(a) of the California Act, provided in effect, as above mentioned, that plaintiff was entitled to a credit in California if he was also liable for the tax in New York and paid it in New York. Defendant (respondent) asserts that it was proper not to allow plaintiff credit in California for the tax paid in New York, because plaintiff should have paid the tax in California and then asked for credit in New York for the amount paid in California. If plaintiff had paid the tax in California and had been given credit in New York for the tax paid in California, there would have been no credit for California to give. The result of proceeding in such manner would have been to pay California in full and to be relieved of the payment in New York. That proceeding would not have involved the giving of credit in California for tax paid in New York.

Although plaintiff was liable for the tax in New York, Section 363 of the New York Tax Law stated in effect that he was entitled to credit if he was also liable for the tax in California and paid it in California, provided California had a reciprocal law to that effect. California did have such a reciprocal law, as shown by Section 25(b) above mentioned. Defendant argues that it is not reasonable to assume that California intended to give up a tax, which it could have collected, merely because a resident made payment to another state which he could have avoided making; that California "intended to give up a tax (by permitting a credit) only to the extent that a resident could not avoid making payment to another state." That argument leads to the further observation that if a California resident could not avoid making the payment in another state then he should not be given credit in California for the tax paid in the other state, because it would then appear that the other state did not have a reciprocal law allowing credit to California residents, which reciprocal law is the basis for allowing such credit, under Section 25(b), in California. It therefore appears, according to that argument, that if plaintiff had avoided the payment in New York a credit in California would not have been involved, because he had paid no tax in New York; and that if he could not have avoided the payment in New York a

credit in California would not have been involved, because New York did not have a reciprocal law allowing credit. It seems, from respondent's argument, that the word "credit" as used in the California statute did not mean that California, the State of the taxpayer's residence, would credit its resident with tax paid in the other state, but it meant that it would not require a resident of the other state to pay a tax in California if the other state would not require a resident of California to pay a tax in the other state.

The word "credit" was used in the statute and should not be deprived of significance by giving it a meaning to the effect that the California resident taxpayer would not be given credit in California but should pay California in full and then try to get credit in the other state. When he claims credit in California, the State says that he should not have paid the tax in New York because he could have paid it in California and claimed credit in New York. If he had paid the tax in California and claimed credit in New York, that State might have denied him the credit, claiming that he should not have paid the tax in California because he could have paid it in New York and claimed credit in California.

In 1937 said Section 25(a) of the statute was amended to provide, among other things, that the credit was not allowable "if such other State or country allows residents of this State a credit against the taxes imposed by such State or country for taxes paid or payable under this act." Deering's Gen.Laws, 1937, p. 3931. It appears that before the 1937 amendment a California resident taxpayer might have found California and another State each claiming that he should pay the tax to it because he was entitled to a credit or refund in the other state.

The California official tax form presented to plaintiff provided in a line thereon, at the place for computing the tax, for a deduction for tax paid in another state. The instruction printed on that form, relative to deduction for tax paid in another state, did not state that the credit should be obtained in the other state, but did state that "In order to obtain the credit," the taxpayer should file a copy of his return to the other state and the receipt showing payment. There was no provision on the New York tax form for deducting tax paid in another state.

It was not until after said 1937 amendment of the California law that the New York Tax Commission announced that residents of California were entitled to a credit against the New York tax on account of their California tax on income from sources in New York.

[2] As above stated, 1935 was the first year in which the California State income tax law was in effect. Plaintiff was required to determine, under the penalty of paying interest and perhaps paying double taxes, whether he should pay the tax on the New York income in California and claim the credit in New York or pay it in New York and claim the credit in California. He was advised by an official of the New York Income Tax Bureau that he was required to pay the tax in New York. It was stipulated that he acted in good faith in paying the tax in New York. Since he acted in good faith in paying the tax there, it could not reasonably be expected that he would claim he should not pay it and ask for credit or for a refund. He had no opportunity to ask for a refund after the California commissioner notified him that his claim for credit had been rejected—the two years within which he could have asked, under the New York law, for a refund having expired before he was so notified. There was no assurance that New York would have allowed him a credit or a refund if he had asked for it. On the contrary, considering the additional assessment made in New York when it was known that plaintiff had paid income taxes in California, and considering the certificate of two of the New York Tax Commissioners to the effect that "the payments were properly made and in accord with the Law and the facts as appearing in the record," it is quite probable that a credit or refund would not have been allowed.

The judgment is reversed, and the superior court is directed to enter judgment for plaintiff for \$4,649.11 with interest thereon at the rate of 6% per annum from August 22, 1940, and for costs.

DESMOND, P. J., concurs.

SHINN, Justice.

I concur in the judgment upon the following ground: California would now say to the taxpayer, "You were not liable for the tax in New York because New York would have given you a credit if you had

paid it in California." With equal propriety, New York could have said, "You do not owe the tax in California because you are entitled to a credit there if you pay it in New York." If he had paid it in California, New York instead of California might have been the one that made the belated demand for payment with penalties and interest. The taxpayer should not be mulcted at this late date on the assumed fact, which is not susceptible of proof, that under identical laws and circumstances New York would have allowed a credit which California has refused to allow. If plaintiff had paid in both states and had demanded from each state a refund because of the payment made to the other state, one or the other should have granted a refund, but which one?



72 Cal.App.2d 847

HERRBACH et al. v. KELLER et al.
Civ. 15066.

District Court of Appeal, Second District,
Division 2, California.

Feb. 4, 1946.

Rehearing Denied Feb. 21, 1946.

Hearing Denied April 1, 1946.

1. Appeal and error ⇨1010(1)

Trial court's findings of facts, if supported by substantial evidence, are conclusive.

2. Replevin ⇨72

Evidence did not justify recovery of a hydraulic press on ground that defendants without plaintiffs' consent wrongfully and maliciously took possession of it and wrongfully withheld it from plaintiffs' possession.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Michael A. Herrbach and another against William M. Keller and others for recovery of a hydraulic press. From an adverse judgment, plaintiffs appeal.

Affirmed.

Daniel A. Knapp, of Los Angeles, for appellants.

Edwin F. Franke, of Los Angeles, for respondents.

WILSON, Justice.

Plaintiffs alleged that they were the owners and entitled to possession of a hydraulic plastic press, designated as "Hydraulic Press No. 5," and that defendants, without plaintiffs' consent, wrongfully and maliciously took possession of it and wrongfully withheld it from their possession. The court found that said allegations were not true and rendered judgment for defendants. As grounds for the appeal appellants assert that the findings are not supported by the evidence.

[1, 2] The manufacturers had agreed to deliver to respondent Keller a hydraulic press, the serial number of which was to be No. 23. Appellants had a contract with the manufacturers whereby the latter agreed to deliver press "No. 5" in the order of construction. Keller took possession of a press stamped "No. 23." Appellants claim that it was actually the fifth press constructed and that it was the press which they had contracted to purchase. The evidence is conflicting upon practically all of the issues and the trial court having found the facts, and there being substantial evidence in support of the findings, they are conclusive upon this court. *Buckhantz v. R. G. Hamilton & Co.*, Cal.App., 163 P.2d 756; *Berger v. Steiner*, Cal.App., 164 P.2d 559; *In re Estate of Isenberg*, 63 Cal.App.2d 214, 216, 146 P.2d 424. It may be added that the press of which Keller took possession, in addition to bearing the serial number set forth in his contract, answered the mechanical description of the press which he contracted to purchase.

We have examined the record and find no errors in rulings upon the admission of evidence. Questions relating to the manner of the preparation of Keller's contract were clearly immaterial. The contract as eventually prepared was signed by the sellers and by Keller as buyer and described with particularity the dimensions and mechanical features of the press which Keller was to receive.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; EDMONDS, J., dissenting.

72 Cal.App.2d 717

PEOPLE v. BROWN.
Cr. 1935.

District Court of Appeal, Third District,
California.

Jan. 28, 1946.

1. Indictment and Information ⇨139

A motion to set aside information, made without moving to set aside plea of not guilty already entered, was too late. Pen.Code, §§ 990, 995, 996.

2. False pretenses ⇨49(1)

Evidence warranted inference that defendant had no account in bank on which check was drawn and cashed check with intent to defraud, and hence sustained conviction. Pen.Code, § 476a.

3. False pretenses ⇨39

Intent to defraud in uttering checks without sufficient funds may be inferred from all circumstances. Pen.Code, § 476a.

4. Criminal law ⇨370, 371(3)

Evidence of similar transactions at the time is admissible to show guilty knowledge and intent in uttering check without sufficient funds. Pen.Code, § 476a.

5. Criminal law ⇨1144(14)

Where record did not contain instructions given nor show that appellant offered any instructions, reviewing court must assume that jury was properly instructed.

6. Criminal law ⇨995(6)

The court could order sentence imposed to run consecutively with sentences which defendant was then serving. Pen. Code, § 669.

Appeal from Superior Court, Sacramento County: Raymond T. Coughlin, Judge.

John T. Brown was convicted of making, drawing, uttering, and delivering a check with knowledge that he had insufficient funds, and he appeals.

Affirmed.

John T. Brown, in pro. per.

Robt. W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

In an information filed in the county of Sacramento on April 28, 1945, defendant

was charged with a violation of Section 476a of the Penal Code of California, to wit, that on May 22, 1944, in the county of Sacramento, he did wilfully, unlawfully and feloniously, with intent to defraud Capital Clothing Company, make, draw, utter and deliver to said Capital Clothing Company a check drawn on the Sacramento branch of the American Trust Company for \$17.68, knowing at the time that he had not sufficient funds or any credit with said bank to meet said check.

On his arraignment he was represented by counsel appointed by the court, and entered a plea of not guilty. On the day set for trial, after a jury had been empaneled, defendant dismissed his counsel and elected to proceed in propria persona. He then moved to dismiss the information on the ground that he had been held to answer without reason or probable cause, and in support of his motion introduced in evidence a copy of the transcript of proceedings at the preliminary hearing. His motion was denied.

On trial of the cause the prosecution called as a witness an employee of Capital Clothing Company who testified that defendant, on May 22, 1944, purchased merchandise from him and in payment therefor wrote out and gave to him the check described in the information, upon which check defendant gave a fictitious address; that the check was refused payment by the American Trust Company and returned to his company. An officer of the bank was then called who testified that he had charge of the bank's records, operations and accounting, that he had examined such records to ascertain whether defendant had an account there during the month of May, 1944, and was unable to find any such account or that defendant had any arrangement for credit with the bank; that the check in evidence had been presented to the bank for payment and payment refused for the aforesaid reason.

For the purpose of showing fraudulent intent on the part of defendant, the prosecution called witnesses who testified that on May 22, 1944, defendant cashed a check with Sears, Roebuck & Company and one with Weinstock, Lubin & Co., both drawn on the Sacramento branch of the American Trust Company and tendered in payment for merchandise, for each of which checks defendant was given some cash; that said checks also bore a fictitious address, and were refused payment by the bank. The

witness for said bank testified that payment of those checks was refused for the same reason that payment of the check charged in the information was refused. Defendant called as a witness the clerk of the court through whom he introduced, as an exemplar of his handwriting, his signature to his motion to dismiss the information. No other testimony was introduced by defendant. On return of the verdict of guilty found by the jury, defendant made a motion for a new trial on all statutory grounds, which motion was denied. Thereafter the court sentenced defendant to confinement in the State Prison for the term prescribed by law, said term to commence to run at the termination of terms of imprisonment which defendant was then serving.

On this appeal from said judgment and sentence appellant contends, first, that the trial court erred in refusing to set aside the information; second, that the evidence adduced at the trial is insufficient to sustain the verdict; third, that the trial court failed to instruct the jury as to the elements of the offense charged; fourth, that the verdict is contrary to law and the evidence; fifth, that the facts charged and proved do not constitute a felony; and, sixth, that the court was without jurisdiction to order the sentence to run consecutively with the term being served by defendant.

[1] Regarding appellant's first contention, the record shows that he was arraigned on May 8, 1945, and on that date entered his plea of not guilty; that his case was then set for trial on May 29, on which latter date, after the jury had been empaneled, and without making a motion to set aside his plea, his motion to set aside the information was made in writing and filed. Having been made after entry of the plea it came too late and was properly denied. Pen.Code §§ 990, 995, 996; *People v. Linton*, 102 Cal.App. 608, 611, 283 P. 389; *People v. Magee*, 60 Cal.App. 459, 462, 213 P. 513; *People v. Ronsse*, 26 Cal.App. 100, 104, 105, 146 P. 65.

[2] Contentions two, four and five involve the sufficiency of the evidence and may be considered together. The gist of appellant's argument is that it was not shown that he did not have an account with the American Trust Company, because the witness from the bank did not testify in so many words that defendant had no such account but testified only that he could not locate such an account nor find that defendant had made arrangements for

credit. It is not argued by appellant that he did have such an account, and we are satisfied that the testimony of the bank's employee that he had searched the records and was unable to find such an account, together with the fact that all three checks drawn by defendant were refused payment, was ample to support a proper inference that defendant had no such account. *People v. Thal*, 61 Cal.App. 48, 54, 214 P. 296; *People v. Roche*, 74 Cal.App. 556, 559, 241 P. 279.

[3,4] Appellant also asserts that no intent to defraud was shown. This is equally without merit. Appellant received the merchandise for which the check was given and the Capital Clothing Company was never paid for it and was in fact defrauded; and that appellant acted with intent to defraud is inferable from this fact, from the facts that his check bore a false address, and that on the same day he cashed the other two checks receiving cash in part for them. Intent may be inferred from all the surrounding circumstances (*People v. Walker*, 15 Cal.App. 400, 404, 114 P. 1009; *People v. Hamby*, 55 Cal.App. 37, 39, 202 P. 907); and evidence of similar transactions at the time is admissible to show guilty knowledge and intent. *People v. Bercovitz*, 163 Cal. 636, 639, 126 P. 479, 43 L.R.A.,N.S., 667. Appellant's criticisms of the testimony are merely captious and furnish no ground for reversal of the judgment.

[5] Regarding his allegation that the trial court did not instruct the jury as to every material element of the offense charged, the record does not contain the instructions given nor does it show that appellant offered any instructions of any kind whatsoever. In this state of the record we must assume that the jury was properly instructed. 8 Cal.Jur., sec. 573, p. 576.

[6] As for appellant's contention that the trial court was without power to order the sentence imposed to run consecutively with the sentences which he was then serving, it is answered by section 669 of the Penal Code, and by the decisions in *People v. Loveless*, 140 Cal.App. 291, 35 P.2d 574; *People v. Hirschbein*, 16 Cal.App.2d 458, 460, 60 P.2d 532; and *Ex parte Quinn*, 25 Cal.2d 799, 801, 154 P.2d 875. Appellant relies upon *In re Morton*, 132 Cal. 346, but that case was decided in 1901 prior to amendment of section 669 of the Penal Code, and is applicable only to the section

as it was then written. See *Ex parte Radovich*, 61 Cal.App.2d 177, 179, 142 P.2d 325.

The judgment and the order denying a new trial are affirmed.

PEEK and THOMPSON, JJ., concur.



73 Cal.App.2d 25

WALLACE v. OPINHAM.

Civ. 7198, Sac. 5744.

District Court of Appeal, Third District,
California.

Feb. 9, 1946.

Hearing Denied April 8, 1946.

1. Gaming ⇨26(1)

Both winner and loser voluntarily engaging in game of "Twenty-One," which was prohibited by statute, were in *pari delicto* with respect to their unlawful playing of the game, and hence loser, in absence of statute authorizing recovery of gambling losses, could not maintain action to recover his losses from the winner allegedly using a deck of marked cards. Pen.Code, § 330.

2. Gaming ⇨25

Where the parties voluntarily engage in a gambling game which is prohibited by law, neither courts of law nor of equity, in the absence of a statute authorizing a recovery of gambling losses, will aid or assist either party to enforce rights growing out of the illegal transaction.

3. Gaming ⇨23

Courts will not become the arbiters of incidental acts of participants in gambling games which are prohibited by law.

4. Action ⇨4

Public policy prompts the courts to decline to distinguish between degrees of turpitude of parties who engage in outlawed transactions, since otherwise courts might be compelled to decide which party cheated the most. Pen.Code, § 31.

5. Gaming ⇨26(1)

The constitutional provision relating to recovery of money paid on contracts for

sale of stock on margin or for future deliveries is not applicable to recovery of losses sustained by one who participates in a gambling game prohibited by statute. Const. art. 4, § 26, as amended in 1908.

Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

Action to recover gambling losses by Raymond Wallace against Harry D. Opinham. From the judgment, the plaintiff appeals.

Affirmed.

Harry W. Falk, of Eureka, for appellant.

Blaine McGowan, of Eureka, for respondent.

THOMPSON, Justice.

The plaintiff appealed from a judgment rendered pursuant to an order sustaining a demurrer to the complaint to recover gambling losses, without leave to amend the pleading. The second cause of action alleges that plaintiff and defendant engaged in "a game of cards * * * known as Twenty-One," which is specifically prohibited by section 330 of the Penal Code. It is asserted that, at that game, the plaintiff lost the total sum of \$9,250 by means of the fraud of the defendant in using a deck of "marked cards", which fact was unknown to plaintiff.

The appellant contends that he was not in *pari delicto* with the defendant and that he may therefore maintain the action to recover the money of which he was thus defrauded.

[1,2] The card game known and designated in the complaint as "Twenty-One" is specifically prohibited by section 330 of the Penal Code, regardless of where it is played. The plaintiff and defendant voluntarily engaged in that unlawful game, in the course of which plaintiff lost the money he now seeks to recover by this suit. The second count of the complaint is necessarily founded on plaintiff's participation in that unlawful and prohibited game. He could not prove the alleged fraud and deceit, by means of which he lost his bets, without evidence showing that the fraud was exercised incident to his participation in that game of cards which is prohibited by statute. It follows that the parties were in *pari delicto* with respect to their unlawful playing of that game. Where the parties volun-

tarily engage in a gambling game which is prohibited by law, *in the absence of a statute authorizing a recovery of gambling losses*, neither courts of law nor equity will aid or assist either party to enforce rights growing out of that illegal transaction. *Babcock v. Thompson*, 3 Pick. 446, 15 Am. Dec. 235; 38 C.J.S., Gaming, § 29, p. 99. In the authority last cited it is said: "In substantially all jurisdictions gambling contracts are treated as unenforceable; and generally, in the absence of a statute providing for recovery or relief, the court will not, at law or in equity, * * * aid or assist either party to a gambling contract or transaction to enforce any right or claim against the other growing out of the contract or transaction, but will leave the parties where they have placed themselves and the court finds them. Even though a party to an illegal betting contract seeks alleged rights against a third person, the court will not aid him where he must rely on the illegal contract." Citing *Kyne v. Kyne*, 16 Cal.2d 436, 106 P.2d 620, 621.

In the *Kyne* case last cited a judgment for defendants, involving the title to money wagered on the outcome of a gubernatorial election, was reversed. The Supreme Court said: "The general rule is that the courts will not recognize such an illegal contract and will not aid the parties thereto, but will leave them where it finds them. The rule has been rigidly enforced in this state to deny any relief in the courts to parties seeking to recover either their stakes or their winnings under a wagering contract which is in violation of law, whether the party against whom the relief was sought was a party to the wager or a stakeholder for the parties to the wager." (Citing authorities.)

The case of *Babcock v. Thompson*, *supra*, was a suit to recover gambling losses. Evidence of fraud on the part of the defendant was rejected and judgment of nonsuit was rendered against plaintiff. The judgment was affirmed. The court said: "The Court are of opinion that the action cannot be maintained. We have no doubt, that according to the general policy and laws of this commonwealth, all gaming is unlawful; and the plaintiff cannot maintain this action, where he is obliged to show his illegal act as the foundation for a recovery. * * * Where a party acts illegally, he is to suffer the loss of his money as the consequence, if the money is sought to be recovered, *except where he may have a remedy under the*

particular provisions of some statute. Here is a case of gaming accompanied with cheating. Clearly if the gaming had been fair, the law would give no remedy. *The only question then is, whether the fraud will alter the case.* We think it will not. If a man thus voluntarily puts himself in a condition to be cheated, through his illegal act he cheats the government, and the other person cheats him, and they must be left to settle the affair between themselves." (Italics added.) To the same effect is *Schmitt v. Gibson*, 12 Cal.App. 407, 107 P. 571.

[3, 4] On principle, the California cases are in accord with the preceding cases. No California statute authorizes a party to an illegal transaction which is prohibited by law to recover gambling losses, regardless of the fact that one of them may have been the victim of fraud or deceit with respect to some incident to that illegal transaction. It has been frequently decided that courts will not become the arbiters of incidental acts of participants in gambling games which are prohibited by law. All persons who are concerned in or who aid or abet the commission of either a crime or a misdemeanor, are deemed to be principals therein. Penal Code, § 31. Public policy prompts courts to decline to distinguish between degrees of turpitude of parties who engage in outlawed transactions. Otherwise courts might be compelled to decide which party cheated the most.

In the case of *Abbe v. Marr*, 14 Cal. 210, a judgment against the defendants for recovery of money lost by plaintiff in an unlawful wager on a horse race, although the respective parties "were not equally at fault," was reversed. The court said: "No Court of justice can listen to such a case. When the plaintiff asserts his own turpitude in this way, he sends his case out of Court. If, in attempting, by way of reprisal or otherwise, to swindle another [or to violate the statute against prohibited gambling], he becomes the victim of his own arts, it may become a question in morals or in honor, which party is the more culpable; Courts of Law entertain no discussion on the subject, but terminate the controversy by shutting their doors in the face of the intruder."

Likewise, in the case of *Gridley v. Dorn*, 57 Cal. 78, 40 Am.Rep. 110, a judgment for plaintiff in a suit to recover a wager on a horse race alleged to have been lost by

fraud of the defendant was reversed and the court was directed to dismiss the action. That opinion concludes with the statement: "If, notwithstanding the evil tendency of betting on races, parties will engage in it, *they must rely upon the honor and good faith of their adversaries, and not look to the courts for relief in the event of its breach.*" (Italics added.)

In *Kreamer v. Earl*, 91 Cal. 112, 27 P. 735, judgment for plaintiff to recover state land procured in contravention of law was reversed and the court was directed to dismiss the action. The Supreme Court said, 91 Cal. at page 118, 27 P. at page 737: "A court of equity will not allow itself to become a handmaid of iniquity of any kind. It intervenes, not for the sake of the party who is benefited by the intervention, but for the sake of the law itself. It matters not that no objection is made by either party; when the court discovers a fact which indicates that the contract is illegal, and ought not to be enforced, it will of its own motion instigate an inquiry in relation thereto." See 17 C.J.S., Contracts, § 272, p. 659.

The California cases are uniform in holding that where money or property is lost in a transaction between the parties which is prohibited by law, neither of the parties has standing in a court of law or equity to recover his losses. *People v. Rosen*, 11 Cal.2d 147, 150, 78 P.2d 727, 116 A.L.R. 991; *Johnston v. Russell*, 37 Cal. 670; *Union Collection Co. v. Buckman*, 150 Cal. 159, 164, 88 P. 708, 9 L.R.A., N.S., 568, 119 Am.St.Rep. 164, 11 Ann.Cas. 609; *Bank of Orland v. Harlan*, 188 Cal. 413, 421, 206 P. 75; *Schur v. Johnson*, 2 Cal. App.2d 680, 683, 38 P.2d 844; *Brooks v. Brooks*, 63 Cal.App.2d 671, 676, 147 P.2d 417; *Asher v. Johnson*, 26 Cal.App.2d 403, 411, 79 P.2d 457.

There are some cases in other jurisdictions which may be in conflict with the foregoing. An examination of such cases relied upon by the appellant in this action indicates that at least one of them are based on statutes specifically entitling plaintiffs to recover their losses when they are not in *pari delicto* with the defendants. *Bamman v. Erickson*, 288 N.Y. 133, 41 N.E.2d 920,

141 A.L.R. 938. If any of such cases exist in jurisdictions having no such statute, we assume they are not in conformity with the California rule or with the great weight of authority in that regard, and we are therefore not in accord with them.

[5] The statutes of several states expressly authorize the recovery of gambling losses under specified circumstances. *Bamman v. Erickson*, *supra*; 24 Am.Jur. 457, § 81. California has no such statute. Article IV, section 26, of the California Constitution, which prohibits the enactment of statutes validating lotteries, and directs the Legislature to prohibit by law the "fictitious buying and selling of the shares of the capital stock of corporations," formerly provided that "All contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and *any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction.*" *Parker v. Otis*, 130 Cal. 322, 62 P. 571, 927, 92 Am.St.Rep. 56. That provision had no application to the recovery of losses sustained by one who participates in a gambling game prohibited by statute. Moreover, that section of the Constitution was amended in 1908. It now provides that "*neither party to any such contract shall be entitled to recover * * * any money paid thereon, in any court of this State.*"

For the reason that it affirmatively appears from the complaint in this action that the gambling losses which plaintiff seeks to recover were sustained and paid by him in the course of a gambling card game in which he voluntarily engaged, which is prohibited by statute, we are of the opinion this suit in *assumpsit* may not be maintained, regardless of the fact that the defendant may have resorted to fraud by furnishing a marked deck of cards with which they were playing the unlawful game of Twenty-One.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

73 Cal.App.2d 20

PEOPLE v. ENDNER.**Cr. 3968.**

District Court of Appeal, Second District,
Division 3, California.

Feb. 8, 1946.

1. Homicide $\Rightarrow$ 234(1), 254

Evidence was sufficient to prove that defendant's mother died as the result of physical violence exerted by defendant, and to sustain conviction of second degree murder as against defendant's contention that death was not shown to be result of a criminal agency. Pen.Code, §§ 187, 188.

2. Homicide $\Rightarrow$ 7, 146

"Murder" is the unlawful killing of a human being with malice aforethought, malice being implied where no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart. Pen.Code, §§ 187, 188.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder".

3. Homicide $\Rightarrow$ 231

Evidence that defendant inflicted a long course of physical abuse upon his mother, who was aged and infirm, established an "abandoned and malignant heart" from which the malice necessary to constitute murder could be implied. Pen.Code, §§ 187, 188.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandoned and Malignant Heart".

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Charles E. Endner was convicted of second degree murder, and from the judgment and from an order denying his motion for a new trial, he appeals.

Affirmed.

Maurice A. Gleason, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

SHINN, Justice.

Defendant, accused of the murder of his mother, Martha Ella Endner, was convicted

in a trial by the court, the crime was found to be murder of the second degree, and defendant was sentenced to State Prison. After the denial of his motion for a new trial, he appealed from the order and from the judgment. His sole contention on the appeal is that the evidence failed to show that Mrs. Endner's death was the result of a criminal agency.

[1] Defendant and his mother had lived together for some 25 years; he had cared for his mother and, with some help from a brother and a sister, had supported her. During this interval defendant married and for a number of years his wife lived with them, but at the time of the mother's death and for some time prior thereto no one else was living in the house. Mrs. Endner was 83 years of age, partially deaf and blind, feeble in health, had much difficulty getting around with the aid of a cane, and weighed about 120 pounds. Defendant was steadily employed by a creamery company. The two lived in a small house adjoining the home of Mr. and Mrs. Whitaker to the west and that of Mr. and Mrs. McChesney to the east.

On the evening of May 4, 1945, defendant returned home from work, prepared dinner, and left the house, returning about 2:30 a. m. in a state of intoxication. At about that time the Whitakers and the McChesneys were aroused by the loud screaming of Mrs. Endner and the cursing of defendant. The testimony of these four persons, who were witnesses for the prosecution, was, in brief, as follows: Mrs. Whitaker arose from bed, put on a gown and slippers and went to her kitchen, the east window of which was some 17 or 18 feet from the window of Mrs. Endner's bedroom. The Whitaker kitchen remained unlighted; Mrs. Endner's room was lighted and the shades were up. Mrs. Whitaker stood in the kitchen and saw defendant striking his mother and then passed from her kitchen into the yard, slamming the door in the hope that it would cause defendant to desist. She stood at the side of her house some 3 feet from the Endners' window and called to defendant to cease striking his mother but he paid no attention to her. She returned to the kitchen, as her husband arrived, and the two watched the Endners for another 10 minutes. Mrs. Whitaker became ill and retired but Mr. Whitaker remained in the kitchen for approximately an hour, and until the police came. Mrs. Whitaker saw defendant strike his mother on the chest and knock her to

the floor, pick her up and throw her heavily on the bed. She saw defendant strike his mother many times, holding a towel wadded up to about 8 inches in size. The blows were administered both before and after Mrs. Endner was thrown onto the bed. Defendant was cursing his mother loudly and she was crying for help. Defendant was "cursing and asking her if she was never going to die; was she going to live forever, and he included—was using terrible language along with it." Defendant called his mother foul names, which were stated by the witness. She had heard commotions in the Endner household at least once a week and had lived next door for more than a year and a half; she had seen defendant strike his mother many times, the last previous occasion being about three days prior to May 5; he would use a rag of some kind and at other times would hit her with his fist. On a previous occasion he had said to her, "Aren't you ever going to die? Am I going to have to tap you on the head with a hammer and get rid of you?" Mr. Whitaker testified that defendant was striking his mother in the morning of May 5th with what looked like a towel "wrapped up, doubled up"; that defendant left the room, appeared to be telephoning, and returned and continued to strike his mother as she lay in bed, and that it appeared that he was hitting her with his fist around the head and shoulders, and he heard defendant say, "Aren't you ever going to die, you old ——? You are my mother but I hate you." The mother continued to scream loudly. He had seen defendant strike his mother before; within two weeks prior to May 5 he had seen Mrs. Endner on the bed with her hands tied to the bedpost and defendant slapping her in the face with a towel. Mrs. Endner was screaming and Mr. Whitaker called the police.

Mr. and Mrs. McChesney were aroused from bed in the early morning of May 5 by the screaming of Mrs. Endner and defendant's cursing. Mrs. McChesney testified that she heard defendant say, "Aren't you ever going to die? I got rid of one of you last year and I will get rid of you this year." She had heard such noises come from the Endner house at least as often as once a week. Mr. McChesney gave testimony substantially the same as that of his wife. He heard defendant say, "This God damn house depresses me. When I get rid of you I will be happy." The McChesneys could not see what was going on in the

Endner house. They had heard similar screaming and profanity in the Endner house on many occasions.

About 4 o'clock in the morning the police came. They entered the house, saw Mrs. Endner lying in bed, and one of the officers testified, "She was drooling at the mouth, and the left side of her lip was lower than the rest." Defendant said she had had a stroke and the police left, but returned after talking with the neighbors and sent for an ambulance, which took Mrs. Endner to the receiving hospital, where she died three days later. The officers testified that defendant was intoxicated but that he conversed with them freely.

Defendant testified that he was drunk when he came home the morning of May 5; that he found the lights on in the house and his mother upon the floor; that he picked her up, placed her upon the bed, and telephoned to his sister; that he "blacked out" shortly thereafter and remembered only vaguely the arrival of the police and other events; that he could not remember striking his mother and that if he had cursed and made the statements testified to by the witnesses he must have been out of his head.

The contention that death was not shown to have resulted from the administration of physical violence by defendant is founded upon what are claimed to be contradictions in the testimony given by Dr. Webb, who performed the autopsy, and Dr. Neilsen, who made an examination of the brain of decedent. Dr. Webb testified that he found multiple bruises upon the body, on the shins, the buttocks, chest, face and head, none of them defined in a manner which would have indicated the agency which caused the bruises. The bruises on the head, one of which was on the left temple, corresponded with inner hemorrhagic areas. Within the skull he found a subdural hemorrhage, a blood clot a quarter of an inch thick beneath the bruise on the left temple. The clot was in the dura mater between the brain proper and its covering. His findings were that there was concussion of the brain and that death resulted from traumatic injury which caused the formation of the blood clot from the source of blood supply of the dura mater outside the brain. He removed the brain from the skull, placed it in formaldehyde and it was taken to Dr. Neilsen for examination. Dr. Webb testified that most of the blood clot remained in the skull, and that the greater part of it which was removed

was washed away in the solution. Dr. Neilsen was called by defendant. He testified that he examined the brain, especially for trauma, and found none, nor any injury to the brain. He expressed the opinion that a blood clot in the dura mater would not cause death unless it was of such proportions as to cause distortion of the brain, and he testified that he found no such distortion. But this opinion had the qualification that the subject was "otherwise healthy," and the witness stated: "But there is another point here that I did not have knowledge of, and that is the details of that assumed subdural hemorrhage, because that was, in all probability, from a vein and not from an artery. I understand that somebody else did a part of the autopsy. Whatever that doctor found would be valuable in arriving at this conclusion." The conclusion referred to evidently was as to the cause of death, Dr. Neilsen having testified that he had formed no opinion in that matter.

Dr. Webb, when questioned on the subject, found no contradiction in the testimony of Dr. Neilsen with his own, nor do we understand that there was such a conflict. Even if there were, it was within the province of the trial court to give full credit to the testimony of Dr. Webb, and this testimony was clearly sufficient to prove that death resulted from a blow on the head of decedent. The evidence was sufficient to prove that Mrs. Endner died as a result of physical violence exerted by defendant.

[2, 3] Murder is the unlawful killing of a human being with malice aforethought. Malice is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Penal Code, secs. 187, 188. The evidence was sufficient to prove defendant to have been of abandoned and malignant heart throughout a long course of physical abuse of his mother, and from this fact malice will be implied. Mrs. Endner's body had many bruises and one blow was severe enough to cause death. She was old, frail, infirm, and with a precarious hold upon life. Defendant was not too drunk to know what he was doing. He testified that he suffered a "black out" after he had placed his mother upon the bed, but he also gave this as an excuse for not visiting his mother at the hospital during her lifetime, although he testified that the continuous "black out," from which he claimed to have been suffering, was not

caused by drink. Defendant telephoned to his sister during the course of his mistreatment of his mother and, as we say, talked freely with the officers. After a full consideration of the evidence, we are of the opinion that the court was justified in concluding that it was defendant's deliberate intention to bring about the death of his mother by means of a course of violent mistreatment.

The judgment and order denying motion for new trial are affirmed.

DESMOND, P.J., and WOOD, J., concur.



72 Cal.App.2d 753

PLATT v. CITY OF LOS ANGELES et al.
Civ. 14665.

District Court of Appeal, Second District,
Division 1, California.

Jan. 30, 1946.

Hearing Denied March 28, 1946.

1. Municipal corporations ⇨187

Under pension provision of Los Angeles charter, causal relationship, mediate or immediate, must be shown between duty performed by policeman and immediate cause of his death.

2. Evidence ⇨571(2)

In mandamus by policeman's widow to compel payment of pension, psychiatrist's testimony could be given weight though he referred to pension file not before court, where reference was in connection with opinion he had rendered to Department of Pensions and he attempted to base his testimony on hypothetical question and hospital records before court.

3. Evidence ⇨571(2)

In mandamus by policeman's widow to compel payment of pension, psychiatrist's testimony could be given weight though he expressed disbelief as to statement in hypothetical question that policeman had not taken liquor for a year, where psychiatrist's conclusions as to cause of death were based on history and facts contained in hypothetical question.

4. Appeal and error — 1011(1)

The findings of fact of a trial court will not be disturbed on appeal because of a conflict in the evidence though appellate court may feel that it would have found the facts differently were it the trier thereof.

5. Appeal and error — 1010(1)

When it is required that proof of a fact be clear and convincing to support a given finding, sufficiency of evidence to support finding is primarily a question for trial court, and if there is substantial evidence to support its conclusion, its determination is not reviewable.

6. Appeal and error — 1010(1)

A trial court's conclusion cannot be set aside on ground of insufficiency of evidence unless there is a clear showing that upon no hypothesis whatever is there sufficient substantial evidence to support the court's decision.

7. Appeal and error — 931(3)

A district court of appeal must assume in favor of judgment existence of every fact which could reasonably have been deduced from evidence, and only when it concludes that such facts are insufficient to support judgment may it interfere.

8. Mandamus — 168(4)

In mandamus to compel payment of pension to widow of policeman who sustained injuries in performing his duties, became insane, and committed suicide, evidence, including conflicting testimony of psychiatrists as to whether injuries caused insanity, supported judgment denying writ.

WHITE, Justice.

This is an appeal from a judgment of the Superior Court of Los Angeles County denying a writ of mandate to compel the payment of a pension to appellant as the widow of Richard T. Platt, a member of the Police Department of respondent City of Los Angeles.

[1] Section 183 of the Charter of the City of Los Angeles authorizes the payment of a pension to the widow of a deceased member of the Police Department who dies prior to the time when he has served in such department the necessary number of years entitling him to service retirement (in this case twenty years) only in the event that such member shall die as the result of any injury received during the performance of his duty or through sickness caused by the discharge of such duty. This provision of the charter means that a causal relationship, mediate or immediate, must be shown between the duty performed by the decedent and the immediate cause of his death. *Cordell v. City of Los Angeles*, 67 Cal.App.2d 257, 262, 154 P.2d 31. The question here presented is, therefore, the correctness of the trial court's conclusion that the deceased police officer's suicide while of unsound mind was not the result of injuries received by him during the performance of his duty. The existence of such causal connection is necessarily a scientific question, upon which it is necessary to resort to the scientific knowledge of experts trained in such scientific subject. Expert testimony, therefore, becomes essential.

The deceased became a member of the police department in 1922 and so continued until his death by suicide in 1940. In her petition for a writ the widow set forth a series of injuries sustained by the deceased during his period of service, the most serious of these being an injury to his right leg on November 21, 1928, which necessitated extended hospitalization and two bone-grafting operations. Petitioner then alleged that the deceased, "as a result of his injuries received as aforesaid, and despite the attempts to restore himself to normal health by surgical operations and treatment, became despondent and sick and diseased in mind and body and his mind and nervous system suffered to the extent that he became mentally unbalanced and while so mentally unbalanced and as a result thereof, he took his own life on the 29th of December, 1940."

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Mandamus by Lela B. Platt against the City of Los Angeles and others to compel the payment of a pension. From a judgment for defendants, petitioner appeals.

Affirmed.

Paul Tylor and Kenneth W. Kearney, both of Los Angeles, for petitioner and appellant.

Ray L. Chesebro, City Atty., and John J. Tully, Jr., Deputy City Atty., both of Los Angeles, for defendants and respondents.

It is conceded that at the time Police Officer Platt took his own life he was of unsound mind, and the trial court found that while the deceased was mentally unbalanced at the time he took his own life and his suicide was the result of his mental condition, "said mental condition was not the result of nor was it caused by, any or all of the injuries received by the said Richard T. Platt while engaged in the discharge of his duties as a member of the Police Department."

Appellant's contentions are (1) "the evidence shows a causal connection between Officer Platt's injuries, his unsoundness of mind and resulting death; (2) the judgment is against the weight of authority and is based upon an erroneous and narrow interpretation of the City Charter; (3) there is no real conflict in the evidence sufficient to support the findings of the trial court."

The evidence adduced before the trial court included the testimony of a physician who attended the deceased, as well as numerous lay witnesses, friends, acquaintances and associates of the deceased, and hospital attendants, whose testimony was directed to the conduct, disposition and habits of the deceased both before and after his accident of November 21, 1928, and to the circumstances surrounding his change of personality over the years which culminated in his death. The evidence thus given was made the basis for a hypothetical question propounded to each of three expert witnesses, one of whom was produced by each of the parties and another selected and appointed by the court. The pertinent and material evidence can therefore best be epitomized by setting forth said hypothetical question, which reads as follows:

"A man twenty-six years of age, in 1922, took and passed the required civil service examinations—physical and mental, for employment as a police officer in the City of Los Angeles, and was so appointed in the month of April, 1922.

"A few weeks prior to this appointment he had been honorably discharged from the United States Marine Corps, at the conclusion of a first enlistment, the last year of which was served in China and the Philippines.

"On the 30th day of August, 1923, this man married for the first time. This marriage lasted but four months. His wife secured a divorce on the grounds of ex-

treme cruelty, alleging in her complaint that her husband objected to her continued employment—that on numerous times he quarreled with her, became abusive, stated she was not properly caring for him; that within a month after the marriage, he cursed her, told her to go to hell, and roughly shoved her about the room; that shortly before the actual separation, he had quarreled with her, called her a God-damn, floozie and struck her with his clenched fist. He did not make any answer to these charges and the case went by default.

"Notwithstanding the divorce upon the grounds indicated, this man and woman, after their separation, continued to see each other upon an entirely friendly basis, and this friendship continued until about the year 1936-37.

"There is nothing of particular moment or note in the record of this man as a police officer until the year 1928 when he began riding as a regular motorcycle officer of the City of Los Angeles. In that year he had three accidents, all of which are noted and referred to in the resume of this man's medical record at the Receiving Hospital of Los Angeles. * * * You have seen and examined this record, Doctor, and I am going to ask you to assume that exhibit to be a resume of the medical record of our hypothetical man in this question.

"In the month of June, 1927, this man married for the second time. He lived with his wife until April, 1930. We have no information as to the circumstances leading up to their separation, but in the year 1937 he brought an action for divorce upon the grounds of her desertion. She permitted this action to go by default, and a final judgment of divorce was entered October 25, 1939.

"During the period of his police department service preceding November 21, 1928, when he had a severe injury to his right leg, the details of which are shown in the resume of the medical records of the Receiving Hospital, hereinbefore referred to, we have the following picture of our hypothetical man:

"He was of a cheerful, happy-go-lucky disposition, and aside from the circumstances leading up to the separation and divorce in his first marriage, there is nothing recorded as to any unusual conduct or behavior on his part. He is described by his first wife's brother, whose rela-

tions with our hypothetical man continued on an entirely friendly basis after the divorce dissolving the first marriage, as being a 'man's man'; it was a pleasure to associate with him. To those who worked with him he appeared to be an average, normal man, neither better nor worse than his fellows.

"Prior to the injury of November 21, 1928, our hypothetical man drank moderately—a cocktail or two before a meal—a few drinks in the course of an evening. Beginning in April of 1927 our hypothetical man was closely associated with another police officer in their daily work and also through visiting between the two families. In the case of our hypothetical man, this would be the second wife, whom he married in 1927, as hereinbefore indicated. This officer stated that during this period our hypothetical man drank to a moderate degree; that upon occasion, they had perhaps more than an entirely moderate amount—such as the occasion of a party or some special function which in their opinion was the cause for celebration, but that on the whole, he never saw our hypothetical man drunk except upon the last occasion in which he and his wife visited our subject at his home. This was in the year 1928, some time before the accident of November 21st, but subsequent to the time when he began riding on the motorcycle squad, which began in the summer of 1928. Apropos of this, the officer whose observations we are now recording, states that our hypothetical man drank somewhat more after he became a member of the motorcycle squad. The occasion of the last visit of the one family to the home of the other was an invitation to dinner. Upon arriving at the home of our hypothetical man some time in the early part of the afternoon, he (the invitee) and his wife discovered our man and his wife in an intoxicated condition; the dishes were stacked in the kitchen sink and it was quite apparent from the condition of the home and the condition of its occupants that there had been a party the night before and that the drinking had been continued to the following day.

"On June 16, 1928, while riding his motorcycle in the discharge of his duty, our hypothetical man was injured to the extent shown in the medical resume. * * * September 29th he had another accident on his motorcycle. On the 21st day of November, 1928, and again while

riding his motorcycle in the discharge of his duty, he had a more serious injury in which his right leg was broken.

"Following this last accident, as you will have noted from the record, our subject was confined in the Fire and Police Ward of the Receiving Hospital until January 17, 1929. From January to May he reported almost daily to the hospital for treatment. In July, 1929, a satisfactory union of the fracture not having been secured, a bone graft operation was performed. By November of 1929 the patient was, in the opinion of the police surgeon, able to return to light duty, it appearing that a solid union had been effected. He returned to such duty in the Police Department, but by March 10, 1930, he was on crutches again, complaining of pain in the region of the old fracture, and X-rays indicated that there was a complete fracture across the old callous, including the bone-graft splint. March 14, 1930, the patient returned to bed in the Fire and Police Ward, and treatment by stimulating the site of the fracture was administered, as shown in the resume of the medical record. April 15th a walking cast was applied and the patient became ambulatory. In May of 1930 a walking brace was applied. By July it was apparent that a satisfactory union had not yet been accomplished, however, and after consultation with specialists, a second bone-graft operation was determined upon. This was performed August 15, 1930, following which the patient remained in the Fire and Police Ward until February 2, 1931, when he was discharged wearing a walking brace. X-rays taken in May of 1931 indicated a satisfactory union, the brace was removed and our hypothetical man returned to light duty in the Police Department as of May 26, 1931.

"To the doctors who treated and cared for our subject in the hospital and during the periods in which he reported there for treatment when he was ambulatory, he appeared to be in good spirits and to have made a satisfactory mental adjustment to his altered condition. He made no undue or unusual complaint of pain or suffering to the doctors. He was co-operative and accepted his confinement and handicap with good grace.

"As observed by the nurse who treated and cared for him during the period of his hospitalization and the period between the first setting of the fracture and the

second bone graft operation, he displayed only slight concern over his injury and the seriousness thereof. One of the nurses administering to him observed that he was drinking to some extent throughout this period. This nurse admonished him to leave liquor alone until his leg was firmly set.

"Some time during this period and while wearing his walking brace, our subject stopped by to visit the officer with whom he had worked in 1927 and up to the time of the beginning of the motorcycle work in 1928. On the occasion of this visit our subject man was intoxicated and proceeded to demonstrate to his friend that his leg was movable. He removed the brace and, taking his leg in his two hands, proceeded to bend it at the fracture line. While doing this, our subject said it did not hurt, when the witness suggested replacing the brace.

"His first wife, who divorced him in 1924, as hereinbefore recounted, visited our hypothetical man while he was in the hospital and saw him upon frequent occasions while he was out of the hospital but undergoing treatment for the leg injury throughout the period of 1928-1931. She first noticed a change in his temperament during the brief period in the early part of 1930 when he was on light duty following his recovery after the first bone graft operation. He was assigned to the handling of telephone calls for the motorcycle squad, at headquarters. He complained to her of the telephones bothering him; that he would hear them ringing even when he was asleep—"I can hear them all night long." During the period of his stay in the hospital following the second bone graft operation, which would be the latter part of 1930, she noticed other changes; "He imagined that one or two of the nurses had it in for him." He was afraid that people were "ganging up" on him to cut off his leg. He depended upon the assistant police surgeon to protect him. During this stay in the hospital, a ring belonging to one of the other patients in the ward disappeared. He imagined the other patients believed him to be guilty of stealing it.

"The second bone graft operation which was performed August 15, 1930, presented no unusual or extraordinary circumstances so far as the medical details are concerned. The nature of the operation performed is set forth in the resume, which you have

seen. The patient was up in a wheel chair on the 3rd post-operative day and thereafter. He was not finally released from the hospital until February 2, 1931, but from the middle of September on, he was not confined to bed in the hospital, being up and about in a wheel chair or on crutches.

"Upon his release from the hospital in February, 1931, he was aided and assisted by his first wife and her brother in settling in an apartment. His second wife had left him in the year 1930 some time prior to the second bone graft operation. His first wife recalls one occasion about this time when the wind unexpectedly blew a door shut. Our hypothetical man began to cry, and ran into the bathroom because, as this witness describes it, "He was so ashamed of himself."

"Upon the release of our hypothetical man from the Receiving Hospital in February, 1931, there was a firm union of the fractured leg, but there was a permanent disability in that member. It was slightly shorter than the other, and thereafter our hypothetical man was unable to walk or stand upon it for any extended period of time. He walked with a brace until May of 1931, and was not released to light duty in the Police Department until the latter part of that month. He was then assigned to the intersection of Los Feliz and Riverside Drive, acting in the capacity of traffic control officer assisting equestrians across Los Felix Boulevard to and from the bridge path in Griffith Park. He continued to be so employed until the early part of January, 1937. On April 4, 1933, in stepping from the curbing at Los Feliz and Riverside Drive, he suffered a ruptured joint and adhesions of the right ankle. May 15, 1933, he 'phoned to the Receiving Hospital with a complaint of some aching and swelling in the right foot and ankle. On June 21, 1931, while on duty, he slipped and sprained his right ankle. April 21, 1936, at the intersection of Riverside Drive and Los Feliz, an automobile bumped into the rear of a car in which our hypothetical man was sitting and as a result of this accident he suffered strained muscles of his neck, with a contusion of the right leg two inches below the knee.

"During the first year or two in which our hypothetical man was stationed at Los Feliz and Riverside Drive, the first wife of this hypothetical man and her brother

had occasion to pass that intersection frequently and saw and talked with him. The brother, during this period, noticed the first real change in him. He describes this change as 'loss of spirit.' His sister noticed this same depression in spirit, and further, that our hypothetical man would ask her if she had any aspirin, complaining of headaches. While to her he had complained some of headaches during the period of his installation in the apartment immediately following his release from the hospital in 1931, he had then refused her offer of aspirin, with the statement that they were 'dope' and habit-forming. In addition to the complaint of headache, our hypothetical man also complained to his former wife of pain in his fractured leg and of difficulty in getting in and out of his automobile to direct the traffic for the equestrians crossing the boulevard.

"In 1931 while on a trip to Las Vegas, Nevada, our hypothetical man met the woman who subsequently became his third wife. Our hypothetical man and this woman began living together as man and wife in the month of January, 1935, in an apartment on Western Avenue in the City of Los Angeles, where they continued to reside until the latter part of 1936 or the first part of 1937, when, following a demand from the second wife for money and the threat on her part to report to the Police Department his conduct in living with a woman to whom he was not legally married our hypothetical man and the woman with whom he had been living and whom we shall hereinafter refer to as his widow, moved to another apartment house where he occupied a bachelor apartment in the same building in which she occupied a housekeeping apartment. In 1937 our hypothetical man instituted a proceeding for divorce from the second wife. A final judgment of divorce was not entered, however, until the fall of 1939 when our hypothetical man and the woman who became his widow moved to a house on Partridge Street. November 25, 1939, this couple were married. They continued to reside at Partridge Street until the death of our hypothetical man December 29, 1940.

"Prior to the time of their commencing to live together, the widow noticed no extraordinary or abnormal behavior on the part of her husband. He did, upon occasion, seem to have spells of depression

but they were not of long duration, nor were they of extraordinary extent or degree. Following their taking up residence together, there were some periods of moodiness and displays of temper, but these she described to minor difficulties incident to their new relationship.

"Throughout the period of their courtship and for some time following the commencement of their living together, the widow describes her husband as drinking to some extent. He was, as she describes him, a 'two-fisted drinker'—he could drink along with any man. He did not during this period drink to the point of intoxication. The brother of his first wife visited our hypothetical man during the period of his residence in the apartment on Western Avenue, and, as he observed it, there had been a change in the drinking habits of our hypothetical man. Whereas, theretofore, as he had known him, our hypothetical man took a few drinks during the course of the evening, he now brought out the bottle, put it on the table, and drank more steadily; he would sometimes consume a pint of whiskey in the course of an evening's visit. At this period our subject complained to the brother of feeling frustrated—he 'felt whipped.'

"Beginning in 1934, our hypothetical man came under the observation of the wife of one of his friends outside the Police Department. She and her husband, our hypothetical man and his wife, visited together frequently. They went on trips together. She describes our subject during the earlier years of her acquaintance with him as varying in health and spirits. He did upon occasion complain of his leg, particularly when walking or standing upon it for any length of time. As to spirits, our hypothetical man, as she observed him, was upon occasion moody; when not in this condition, he was of average temperament. In 1937 she recalls one occasion when, after walking about the county fair at Pomona for some time, our hypothetical man had to be assisted, almost carried, back to the automobile. The foot on the injured leg was black and blue and he seemed to be in considerable pain. As time went by, his spells of moodiness and depression increased. He would, as she describes it, sit for hours staring off into space. She last saw him December 23, 1940, by which time he had developed the peculiar idea that he was not as good a man as he had been before; that he was

unable to walk and get about and do the things he had been accustomed to doing; he often spoke to her of his activities prior to his leg injury—his love for hunting and fishing in which sports he could no longer indulge.

"Another person who observed our hypothetical man over the period of his last five or six years of life was a woman who has known the widow for some considerable time. She first met him in 1934. She lived with our hypothetical man and his widow for about six to eight weeks in the month of December, 1937, and January, 1938. As described by her, our hypothetical man's mental condition was fairly good during this period of her acquaintance with him. Later she noticed and observed periods of moodiness, melancholy and depression. There were periods when he would flare up over nothing or become upset over personal business, the exact details of which she was not familiar with. During the period of the residence on Partridge Street (the fall of 1939 to 1940) our hypothetical man made complaint of bells ringing; he also complained of headache. Upon occasions she observed him sitting in his chair at home going through the motion of dialing a 'phone, picking up a receiver and putting it to his ear and writing down messages, when, in fact, there was no 'phone near him.

"In the early part of the year 1937 our hypothetical man was transferred from the post at Los Feliz and Riverside Drive to the Central Police Station at First and Hill where he was assigned to the handling of telephone communications, reports, etc., for the motorcycle squad of the Police Department. The room in which this work was done was small, the ventilation was poor, and the lighting was artificial. At times his tour of duty or 'watch' was during the daytime, and at others at night from 8 a.m. to 4 p.m., or from 4 p.m. to 12 midnight. He was so assigned until September 16, 1940, when he was transferred to another station. His work there will be referred to later on in this question.

"During the period in which he was on the telephone at Central, he worked for a period with another police officer, a former motorcycle man, also on light duty because of injury. As observed by this man during the period in which they worked together, our hypothetical man at times complained of pain in his injured

leg; he favored it; at times he limped noticeably. At times, without explanation, he would leave the desk at which he worked and walk out, returning shortly thereafter without making any explanation. There were times when our hypothetical man appeared moody, depressed and melancholy, and at times when the two of them were alone together there was no conversation—our hypothetical man would not have anything to say. At other times and in the presence of other officers—or if the two men started upon a subject of interest to our hypothetical man—he would converse readily and take an active part in the discussion.

"In the year 1938 and on this telephone assignment at Central our hypothetical man came under the observation of another officer who was over him in a supervisory capacity. This man had known our hypothetical man prior to 1926 and during that period had known him as an entirely normal and healthy individual. As observed in 1938, our subject appeared moody and depressed; he was not steady on the job; he appeared forgetful, sometimes looking off into space, and at other times he was attentive. Physically, he was incapacitated. He complained of pain in his leg. He would sit rubbing the frontal portion of his head, complaining of headaches.

"In the summer of 1939 our hypothetical man was treated by a private physician following an attack of acute alcoholism. This doctor found our hypothetical man to be in poor condition. He had an unstable nervous system; he was dejected and despondent. He complained of headaches, backaches and pain in the right leg. This leg was shorter than the other, and bowed outward. His pelvic bone had lifted slightly to compensate for his shorter leg. He was underweight, had a poor appetite, and suffered from insomnia. This doctor prescribed vitamins, a balanced diet, exercise, and distraction from himself. This doctor further found a severe advanced neuritis, probably traumatic in origin, which, from the history of the case given to him by our hypothetical man, he attributed to the leg injury of 1928.

"Following this episode our subject did not indulge in the use of intoxicating liquors to any extent or at all until the summer of 1940. He and his wife had established their residence at the Partridge

Street address in the fall of 1939. His periods of moodiness and depression increased. He complained to his wife of headache and a pain in his leg and back. He tried to work in his yard but declared that his aches and pains would not permit it. During the year 1940 our subject was unable to have any sexual relations with his wife. Sometime in the early part of this year he became impotent.

"From September 16, 1940, until the time of his death, he worked on the telephone and at the desk for an investigating unit of the Police Department, charged with the duty of investigating felony, traffic cases, accidents, etc. From October 16, 1940, on, to the date of his death, he came under the observation of a detective lieutenant of police who had known him casually some four or five years before. As observed by this man, our subject appeared to be often in a state of melancholy—he was morose, absent-minded and gloomy. There was some inability to concentrate on his duty. He stated, in answer to inquiries as to his health, that he was 'as well as could be expected.' Upon another occasion and shortly before his death, he stated that he sometimes felt as if he could not go on—he did not know whether he would make it or not.

"Beginning some time in the summer of 1940 our subject again began to drink. He would consume as much as a pint of whiskey in 24 hours. On six occasions, from the summer of 1940 until the date of his death, his wife states that he was intoxicated to the point where he lay down and went to sleep. To her he stated that the drinking was to alleviate his pain and suffering.

"During the last six months of his life he at times spoke to his wife of his father owning and operating a very large ranch some place in Montana. This was not the fact. He spoke to her about a big political job he was going to get in Sacramento that would pay \$12,000.00 a year. He spoke to her of the Mayor of the City of Los Angeles wanting 'to get' his job. During this period he would tell his wife and friends glowing accounts of his fighting with the Marines in France during the last war. The telling of these tales was not confined to the year 1940 but had begun some years prior thereto. While our subject had served in the Marines, he had not left the United States until the year 1921, when he served in China and the Philippines.

"There were a number of children living on the street and he was fond of them. He watched them at their play and was on the best of terms with them. They would play in and about his house. On occasion, however, he complained to his wife of their noise and it was necessary for her to send them away.

"On Christmas day, 1940, our subject and his wife went out for dinner at the home of friends. After the meal and in the late afternoon for no apparent reason he became nervous and demanded that she take him home. She did so and suggested calling a doctor for him. He declared he wanted no doctors near him.

"On the 28th day of December our subject was at home. He did not go to his work on that day. About 4:00 in the afternoon he came in, having been out for several hours, and his wife noticed that he had been drinking but was not intoxicated. She went across the street to a neighbor's house that evening, and sometime between 9 and 11 o'clock noticed that his automobile was gone—he had driven away. She did not return to her home that night but stayed at the neighbor's. She did not see him again until about 10:30 on the morning of December 29th.

"On the night of December 28-29, 1940, we know nothing of the movements or conduct of our hypothetical man until 3:00 a.m., of the morning of the 29th, at which time his automobile, which he was driving, collided with another automobile about five or six blocks away from his home. As a result of this accident our subject received a deep abrasion and contusion, mid frontal, 1½ inches, as noted on the record by the doctor on the Receiving Hospital ambulance which went to the scene of the accident. Our subject was treated at the scene for this head injury and taken directly to his home. At the time of this accident our subject was intoxicated.

"At 10:30 in the morning our subject's wife, upon returning home, saw her husband coming from the bedroom. She asked him where he had been and what happened. He stated that he did not know—he could not remember where he had been or what he had done since leaving home the preceding evening. Inquiry on her part by telephone at his suggestion revealed that he had been in an automobile accident—that no other person was injured, and that his car was wrecked. He remained at home that day. In the after-

noon the wife went out to look for a house into which they might move. His regular tour of duty that day would have been from 4:00 p.m. to midnight. When his wife returned to the house about 6:00 p.m. she found him in bed. He got up sometime later and she fixed him something to eat. He was intoxicated but promised to sober up. Sometime later and following a quarrel between them, she took some quilts and went outside the house. He ordered her back into the house. She told him that she could not stand his drinking and he continued abusing her. At about 11:00 p.m. she again went out of the house with her quilts. Shortly thereafter she heard a shot. The police were called and it was discovered that he had taken a 44-caliber, frontier-model revolver (a gun owned by his father), and, holding it in his right hand, had placed it to his right temple, and steadying the barrel with his left hand and pulled the trigger."

Dr. H. Victor Parkin, testifying for petitioner, expressed the belief that there was a causal connection between the injuries received by deceased in November 1928 and his unsoundness of mind. In substance, he attributed his mental state primarily to a reaction to his crippled condition and the subsequent aggravations thereof, "*although there are some evidences of a manic-depressive state*, because he had an elated condition for a while. The consistent thing is the depressive state and it apparently grew out of his brooding over the fact that he was not the man he used to be by reason of his injury."

Dr. Eaton, on behalf of respondents, testified that he believed decedent suffered from manic depression; that he shot himself because of his mental illness and because of the amount of alcohol he had consumed and the accident he had on the early morning of December 29, but that the accidents and injuries in his police work did not cause the mental illness which resulted in suicide; that any experience the man went through would have an effect on his whole life, his make-up and emotions; that one could not separate any man from his life experiences; they are all part of his life. In answer to the question, "Are you able to separate the experiences he had as a motorcycle officer, suffering accident to his right leg, from his other experiences?" the answer was, "Those are all part of his life experiences as given in the history." In

answer to the question, "Well, a person who has the constitutional make-up that this hypothetical man had, would he be more likely to be affected by the injuries that this question shows he did have than if he had not had the injuries?" he replied, "I think a manic depressive make-up predisposes an individual to the development of manic depressive insanity; because of that constitutional make-up their resistance to any type of trauma I believe is less than in the normal individual who has not that make-up." To the question, "* * * the man with the constitutional make-up that this man had, had a lower resistance to any type of trauma than if he had not had that make-up, that is correct, is it not" he answered, "I think so."

Dr. A. V. Gerty, the psychiatrist appointed by the court, testified that in his opinion the patient was mentally unsound; that the injury and mental conditions were only incidental to and not the cause of the suicide; that the actual difficulty was the result of too much alcohol. He further testified on cross-examination as follows:

"A. I do not believe that I can change my opinion as to the amount of drinking, the amount of damage drinking did to his brain at the time of his death.

"Q. Well, the fact that he had not had a drink for a year, has that fact any effect on your opinion? A. I am sorry to say, but I cannot quite, even though the evidence may be that way, and put in the paper that way, I cannot quite subscribe to it myself.

"Q. Well, you do not believe that he went without a drink for a year, do you, Doctor? A. No, I don't.

"Q. That is all I wanted to know, that is what the evidence shows though. A. I just say that we do not get patients into this condition, through that way of drinking.

"Q. Well, what I am getting at is, Doctor, you do not believe that statement that he went a year without a drink? A. I cannot very well believe that, because of my experience with alcoholic patients."

It is conceded by appellant that the findings of the trial court, if supported by substantial evidence, may not be set aside, but it is urged that the testimony of Dr. Eaton and Dr. Gerty created no substantial conflict with the testimony of appellant's witness, Dr. Parkin, for the reason

that Dr. Eaton based his testimony not only upon the hypothetical question but also upon the pension file, which was not before the court, and Dr. Gerty, in addition to the hypothetical question, considered the hospital and nurse's and doctor's records, and moreover, because of his prejudice against alcohol, did not believe the facts as stated in the hypothetical question.

[2] Appellant's contention that Dr. Eaton's testimony was based in part upon certain pension files which were not before the court cannot be sustained, because the record shows that the doctor's reference to the pension files was in connection with an opinion he had rendered to the Department of Pensions and that in giving his testimony before the court he, as he said, "tried to make my answers here on the basis of the hypothetical question only" and the hospital records.

[3] Appellant's attack upon the testimony of Dr. Gerty is equally devoid of merit, because while the witness stated that he was reluctant to believe that Officer Platt did not take any intoxicating liquor for one year during the period involved in the hypothetical question, nevertheless, in reading his testimony it is at once apparent that he based his conclusions as to the cause of Officer Platt's self-destruction upon the history and facts contained in the question as propounded.

The testimony of Drs. Eaton and Gerty was that the primary and efficient cause of Officer Platt's committing suicide was the excessive use of alcohol; that his mental derangement, as the result of which he took his own life, was occasioned by over-indulgence in alcoholic liquors. Dr. Gerty, in answer to a question, "And what connection if any did you find between that condition of mind and the injuries that he had suffered while in the discharge of his duties?" testified, "I think the injury and the mental condition was only incidental to, in other words, it was not the actual cause of his suicidal attempt." In answer to the question, "What do you consider the actual cause?" the witness stated, "I think the actual difficulty was the result of too much alcohol." Dr. Gerty traced Officer Platt's addiction through a period of years, showing the consumption thereof in increasing quantities, and that approximately four years after his discharge from the hospital Officer Platt "would sometimes consume a pint of whiskey in the course of an eve-

ning's visit." With reference to the fact that the decedent drank more heavily after the accident than before, Dr. Gerty testified:

"Q. Now, maybe I have asked you this question before, do you attach any importance to the fact that he drank more heavily after the accident than he did before? A. I think it is progressive, I think the alcohol is one of those things we usually find is progressive, drink a little more and a little more, and it makes bigger inroads and first thing we know, he is in the situation that he was in 1940."

The witness did not attribute any part of Officer Platt's drinking to the accident, and was of the opinion that the accident did not cause him to do the drinking he did. The doctor also gave it as his opinion that if Officer Platt had never had the accident in question, he would nevertheless, according to the facts contained in the hypothetical question, have committed suicide because of the alcoholic psychosis with which he was afflicted.

[4-8] While it is true there was other expert and nonexpert testimony which would justify the inference and conclusion that there was a causal connection between the immediate cause of decedent's death and the accident he suffered in line of duty in the police department, the rule is so firmly established as to require no citation of authority that the findings of fact of a trial court will not be disturbed on appeal because of a conflict in the evidence. And this is true even though the appellate tribunal might feel that it would have found the facts differently were it the trier thereof. When it is required by law that proof of a fact or facts must be clear and convincing to support a given finding, the sufficiency of the evidence to support the questioned finding is primarily a question for the determination of the trial court. As was said by this court in *Cordell v. City of Los Angeles*, supra, 67 Cal.App.2d at page 266, 154 P.2d at page 36, "If there be substantial evidence to support such conclusion, the determination is not open to review on appeal. It being the function of the trial court to determine what facts are established by the evidence, before its conclusion can be set aside upon the ground of 'insufficiency of the evidence' there must be a clear showing that upon no hypothesis whatever is there sufficient substantial evidence to support the decision reached in the court be-

low. We must also assume in favor of the judgment the existence of every fact which could reasonably have been deduced from the evidence. Only when we can conclude that such facts are insufficient to support the judgment rendered may we interfere, because, in such a situation the question becomes one of law." By reason of the foregoing rules and the evidence herein narrated, it must be held that a reversal of the judgment in the instant case is not warranted upon the ground of insufficiency of the evidence to support the judgment rendered, because the court was fully warranted in accepting the opinions of the two psychiatrists who testified against appellant's contentions as the more reasonable.

Finally, appellant urges that the judgment is predicated upon a narrow interpretation of the applicable provisions of the city charter and is against the weight of authority which holds that pension provisions should be given a broad and liberal construction, to the end that the humane purposes of such enactments may be realized and fulfilled. We are not unmindful of the rule contended for by appellant, and we recognize that pension provisions in our law are founded upon sound public policy and with the object of protecting, in a proper case, the pensioner and his dependents against economic insecurity; and that such legislation should be interpreted fairly and broadly to the end that the intended benefits be conferred. But the right to a pension is not indefeasible, and where, as here, the finding of the trial court that decedent was mentally unbalanced at the time of his demise; that his suicide was the result of his unbalanced mental condition; "but that said mental condition was not the result of, nor was it caused by, any or all of the injuries received by the said Richard T. Platt while engaged in the discharge of his duties as a member of the Police Department of the City of Los Angeles," finds substantial support in the evidence, it must be held on appeal that there was no causal connection between the injuries sustained by the decedent in line of duty as a police officer, his unsoundness of mind and resultant self-destruction.

The cases cited by appellant in support of her contention that the judgment is "against the weight of authority and is based upon an erroneous and narrow interpretation of the City Charter" are readily distinguishable from the case at bar. In

Faber v. Board of Pension Commissioners, 56 Cal.App.2d 825, 133 P.2d 404, the deceased was struck on the head with a bottle, and his mental deterioration commenced almost immediately, while no facts were established and no medical theory was advanced in an attempt to attribute the mental derangement to a cause other than the head injury. In the case with which we are here concerned, while the self-inflicted fatal wound was the result of decedent's unsoundness of mind, there was substantial evidence that his mental derangement was not in turn caused by the injuries received in line of duty as a police officer.

In *Bradley v. City of Los Angeles*, 55 Cal.App.2d 592, 131 P.2d 391, the policeman was bitten by a mad dog. It was conceded that he had a pre-existing liver condition. The trial court found, upon competent and substantial evidence, that the dog bite, followed by the Pasteur treatment for it, so accelerated and aggravated the pre-existing disease that it ultimately and in direct sequence caused his death by suicide while of unsound mind.

The case of *Buckley v. Roche*, 214 Cal. 241, 4 P.2d 929, in the main merely announces the rule followed in the *Bradley* case, *supra*, with respect to the acceleration or aggravation of a pre-existing condition. In the *Buckley* case, which was tried upon a stipulation of facts, the trial court held, and the supreme court affirmed the holding, that while the decedent was afflicted with a pre-existing heart ailment, it was the exertion incident to his climbing a spiral stairway in the Hall of Justice where his service was performed that produced the fatal heart spasm, and that his death therefore was due to an injury sustained by him while in the performance of his duties.

In the case of *Casserly City of Oakland*, 215 Cal. 600, 12 P.2d 425, the court reaffirms the long recognized and established doctrine to which we have herein referred that pension legislation should be applied fairly and broadly with a view to conferring the benefits intended. But in the cited case the evidence clearly and without contradiction showed that the decedent, who was a member of the Oakland City Fire Department, contracted bronchopneumonia as the direct result of a fire drill participated in by him under orders of his superior officers on November 6, 1930, from the effects of which disease

his death occurred on December 21 following. The sole question presented was whether a fireman who contracts a disease in the performance of his duty and whose death occurs shortly thereafter as a direct result thereof is "killed while in the performance of his duty" within the meaning of the Charter of the City of Oakland.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.



73 Cal.App.2d 44

PEOPLE v. STEWART.

Cr. 1942.

District Court of Appeal, Third District,
California.

Feb. 11, 1946.

1. Criminal law ⚖️1144(14)

Appellate court will assume that an instruction given by court was proposed by defendant in absence of showing that it was not proposed by him.

2. Criminal law ⚖️824(10)

Failure of court on its own motion to include in instruction on the credibility of witnesses instruction that presumption that witness speaks the truth may be repelled by evidence of previous conviction of a felony was not error, where instruction stated that presumption may be repelled by evidence affecting witness' character for integrity and it was shown that witness for state was presently in the penitentiary and had served two previous terms of imprisonment.

3. Larceny ⚖️65

Conflicting evidence sustained conviction of grand theft.

4. Criminal law ⚖️1186(4)

Where evidence other than testimony of a witness who had previously been convicted of felony was ample to sustain conviction, any error in failing to instruct jury that presumption that witness speaks the truth may be repelled by evidence of previous conviction of felony did not result

in a miscarriage of justice. Const. art. 6, § 4½.

5. Criminal law ⚖️736(2)

Conflicting evidence as to whether confession made to sheriff was voluntarily made or induced by promise of immunity was for jury.

6. Criminal law ⚖️531(3)

Jury's implied finding that confession was voluntary was supported by evidence

7. Criminal law ⚖️808½

Instruction on the presumption of innocence and reasonable doubt in exact language of statute was not erroneous. Pen. Code, § 1096.

8. Criminal law ⚖️780(3)

Instruction on necessity for corroboration of testimony of an accomplice was not erroneous.

9. Criminal law ⚖️829(10)

Refusing instruction on the necessity for corroboration of the testimony of accomplice was not error where subject matter was covered by other instructions.

Appeal from Superior Court, Lassen County; Ben V. Curler, Judge.

Glenn Stewart was convicted of grand theft, and from the judgment and an order denying his motion for new trial, he appeals.

The judgment and the order affirmed.

James A. Nutting, of Susanville, for appellant.

Robert W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Defendant, who was convicted of grand theft, appeals from the judgment and the order denying his motion for a new trial, the principal if not the only ground urged for reversal being that the trial court's instructions to the jury were insufficient.

The property which defendant was charged with stealing consisted of articles of jewelry which were extracted from the show window of a jewelry store, through a hole which had been made in the plate glass window of the store. The stolen property was found in the possession of defendant's

mother, who turned it over to the sheriff after the arrest of her son. The principal witness against defendant was one Waters, who testified that he was an inmate of San Quentin prison, having been convicted of burglary in Susanville, with two prior convictions of felony. Waters stated that at the time of the theft of the jewelry in question he was employed in Susanville; that he knew defendant and was with him on the evening of the theft; that about 11 o'clock he and Stewart walked past the jewelry store and saw the jewelry in the show window and also observed that a piece had been cut out of one corner of the window; that defendant enlarged this hole and then, by means of a hooked wire, extracted the jewelry, defendant and Waters each taking a part of it; that Stewart took three ladies' wrist watches, a wedding set, two men's rings and one man's wrist watch. The sheriff of Lassen County, also produced as a prosecution witness, testified that after loss of the jewelry was reported to him by the owner of the store, who gave him a list of the missing articles, he questioned Stewart, who then admitted that he and Waters had taken same from the store window and that they had each received a part of it; that defendant gave the witness a list of the things he had received and offered to recover them, stating that they were in the possession of his mother; that he and defendant then contacted the mother, who later produced the articles which defendant admitted he had received, stating that her son had given them to her.

Called for the defense, Mrs. Stewart admitted possession of the stolen articles, but stated that she had found them hidden in the torn cushion of a car which Waters had offered to sell to her son; that she had shown the jewelry to her son after she found it; that it had been in her possession several months, but she had not made any report to the sheriff.

Stewart himself testified that he had a conversation with the sheriff about the robbery, at which time the latter stated that he had a signed confession from Waters and then showed him a wrist watch and ring that he (Stewart) had seen in the possession of Waters and his girl; that the sheriff told him then that if he wanted to help recover "the stuff," he, himself, would not swear out a warrant, and he was almost certain that the owner would not; that he had then agreed to help, and they went to

his home, but not finding his mother there, sought and found her; that he told his mother, in the sheriff's presence, that the latter had said that he would not swear out a warrant if defendant would help get the stuff back, and that he was almost certain that the owner would not either; that he did not then know where the jewelry was. He denied having taken the jewelry from the store, or that he had ever told the sheriff that he had done so. He admitted that he was with Waters the night of the theft but denied they stopped at the store. He stated he first learned of his mother's possession of the articles about three weeks after the robbery and saw them in their home at that time. He admitted that he had written out a list of the missing articles and given same to the sheriff, but claimed that he had copied the list from one in the sheriff's possession, and had not made it from memory.

At the conclusion of the trial the court gave the following instruction of which appellant complains: "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility."

[1] Appellant's objection to the instruction is not that it is incorrect as far as it goes, but he urges that it should have been supplemented by a statement that the presumption that a witness speaks the truth may be repelled by evidence that he has been convicted of a felony; and that because of a lack of such an instruction the jury were not given the correct scales to weigh the testimony of Waters or to test its weight when contradicted by the testimony of Mrs. Stewart; and that defendant was therefore prevented from having a fair trial. At whose request said instruction No. 5 was given does not appear, and it has been held in numerous cases that in the absence of a showing that it was not proposed by a defendant an appellate court will assume that it was proposed by him. *People v. Cebulla*, 137 Cal. 314, 317, 70 P. 181; *People v. Mesa*, 121 Cal.App. 345, 347, 8 P.2d 920. It is not contended that appellant proposed any instruction covering the omitted language, and the only instruction which the record affirmatively shows was requested by defendant and not given was

one regarding the necessity for corroboration of the testimony of an accomplice.

Appellant cites no cases supporting his argument that the failure of the court, on its own initiative, to include in instruction No. 5 the language which he claims should have been included constitutes reversible error. He refers to *People v. Holt*, 25 Cal. 2d 59, 64, 153 P.2d 21. There the court quoted from 8 Cal.Jur. 309, to the effect that it is the duty of the court in criminal cases to give of its own motion instructions on the general principles of law pertinent to such cases, even when they are not proposed by the parties themselves, but that it is not its duty to give instructions upon specific points developed through the evidence unless such instructions are requested. It also quoted from *People v. Putnam*, 20 Cal.2d 885, 890, 129 P.2d 367, wherein it was said that a court is not relieved of the duty to give instructions whose necessity is developed through the evidence introduced at the trial, and that an instruction is necessary if it is vital to a proper consideration of the evidence by the jury. But in the *Holt* case, where an instruction on the right of one attacked to stand his ground and slay an adversary, if necessary, was requested, the court held, in effect, that under the circumstances of that case as developed by the evidence, the failure to so instruct was not prejudicial, as the instruction was not vital to the case, it appearing from the evidence that *Holt* had invited the encounter and that, as a reasonable man, he was not warranted in believing that he was in such imminent danger of great bodily injury as to justify the commission of homicide.

[2] So in the instant case we are of the opinion that the giving of an instruction that the credibility of a witness may be repelled by evidence that he has been convicted of a felony was not necessary or vital to a proper consideration of the evidence by the jury. Here the defense showed that *Waters* was presently in the penitentiary, and that he had served two prior terms of imprisonment. It was therefore apparent to the jury that he was not an admirable character, and it is safe to assume that, without being so instructed, they considered these facts in weighing his testimony, especially since the instruction stated that the presumption that a witness speaks the truth may be repelled by evidence affecting his "character for truth, honesty or integrity." It must have been obvious to

them that evidence of *Waters'* criminal record was shown for no other purpose than to discredit him as a witness.

[3, 4] Appellant here does not contend that the evidence is insufficient to justify the verdict. It was ample for that purpose. Defendant admitted that he was with *Waters* the evening of the robbery; the stolen articles were to his knowledge in the possession of his mother, who told the sheriff that her son had given them to her; defendant admitted the robbery to the sheriff, and both the sheriff and his deputy testified that defendant's confession was voluntary; also defendant was able to make a list of the stolen articles before they were produced by his mother. In view of these facts, even if it were held that the trial court erred in failing to instruct the jury in the respect of which complaint is made, it cannot be said that such error resulted in a miscarriage of justice. See Const. of California, Art. VI, § 4½; *People v. Kelso*, 25 Cal.2d 848, 155 P.2d 819, and cases therein cited at page 853.

[5, 6] Appellant also contends, though without apparent conviction, that the statements made by him to the sheriff were not voluntary, but were induced by a promise on the part of the sheriff that he would not, himself, swear out a warrant for defendant's arrest. Defendant's testimony in this respect was denied by the sheriff and his deputy, who testified that defendant was informed that any statement he made must be voluntary, and that no threats, force or promises of immunity were made to him. The conclusion of fact to be drawn as to whether the confession was voluntary was one for the jury, and it cannot be said that their implied finding that the confession was voluntary was without support in the evidence. *People v. Castello*, 194 Cal. 595, 599, 600, 229 P. 855.

[7, 8] Appellant also complains of the instruction given by the court on the presumption of innocence and reasonable doubt, and that given on the necessity for corroboration of the testimony of an accomplice. It is not pointed out in what respect, if any, these instructions are defective, and we find nothing in them to condemn. The former was in the exact language of section 1096 of the Penal Code. Also see *People v. Gray*, 52 Cal.App.2d 620, 657, 127 P.2d 72.

[9] Finally, appellant states that the trial court erred in failing to give an in-

struction proposed by defendant on the necessity for corroboration of the testimony of an accomplice. This instruction was refused for the assigned reason that the subject matter was "covered by other instructions." It apparently was so covered.

The judgment and the order denying a new trial are affirmed.

PEEK and THOMPSON, JJ., concur.



72 Cal.App.2d 726

JORDAN v. FRIEDMAN et al.

Civ. 15113.

District Court of Appeal, Second District,
Division 2, California.

Jan. 29, 1946.

Hearing Denied March 28, 1946.

1. Action ☞68

Contracts ☞290

Where contract provided that demand for arbitration should be filed in writing with architect within reasonable time after cause thereof and in no case later than time of final payment, general contractor who did not file demand for arbitration with architect, but who served demand on subcontractor approximately three months after time of final payment, waived right to arbitration and motion to stay subcontractor's action to foreclose mechanic's lien until arbitration had been had was properly denied. Code Civ.Proc. § 1284.

2. Contracts ☞290

Where a contract provides that a demand for arbitration must be filed within a stated time and party desiring arbitration permits the agreed time to pass without making demand, he waives his right to arbitration.

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action to foreclose a mechanic's lien by Scott S. Jordan, doing business under the name and style of Los Angeles Plastering Company, against Harry Friedman and others. From an order denying a motion for stay of proceeding until arbitration had

been had, Harry Friedman, doing business under the name and style of the Contracting Engineers Company, appeals.

Affirmed.

William Katz, of Los Angeles, for appellant.

A. V. Muller, of San Luis Obispo, for respondent.

WILSON, Justice.

Respondent is a plastering contractor and appellant is a general contractor. The latter had a contract to construct a theater building and entered into a subcontract with respondent for the plastering of the building. After the completion of the work respondent filed a mechanic's lien on the building and commenced an action to foreclose the same.

After filing his answer appellant moved for a stay of proceedings until arbitration had been had in accordance with the contract. The motion was denied and defendant appealed. The affidavit on which the motion was based set forth the arbitration clause of the general contract which was adopted by the subcontract, providing among other things as follows: "* * * All questions subject to arbitration under this Contract shall be submitted to arbitration at the choice of either party to the dispute. * * * The demand for arbitration shall be filed in writing with the Architect, * * * within a reasonable time after cause thereof and in no case later than the time of final payment except as otherwise expressly stipulated in the Contract. If the Architect fails to make a decision within a reasonable time, an appeal to arbitration may be taken as if his decision had been rendered against the party appealing." The affidavit alleged that during the construction of the building a number of differences and disputes arose between respondent and appellant concerning the work done, the materials furnished, and the rights and responsibilities of respondent under the contract; in August, 1942, appellant requested arbitration (he does not allege that the request was in writing) and on October 15, 1942, after the commencement of the action, he made written demand on respondent that the disputes be settled by arbitration and the latter refused to arbitrate. Respondent denied receiving any offer except the written demand of October 15, 1942. He alleged, and it is not denied, that notice of completion of the work was filed

June 8, 1942, and that under the terms of the contract he was entitled to his final payment 35 days thereafter.

[1, 2] Section 1284 of the Code of Civil Procedure provides that if the issue involved in a suit or proceeding is referable to arbitration by reason of an agreement between the parties, the court shall stay the action until arbitration has been had "provided, that the applicant for the stay is not in default in proceeding with such arbitration." Appellant is in default in two particulars: (1) He did not file a demand for arbitration in writing with the architect as required by the contract; (2) the demand served on respondent, on October 15, 1942, was of no avail since the contract did not provide for service on any person other than the architect. If such service had been permissible it was not served, as the contract provided, "within a reasonable time after cause" arose. It was served approximately three months after the last day allowed by the contract for the demand, to wit, "the time of final payment." Where a contract provides that a demand for arbitration must be filed within a stated time and the party desiring arbitration permits the agreed period to pass without making demand, he waives his right to arbitration. *Winchester v. North British, etc., Co.*, 160 Cal. 1, 6, 116 P. 63, 35 L.R.A.,N.S., 404; *Case v. Manufacturers' Fire & Marine Insurance Co.*, 82 Cal. 263, 268, 21 P. 843, 22 P. 1083.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.



72 Cal.App.2d 804

KROBITZSCH et al. v. MIDDLETON.
Civ. 12802.

District Court of Appeal, First District,
Division 2, California.

Feb. 1, 1946.

Hearing Denied April 1, 1946.

1. Contracts ⇨237(1)

A supplemental agreement adding to or varying the terms of original contract, so as to impose new and onerous burdens
165 P.2d—46½

upon one of the parties, must be supported by a consideration.

2. Contracts ⇨71(1)

Any suspension or forbearance of a legal right, though for one day only, constitutes a sufficient consideration to support a contract.

3. Vendor and purchaser ⇨82

Supplemental agreement of February 15, by which vendors having legal right under original contract to serve 60 days' notice and declare a forfeiture for payments then in default, granted extension of 60 days, from January 6, to make payments in default and by which purchaser agreed to pay taxes and other expenses which he was not obligated under original contract to pay, was supported by sufficient consideration.

4. Vendor and purchaser ⇨87

Where purchaser two months after institution of proceeding to condemn right of way for state highway across land and while \$5,000 in default, instead of attempting to rescind, entered into supplemental agreement for payment of expenses to be incurred in condemnation proceeding and for application of money received as damages or otherwise on purchase price, he could not contend that condemnation proceeding created such an encumbrance as placed vendors in default before forfeiture of purchaser's rights.

5. Damages ⇨85

Vendor and purchaser ⇨335

Vendor of land upon default by purchaser without valid excuse is entitled to retain money paid on purchase price regardless of whether contract so provides, and hence contracts were not rendered illegal by provision therein for retention of such payments as liquidated damages, though measure of damages was readily computable.

6. Vendor and purchaser ⇨87

Supplemental agreement entered into after vendors had accepted payments after they were due providing that time was of the essence and that waiver by vendors of breach of original or supplemental agreement should not be deemed a waiver of any subsequent breach, restored time essence clause of original contract.

7. Vendor and purchaser ⇨87

Supplemental agreement granting extension of 60 days for paying installments

then in default under contract to purchase land and providing that should purchaser fail to comply with any terms of supplemental agreement, the 60 days' notice of default provided for in original contract should become immediately operative to same extent as though personally served and received by purchaser, dispensed with the necessity of a further 60 day notice of default when purchaser failed to pay past-due installments within extension period.

8. Vendor and purchaser ⇨87

Acceptance by vendors of rent owed by third party for part of land under agreement with purchaser that acceptance of rent should not operate to waive any breach by purchaser of contract to purchase land on installments or supplemental agreement granting extension of time for paying past-due installments, did not operate as a waiver of defaults or estop vendors from thereafter declaring a forfeiture of purchaser's rights for failure to pay installments.

9. Appeal and error ⇨999(1), 1008(1)

Waiver and estoppel are questions for the jury or trial court, unless but one inference can be drawn from the evidence.

10. Vendor and purchaser ⇨104

Purchaser had the burden of proving transaction on which he sought to predicate a waiver of default by such evidence as did not leave the matter doubtful.

11. Vendor and purchaser ⇨104

Purchaser failed to show that circumstances under which without vendors' knowledge purchaser paid premium for insurance policy delivered to vendor were such that a waiver of purchaser's prior default in payment of installments under contract to purchase land could be predicated thereon.

12. Vendor and purchaser ⇨95(2)

Vendor's participation in discussions at public meetings of interested property owners concerning water rights and question of a highway crossing a lagoon on the land by a fill instead of by a span was as compatible with a forfeiture of purchaser's rights for previous default in payment of installments under contract to purchase land as with a continuance of the contract and was not shown to constitute a waiver of such default or an estoppel against vendor to declare a forfeiture of purchaser's rights under contract.

13. Appeal and error ⇨172(1)

Purchaser's contention raised for first time on appeal that vendors by declaring a forfeiture of purchaser's rights under contract to purchase land repudiated contract and must return all moneys paid by purchaser under contract could not be considered where it was inconsistent with theory reflected in the pleadings on which suit was tried.

14. Vendor and purchaser ⇨97

An accounting to purchaser was not a prerequisite to putting him in default by vendor where neither original contract to purchase land nor supplemental agreements obligated vendors to make any accounting.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Suit by Lillian A. Krobitzsch and others against George E. Middleton, to quiet title to realty, wherein defendant filed a cross-complaint. From a decree quieting title in plaintiffs, defendant appeals.

Decree affirmed.

Keyes & Erskine and A. P. Black, all of San Francisco, and Edwin H. Williams, of San Jose, for appellant.

Elliott M. Epstein and Boynton & Boynton, all of San Francisco, for respondents.

GOODELL, Justice.

Plaintiffs sued to quiet title to a piece of property in San Gregorio, San Mateo County, consisting of about 318 acres, known as the "K Beach" or "Driver" Ranch. It is bounded on the west by the ocean, on the east by the county highway, and is traversed throughout its entire length, a distance of about one mile, by the right of way of the former Ocean Shore Railroad. Prior to the construction in 1940 of the Ocean Shore Boulevard across the property, access to the ocean beach and the San Gregorio Lagoon, a picnicing and recreation area, was by means of a private toll road extending through the property from the county highway.

On June 6, 1937, by a contract in writing acknowledging receipt of a \$500 down payment, R. W. Krobitzsch, since deceased, and his wife, Lillian A. Krobitzsch, gave George E. Middleton, the appellant herein, an option to purchase the property for \$50,000, payable as follows: "The further sum of \$4500 on or before July 6, 1937, and \$2500 every six months thereafter until the full

purchase price is paid, together with interest at the rate of six per cent per annum on the unpaid balance." Time was declared to be of the essence.

The appellant paid several installments, the last one on April 5, 1939 in the sum of \$1,733.12. He also paid certain taxes, and certain premiums on fire insurance policies covering buildings on the property. The respondents concede that the various payments made by the appellant plus the money retained by them come to \$19,525.

On August 4, 1941 the appellant wrote to one of the attorneys for the Krobitzschs, asking for an itemized statement of rents paid to the Krobitzschs by tenants and for a statement of what was claimed to be still due from appellant. The next day the Krobitzschs wrote him declaring the contract null and void and stating that all his rights thereunder were terminated. Almost a year later, on July 14, 1942, this suit was filed. The appellant filed an answer and cross-complaint wherein he alleged, *inter alia*, that he was the owner of equitable title to the property. He pleaded that the sixty-day notice (required by paragraph 9 of the agreement) had not been given; that \$17,082.25 had been paid by him, and that no accounting of other sums had been rendered to him. He claimed that for these and other reasons he was not in default. The appellant's prayer was that the court should "find and determine that said agreement dated June 6th, 1937, is in full force and effect", and for general relief. The court made findings in favor of the plaintiffs and entered a decree quieting their title.

Several contentions in this case revolve around paragraph 9 of the agreement which reads as follows: "9. In the event of default of any of the payments due hereunder on the dates and in the manner herein provided for, first parties may at their option declare this agreement null and void and of no effect, and shall keep and retain as rental, depreciation and liquidated damages, any and all monies paid under the terms hereof, and provided further first parties shall have no right or claim against second party, except to the retention of such monies so paid, and to declare this agreement null and void as aforesaid. Sixty days notice of any such default shall be given to second party by registered mail at the address given below or any change thereof sent to first parties by registered mail."

The cross-complaint characterizes the writing of June 6, 1937 as a contract of sale. The answer thereto denies this and alleges that it is an option. This the court found it to be. The provision that the second party shall have "the exclusive right and option to purchase on or before July 6, 1937" seems to have been designed to fix the time for the exercise of the option. The \$4,500 payment called for on that date was a sizable one, and it is difficult to see why the words "to purchase on or before July 6, 1937" were used had it not been the intention that such payment then made would bring into existence a binding bilateral contract. See *Menzel v. Primm*, 6 Cal.App. 204, 209, 91 P. 754; *Howard v. D. W. Hobson Co.*, 38 Cal.App. 445, 458, 176 P. 715; *Smith v. Bangham*, 156 Cal. 359, 363, 104 P. 689, 28 L.R.A., N.S., 522; *In re Estate of Fulmer*, 203 Cal. 693, 696, 265 P. 920, 58 A.L.R. 430; 25 Cal.Jur. p. 525, sec. 51.

However, as this is a suit to quiet title it is not necessary to decide herein whether, as held by the trial court, the writing of June 6, 1937, remained a mere option or whether, on July 6, 1937, when the \$4,500 was paid it became a binding contract of purchase and sale.

Two later agreements were made, the first on February 15, 1940, the second on June 4, 1940. In the cross-complaint (in which they are set out) the appellant alleges that both are void for lack of consideration. Appellant's second point on appeal attacks the agreement of February 15, 1940, on that ground. The importance of this point will appear later on, particularly when we discuss in detail the provisions of paragraph 9 of the original agreement.

[1] It is of course true, as held in *Main Street, etc., R. Co. v. Los Angeles Traction Co.*, 129 Cal. 301, 61 P. 937, and in *Anderson v. Adler*, 42 Cal.App. 776, 184 P. 42, cited by appellant, that a supplemental agreement either adding to or varying the terms of the original contract, so as to impose new and onerous burdens upon one of the parties, requires a consideration to support it.

On February 15, 1940, \$5,000 was over-due, and the writing of that date opens by admitting it. It reads in part as follows:

"Under the option agreement of June 1937, Middleton is in default in payment due July 6, 1939; and further in default

of payment due January 6, 1940, plus interest. Under said agreement Krobitzsch has the right to serve notice of default and take advantage of the provisions of paragraph 9.

"In consideration of Krobitzsch's forbearance to serve such notice of default and take advantage of the forfeiture provisions of said paragraph 9, and at Middleton's instance and request, this agreement, termed 'Supplemental Agreement', is made. The consideration is Krobitzsch's forbearance to take advantage of said provisions of paragraph 9".

"On or before February 21, 1940, all current taxes and back taxes on the property * * * together with all penalties due to date, shall be paid by Middleton.

"On or before April 5, 1940, all taxes then due on said property shall be paid by Middleton at the place and places where due. * * *

"Upon payment by Middleton of all taxes and insurance as above provided on or before the dates particularly specified, then Middleton is granted an extension of 60 days from and after January 6, 1940, in which to make the payments now in default and due July 6, 1939, and January 6, 1940, respectively."

In addition to the foregoing promises appellant bound himself to do certain things and to pay certain expenses (discussed later) in connection with the taking by condemnation of part of the property.

By the original agreement he had not been obliged to pay any of the taxes mentioned in this supplemental agreement.

It is apparent from a reading of the promises of appellant and of the paragraph last quoted, that by this February 15, 1940 agreement, signed by R. W. and Lillian A. Krobitzsch as well as by Middleton, mutual promises were exchanged by the parties. Each side agreed to do, or not to do, something.

[2,3] The only case cited by the appellant on this point is *Strong v. Sheffield*, 144 N.Y. 392, 39 N.E. 330, 331, where a wife endorsed a demand note of her husband's upon this promise by the payee: "I will hold it until such time as I want my money * * *." The appellant argues that this case and other authorities (none of which, however, are cited) "clearly establish that where forbearance is given * * * the forbearance must be for a

considerable period of time, otherwise, it cannot be regarded as any consideration."

Strong v. Sheffield does not so hold and we are sure that no case so holding can be found. It is settled law in California that "Any suspension or forbearance of a legal right constitutes a sufficient consideration.

* * * Even though the forbearance is for one day only, there is a sufficient consideration as the law does not weigh the quantum." 19 Cal.Jur. p. 842, sec. 37; *Whelan v. Swain*, 132 Cal. 389, 64 P. 560; *Ramish, Inc., v. Woodruff*, 2 Cal.2d 190, 207, 40 P.2d 509, 96 A.L.R. 1146; *Bank of America v. Hollywood Imp. Co.*, 46 Cal. App.2d 817, 822, 117 P.2d 13. In *Strong v. Sheffield* the court said: "* * * there was no agreement to forbear for a fixed time, but an agreement to forbear for such time as the plaintiff should elect" and "It would have been no violation of the plaintiff's promise if, immediately on receiving the note, he had commenced suit upon it." The agreement of February 15, 1940 was supported by a sufficient consideration.

[4] One of the chief points relied on by appellant is that the eminent domain proceeding created an encumbrance which rendered the respondents "completely helpless and hopeless of conveying a perfect title" (*Prentice v. Erskine*, 164 Cal. 446, 449, 129 P. 585, 586,) and that the destruction of San Gregorio lagoon, the elimination of the toll road revenue and the taking by the state of the southern and "strategic" end of the railroad right of way did likewise, and greatly impaired the value of the property. He relies upon *Hunt v. Inner Harbor Land Co.*, 61 Cal.App. 271, 214 P. 998, and *Ogren v. Inner Harbor Land Co.*, 83 Cal.App. 197, 256 P. 607 (in both of which, after a contract of sale had been made, the land in question was condemned) also upon *Prentice v. Erskine*, 164 Cal. 446, 129 P. 585; *Conlin v. Osborn*, 161 Cal. 659, 120 P. 755, and *Koshland v. Spring*, 116 Cal. 689, 48 P. 58. The rule of these cases is thoroughly settled, but it can have no application here for the reasons, first, that the appellant made no attempt to rescind, but stood on his contract, and, second, he definitely and expressly accepted and acquiesced in the situation which arose from the condemnation proceeding with eyes open to all its consequences. The second reason probably explains the first. In other words, such acquiescence makes the appellant's failure to attempt to rescind understandable.

The appellant's acceptance of the situation presented by the condemnation suit, and his acquiescence therein, is manifested by the supplementary agreement of February 15, 1940, already discussed. On December 13, 1939, which was two and a half years after the original contract was made, the State of California filed an eminent domain proceeding to condemn the right of way for the Ocean Shore Boulevard through this property which ultimately took 27.54 acres. Two days later, on December 15, 1939, a writ of possession was issued. Exactly two months thereafter the agreement of February 15, 1940 was made, so it appears that everybody concerned then knew that the highway department was in possession. The agreement is illuminating on that point. It reads in part as follows: "Middleton approves and expressly consents to the granting by Krobitzsch to the State of California the right to use and pass over the toll road on the property described in the June 1937 agreement during the construction by the said State of a state highway." It further provides:

"It is understood that certain engineering expenses and costs of litigation, etc. may be incurred in the determination of the damage done to the property by reason of the state highway built across the same. Middleton agrees to personally pay all expenses incurred by reason thereof and in the event that Krobitzsch retakes the said property and cancels all agreements by virtue of any default of Middleton, then Middleton agrees to pay for all such legal, engineering and other expenses which may have been incurred to the time of said taking over, and to furnish to Krobitzsch a statement in writing from any engineers, attorneys or others, confirming that they will look to Middleton for any expenses or charges which may be incurred during such time as he may be acting under said agreement.

"All moneys received from the State of California, Joint Highway District or any County arising out of the road now or hereafter to be built, whether for damages or otherwise, shall be paid to Krobitzsch and applied on the last amounts due in point of time by Middleton under the original agreement, and governed in all other respects by the terms and conditions thereof."

This point was not pleaded or raised in the trial court. On February 15, 1940 when the agreement was made the condemnation suit had been pending for two

months, and possession of part of the property had been taken by the state. There was no attempt then, or at any later time, to rescind. The obligations assumed by the appellant by that agreement were utterly inconsistent with a rescission and those obligations were assumed right in the middle of an arrearage of \$5,000 and with eyes open to the possibility, expressed therein, that the Krobitzschs might retake the property and cancel "all agreements by virtue of any default of Middleton". Such acquiescence of the appellant certainly precludes him from now urging this point for the first time on appeal in a belated attempt to put the vendors in default.

Appellant presents the further point that the respondent "secured the signature of Middleton to the supplemental agreement of February 15, 1940, by leading him to believe that all installment payments could remain in abeyance until the termination of the highway litigation. * * *

The record contains no evidence whatever to support this contention.

We might add that it is difficult to see how this contention can be urged when the language of the agreement of February 15, 1940 itself shows it was made for the purpose of thereby granting the appellant "an extension of 60 days from and after January 6, 1940, in which to make the payments now in default and due July 6, 1939, and January 6, 1940, respectively."

The appellant contends that "The entire purchasing agreement is illegal for the reason that it provides for liquidated damages in a case where the measure of damage is readily computable." This attack is directed to the provision that in case of default the sellers "shall keep and retain as rental, depreciation and liquidated damages, any and all monies paid under the terms hereof * * *."

[5] A complete answer to this contention is found in *Glock v. Howard, etc., Co.*, 123 Cal. 1, at pages 11, 12, 55 P. 713, at page 716, 43 L.R.A. 199, 69 Am.St.Rep. 17, wherein the court says: "When an equitable showing is not made to excuse the breach, the vendor has the right in equity, as he always has at law, to retain the moneys paid by the vendee. Therefore we have said that it matters not in such contracts that the parties have declared that the vendor may retain the moneys paid as stipulated damages. The name which the parties thus give does not alter the fact nor

change the vendor's rights. If it be said that the clause for stipulated damages is void, still the vendor is entitled to retain the money." Expression is given to the same thought in the concurring opinion in 123 Cal. at pages 20, 21, 55 P. at page 720, 43 L.R.A. 199, 69 Am.St.Rep. 17. Interesting comments on the Glock case are found in *Martinelli v. Hogrefe*, 123 Cal.App. 438, 11 P.2d 412; *Sawyer v. Sterling Realty Co.*, 41 Cal.App.2d 715, 107 P.2d 449; and *Kelso v. Ulrich*, 67 Cal.App.2d 698, 155 P.2d 407. See, also, 25 Cal.Jur. 790.

In support of this contention the appellant cites numerous cases. With one exception, none of them involves an attempt by a vendee to recover payments made on the purchase price of real property and none of them asserts principals contrary to the doctrine of *Glock v. Howard, etc., Co.*, supra. They involve suits upon bonds conditioned upon performance of leases and other contracts by third parties (*Weinreich Estate Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 P. 667; *Stephens v. Daugherty*, 33 Cal.App. 733, 166 P. 375; *Los Angeles, etc., Association v. Pacific Surety Co.*, 24 Cal.App. 95, 140 P. 295); deposits to insure performance of executory contracts (*McInerney v. Mack*, 34 Cal.App. 153, 166 P. 867; *Green v. Frahm*, 176 Cal. 259, 168 P. 114; *Thomas v. Anthony*, 30 Cal.App. 217, 157 P. 823); liquidated damages in an agreement for the sale of personal property (*Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 P. 36, 25 Am.St.Rep. 102); provisions for the deduction of a certain sum as liquidated damages for each day's failure of performance of a contract. *Consolidated Lumber Co. v. Los Angeles*, 33 Cal.App. 698, 166 P. 385; *Long Beach, etc., District v. Dodge*, 135 Cal. 401, 67 P. 499; *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 P. 890. The exception referred to, *Phelps v. Brown*, 95 Cal. 572, 30 P. 774, wherein the vendee was allowed to recover a deposit or initial payment on the purchase price, was expressly distinguished in the *Glock* case, 123 Cal. 14, 55 P. 717, 43 L.R.A. 199, 69 Am.St.Rep. 17, on the ground that it "affords a typical instance" of rescission by the vendor.

The eighth point made by the appellant is that "Krobitzsch having continually waived the time essence clause it was thereafter impossible for him to give Middleton a valid sixty day notice of forfeiture until he had first re-instated the 'time essence' clause."

[6,7] That the respondents accepted payments after they were due is certainly true, but all such payments were made prior to February 15, 1940. The last payment purporting to be on account of an installment was of \$1,733.12 made on April 5, 1939, which apparently completed, three months late, the payment due on January 6, 1939. Thereafter, on July 6, 1939, another installment of \$2,500 fell due, and thereafter, on January 6, 1940 still another, of \$2,500. The agreement of February 15, 1940 after admitting these two defaults further admits that "Under said agreement [of June 6, 1937] Krobitzsch has the right to serve notice of default and take advantage of the provisions of paragraph 9". The agreement of February 15, 1940, served effectively to restore the time clause of the original agreement (25 Cal.Jur. p. 618), and therein the parties fixed their own time for the appellant's re-instatement at 60 days from January 6, 1940, which was the period of the extension. The appellant could re-instate himself only by paying the two defaulted installments within that time. The 60 days from January 6, 1940 were by that agreement being given to the vendee to clean up his defaults, and the parties therein dispensed with the necessity of a further 60 day notice (under paragraph 9) in case the vendee did *not* clean up his defaults, by the provisions which the appellant attacks as "ambiguous, obscure, contradictory and uncertain".

After the provisions whereby the appellant agreed to pay certain taxes and those whereby the Krobitzschs granted appellant the extension "in which to make the payments now in default and due July 6, 1939, and January 6, 1940 respectively", the agreement of February 15 reads:

"The waiver by Krobitzsch of any breach of any term, covenant or condition herein contained or of the original agreement of June 1937, shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant or condition in either of said agreements contained.

"Time is of the essence hereof and if Middleton, for any reason, fails to comply with any of the terms, or conditions in this Supplemental Agreement contained, then it is expressly agreed between the parties that the notice of default provided in paragraph 9 of said June 1937 agreement becomes immediately operative in the same manner and to the same extent as though

the same were personally served and received by said Middleton. [Emphasis added.]

"If Middleton fully and faithfully complies with all the terms and conditions hereof and on the precise dates herein agreed upon, then he shall be relieved of the automatic notice of default provision herein provided for."

The language of the agreement discloses the clear intent that the appellant be obligated to pay the two overdue installments within the extension period. The object and purpose of the appellant in entering into the agreement was to halt the service on him at that time of the sixty-day notice then threatened. The opening paragraphs already quoted show this. The primary purpose, then, of the agreement was to grant the sixty-day extension from the last installment date (January 6, 1940) for the payment of the two installments, and if it were not the intent to bind appellant to make those payments within that time the execution of the agreement would have been meaningless. Neither of the two defaulted payments was made within the 60 day extension period (nor since) and under the plain meaning of the agreement the "automatic notice of default" came into play, and the 60 day provision of paragraph 9 became superseded.

We see nothing ambiguous or obscure about the language.

What has just been said also answers appellant's (seventh) point that no sixty-day notice was ever served. Under the circumstances just related it did not have to be.

It cannot be claimed that after February 15, 1940 any *installment* payment was accepted for certainly none was tendered. On August 5, 1941, when the letter was sent to appellant, five semi-annual installments were overdue, aggregating \$12,500, which included the two installments for the payment of which the extension was granted.

The appellant paid certain taxes and penalties on or before February 21, 1940, and certain other taxes on or before April 5, 1940. Such payments however cannot be treated as belated acceptances of overdue obligations, for he was not obligated before February 15, 1940 to pay them, and his agreement then to pay them was part of a fresh consideration for the extension which he then sought and got.

[8] This brings us to the \$650 payment. One Quilici owed \$650 as rental for part of the ranch. On June 4, 1940 the second supplemental agreement was made wherein it was agreed that the Krobitzschs "may collect and receipt for the rentals aforesaid; and that the acceptance thereof shall not operate nor be deemed to waive any breach of any covenant or covenants by said second party [Middleton] to be done or performed in any of his agreements relating to the aforesaid property and in particular, that Supplemental Agreement between the same parties hereto dated February 15, 1940; nor shall the same operate nor be deemed nor considered as a release, estoppel nor waive any default or defaults on the part of the second party, * * *." The language just quoted in our opinion adequately safeguarded this payment from any claim that the acceptance of it created a waiver or estoppel.

[9] The allegations of waiver and estoppel in the appellant's cross-complaint were denied, and the court by its findings negated these claims of waiver. "Unless but one inference can be drawn from the evidence, waiver and estoppel are questions for the jury or the trial court." *Lowe v. Copeland*, 125 Cal.App. 315, 322, 13 P.2d 522, 525, citing 27 R.C.L., Waiver, p. 912; *Kerr v. Reed*, 187 Cal. 409, 202 P. 142; *Parke v. Franciscus*, 194 Cal. 284, 228 P. 435.

The appellant paid an insurance premium of \$73.50 on December 14, 1940, respecting which the record shows the following:

"Q. Did they [conversations] extend as long as the time when you got the insurance policy in 1940 * * * on which you paid \$73.50 premium? A. No, they didn't go up to that time. I didn't hear from Mr. Krobitzsch so I went ahead and paid the insurance premiums. I didn't hear anything from him."

Again, referring to the payment of the \$73.50:

"Q. Was that done with the knowledge and consent of Mr. Krobitzsch? A. No.

"Q. The insurance policy was issued in your joint name? A. Yes, with the consent of Mr. Krobitzsch.

"Q. And the policy was delivered to Krobitzsch? A. Yes.

"Q. So he actually had possession of it and accepted the policy? A. Yes.

"Q. That was on December 14, 1940? A. Yes."

[10, 11] Nothing more than this appears in the record respecting the circumstances. It is clear that the policy was paid for by Middleton without Krobitzsch's knowledge. If the waiver of a default was to be predicated on this transaction it was incumbent on the appellant, who claimed the waiver, to prove it by such evidence as did not leave the matter doubtful or uncertain. 25 Cal.Jur. p. 932, sec. 7. The record does not show the circumstances surrounding the payment, and the trial judge was not convinced, for he found there was no waiver.

[12] The record shows that some question arose respecting water rights on the property, also as to the highway crossing the lagoon by a fill instead of by a span, and that there were conversations between Messrs. Krobitzsch and Middleton on both subjects. There is considerable argument in the appellant's briefs that such dealings and conversations showed a course of conduct inconsistent with a forfeiture. Counsel for respondents repeatedly and consistently pressed for the fixing of the dates and times of these discussions but without much success other than to finally develop that two public meetings of interested property owners were held, one on the water rights question, the other as to the crossing of the lagoon, both around May 20, 1940. Granting that there were such discussions, they were as compatible with a forfeiture of appellant's rights as with a continuance of the contract for in either case Krobitzsch was vitally concerned. Not only were the times not definitely fixed, but the testimony was so vague and indefinite that the judge remarked "I would kind of like to get this myself. I don't quite follow it through, to be perfectly frank. You will have to tie this up a little better. I don't see it yet myself."

As in the case of the insurance premium the judge was not convinced that the acts and conduct now relied on showed any waiver or estoppel, and the burden of convincing him was on the appellant.

We are satisfied that nothing was done on the respondents' side after February 15, 1940 which in any way re-opened the appellant's default which then admittedly existed, and which was never within the sixty-day period, or thereafter, cured.

[13] The appellant also claims that the agreement was repudiated or abandoned or rescinded because of the respondents' letter of August 5, 1941 (relying, in that

behalf, on *Gaume v. Sheets*, 181 Cal. 119, 183 P. 535). There was no such claim in the trial court by pleading or otherwise. The case was tried on the theory that the two supplementary agreements were void for lack of consideration; that the 60-day provision therefore retained its full efficacy and the notice of August 5, 1941 was insufficient to put the appellant in default. The allegations of the cross-complaint and its prayer for an adjudication that the contract remained in full force and effect show this, and are utterly inconsistent with the claim now asserted for the first time on appeal of repudiation, abandonment, or rescission. The claim under this head that the "respondents must return to appellant all monies paid by him, together with interest thereon" is fully answered by *Glock v. Howard, etc., Co.*, discussed earlier.

[14] There is no merit in the contention that the appellant could not be put in default until an accounting was made to him by the respondents for there is nothing in any of the three agreements showing any obligation on the respondents' side to make any accounting.

The decree is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER, J., dissenting.



72 Cal.App.2d 817

In re CLARKE'S ESTATE.

WEBB v. CLARKE.

Civ. 15078.

District Court of Appeal, Second District,
Division 2, California.

Feb. 1, 1946.

1. Deeds ☞208(1)

Conflicting evidence sustained finding that deed of gift from mother to son was invalid for want of delivery and that mother was owner of property at time of her death.

2. Appeal and error ☞1011(1)

Findings of fact made by trial court on conflicting evidence cannot be disturbed by an appellate court.

3. Deeds ⇨194(2)

The presumption of legal delivery created by evidence of acknowledgment of the deed by grantor and of its possession by grantee is not conclusive.

4. Deeds ⇨56(2)

"Delivery" involves more than mere physical handing of deed to grantee, and the act of delivery must be accompanied with intent that deed shall become presently operative and that title shall pass immediately.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

5. Evidence ⇨269(2)

Where issue in suit was whether grantor, since deceased, delivered deed with intent that it should convey title, declarations and acts of grantor made and done either before or after alleged delivery were admissible to show grantor's intention.

6. New trial ⇨99

A motion for new trial on ground of newly discovered evidence was properly denied, where alleged newly discovered evidence was merely cumulative and would not have removed conflict already existing, and especially where there was no sufficient showing that evidence could not with reasonable diligence have been produced at trial.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Proceeding in the matter of the estate of Lavinia Eleanor Clarke, deceased. Margaret Lavinia Webb petitioned to have certain property to be adjudged the property of the estate and to require Charles Richard Clarke, as executor of the estate, to file an amended inventory which should include such property, and Charles Richard Clarke opposed the petition and claimed title to the real property by reason of a deed of gift in his favor signed and acknowledged by deceased. From a judgment setting aside the deed and adjudging property to be property of the estate, Charles Richard Clarke appeals.

Affirmed.

L. G. Hayford, Noel Edwards, and Clayton B. Thomas, all of Los Angeles, for appellant.

A. A. Rotberg, of Los Angeles, for respondent.

WILSON, Justice.

This is an appeal from a judgment setting aside a deed from decedent to appellant, adjudging that the property described therein is the property of the estate, and directing appellant, as executor of the estate, to file an amended inventory which shall include said property.

Appellant and respondent are the surviving children of the decedent. Appellant claims title to the real property by reason of a deed of gift in his favor dated June 6, 1932, signed and acknowledged by decedent.

1. *The conflicting evidence.* The deed remained in the possession of decedent in her safe deposit box unknown to appellant for more than ten years. Appellant testified that on June 29, 1942, he and his mother visited the safe deposit box where she handed the deed to him and said she was deeding the property to him to compensate him for what he had done for her. The deed was returned to the box where it remained until an undetermined date. There was evidence that decedent had said that the deed was made at a time when she owed her son money which he had expended for her, but that she had repaid the loan and did not want him to have the property to the exclusion of his sister, respondent; that the deed was missing from her possession; that she wanted a will drawn that would divide the estate equally between appellant and respondent; that later she had another will (her last) prepared, stating that she had repaid appellant and wanted her will changed. The cash bequest to appellant was omitted from the latter will.

Appellant testified that when the safe deposit box was opened by the Inheritance Tax Examiner the deed of gift to him was in the box. The Examiner testified that he made an inventory of the contents of the box, and that the deed of gift was not on his inventory. The absence of the deed from the Examiner's inventory is significant, since an unrecorded deed from decedent would indicate that the property described therein was taxable in the proceedings to probate the estate. Other witnesses gave evidence of decedent's conduct from which it appeared that until her death she exercised dominion over the property and that appellant had no control of it until after decedent passed away.

Appellant relies on *Stewart v. Silva*, 192 Cal. 405, 409, 221 P. 191, where it is said that possession of a deed by the grantee is prima facie evidence of delivery. But,

like any other prima facie evidence, it may be overcome by other evidence. In making its findings the court concluded that the prima facie showing had been overcome.

[1,2] Since the evidence conflicted in many particulars it would be futile to state more than we have already outlined. The court found that the deed had never been delivered to appellant and that decedent was the owner of the property at the time of her death. There is an abundance of evidence to sustain the decision. Findings of fact made by the trial court on conflicting evidence cannot be reviewed or disturbed by an appellate court. *Buckhantz v. R. G. Hamilton & Co.*, Cal.App., 163 P.2d 756; *Berger v. Steiner*, Cal.App., 164 P.2d 559; *In re Estate of Isenberg*, 63 Cal.App.2d 214, 216, 146 P.2d 424.

[3-5] 2. *Alleged errors in the admission of evidence.* Error is asserted by appellant in the admission of evidence of declarations made by the deceased grantor after the alleged delivery of the deed. Granting that such declarations would be inadmissible if it were certain that the deed had been delivered, yet here the delivery was the very question at issue. The only evidence of actual delivery was the uncorroborated testimony of the grantee. The presumption of legal delivery created by evidence of the acknowledgment of the deed by the grantor and of its possession by the grantee is not conclusive. Delivery involves more than the mere physical handing of the deed to the grantee, but the act of delivery must be accompanied with the intent that the deed shall become presently operative and that title shall pass immediately. *Dinneen v. Younger*, 57 Cal.App. 2d 200, 204, 134 P.2d 323, and cases cited on pages 205 and 326, respectively. Where the issue is whether or not the grantor delivered the deed with the intent that it should convey title, declarations and acts of the grantor made and done either before or after the alleged delivery are admissible to show the grantor's intention. *DeCou v. Howell*, 190 Cal. 741, 750 214 P. 444; *Horsman v. Maden*, 48 Cal.App.2d 635, 641, 120 P.2d 92.

[6] 3. *The motion for new trial.* Appellant made a motion for a new trial on the ground of newly discovered evidence and on grounds of error previously discussed in this opinion. The motion was properly denied. The alleged newly dis-

covered evidence was merely cumulative and would not have removed the conflict already existing. There is no sufficient showing that the evidence could not with reasonable diligence have been produced at the trial.

Judgment and order affirmed.

MOORE, P. J., and McCOMB, J., concur.



73 Cal.App.2d 39

PHELPS v. LOOP et al.

Civ. 14995.

District Court of Appeal, Second District,
Division 3, California.

Feb. 11, 1946.

1. Homestead ⇨200

Declaratory relief action by judgment creditor to determine whether property of debtors was subject to homestead did not extend the 90 day statutory period within which creditor was required in a separate execution proceeding to serve petition for appointment of appraisers on the debtors or their attorney. Civ.Code, § 1248.

2. Homestead ⇨200

Where petition for appointment of appraisers of homestead property after levy of execution was not served on debtors or their attorney within statutory 90 day period, lien of execution ceased at expiration of 90 day period and judgment creditor was not entitled thereafter to have an execution, based upon the same judgment, levied upon the homestead. Civ.Code, §§ 1246, 1248.

3. Homestead ⇨200

Under statute relating to application for appointment of appraisers to appraise homestead after levy of execution, amended petition for appointment of appraisers alleging that no previous execution had been levied on the homestead except that more than four years earlier a proceeding for appointment of appraisers had been commenced, was insufficient. Civ.Code, § 1246.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Mary E. Bryan Phelps against C. V. Loop and another for appointment of appraisers to appraise homestead after levy of execution. From an order denying amended petition, petitioner appeals.

Affirmed.

Irving E. Read, of Los Angeles, and Monroe & McInnis, of San Diego, for appellant.

Chandler & Wright and Don F. Tyler, all of Los Angeles, for respondents.

WOOD, Justice.

This is an appeal by a judgment creditor from an order denying her amended petition for appointment of appraisers to appraise a homestead after levy of execution.

Appellant, Mrs. Phelps, as plaintiff in an action in San Diego County against C. V. Loop and Ethel Loop to foreclose a chattel mortgage, obtained judgment on September 27, 1932, for \$9,770.93 and for foreclosure. After crediting the judgment with the proceeds of the foreclosure sale, held on October 2, 1932, there was a deficiency judgment of \$9,243.30. In June, 1940, appellant gave notice of motion for issuance of execution. On June 24, 1940, after the service of said notice, the judgment debtors filed their declaration of homestead claiming an apartment building in Los Angeles, consisting of 16 separate apartments, as their homestead. Execution was issued July 29, 1940, and was levied upon said property on November 14, 1940. On December 11, 1940, the execution was returned wholly unsatisfied.

About December 16, 1940, appellant commenced a declaratory relief action in Los Angeles County to determine whether the property was subject to a homestead—it being appellant's contention therein that a homestead on that kind of property was not valid.

On January 11, 1941, appellant filed a petition for appointment of appraisers to appraise the homestead, but did not serve it on the debtors or their attorney.

On May 11, 1944, it was decided in *Phelps v. Loop*, 64 Cal.App.2d 332, 148 P.2d 674 (the declaratory relief action) that the homestead was valid. On October 3, 1944, appellant obtained an alias writ of execution upon the same deficiency judgment above mentioned, and that writ was levied

on the same property on November 30, 1944. On January 24, 1945, appellant filed the amended petition for appointment of appraisers, which is involved herein.

Section 1245 of the Civil Code provides: "When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section 1241 is levied upon the homestead, the judgment creditor may at any time within sixty days thereafter apply to the superior court * * * for the appointment of persons to appraise the value thereof, and if such application shall not be made within sixty days after the levy of such execution the lien of the execution shall cease at the expiration of said period, and no execution based upon the same judgment shall thereafter be levied upon the homestead."

The lien of the judgment obtained on September 27, 1932, expired five years thereafter. The declaration of homestead having been filed in 1940, after the expiration of the judgment lien in 1937, the homestead was not subject to execution in satisfaction of a judgment within any of the classes or exceptions enumerated in the Section 1241 referred to in Section 1245. (Stated generally, those exceptions relate to a homestead which is subject to a lien.)

As to the service of the petition for appointment of appraisers on homestead property, Section 1248 of the Civil Code provides: "Within ninety days from the date of filing the petition, a copy thereof, with the notice of the time and place of hearing, must be served, upon the claimant or his attorneys at least two days before the hearing; and if such notice shall not be so served, the lien of the execution shall cease at the expiration of said period of ninety days, and no execution based upon the same judgment shall thereafter be levied upon the homestead."

As above shown, appellant complied with Section 1245 by filing her first petition for appointment of appraisers on January 11, 1941, which was within 60 days after the levy of the first execution was completed on November 14, 1940. She did not comply, however, with Section 1248 by serving a copy of her first petition upon the debtors or either of them or their attorney within 90 days after filing the petition or at any time.

[1, 2] She did not serve the copy of the petition for the reason, according to her brief, that she could not prosecute both the

declaratory relief action and the execution proceeding at the same time, and she chose to prosecute the declaratory relief action first in order "to find out which remedy was the correct one." She also states that if the court sustained her in the declaratory relief action, she "could then safely enforce her execution as against defendants' entire property." If the appellant had been successful in the declaratory relief action and had obtained a decision that the apartment-house property was not the kind of property that could be homesteaded, then appellant could have proceeded with the execution against the entire property, and there would have been no requirement that appraisers be appointed. Rather than to proceed with the execution against the property which she claimed was worth about \$25,000, even though it appeared that the property was subject to a homestead exemption of \$5,000, she elected to test the validity of the homestead in the expectation that the debtors would not be entitled to an exemption of \$5,000. She argues in effect that the proceedings by way of petition for appointment of appraisers were necessarily suspended and had to "remain dormant" during the time the declaratory relief action was pending, and that the time consumed in prosecuting that action, about 3½ years, should not be included in computing the time within which she was required to proceed with her application for appointment of appraisers. She was not required to seek declaratory relief, but did so apparently because she considered it would be to her financial advantage. The declaratory relief action did not extend the time within which she was required, under said Section 1248, to serve the petition upon the debtors or their attorney. Appellant having failed to serve the first petition within 90 days after it was filed, the lien of the first execution ceased at the expiration of said period of 90 days, and she was not entitled thereafter to have an execution, based upon the same judgment, levied upon the homestead. Civ.Code, § 1248.

[3] Section 1246 of the Civil Code provides that the application for appointment of appraisers must show, among other things, "That no previous execution arising out of the same judgment has been levied upon said homestead." The amended petition herein did not make that required showing, but on the contrary alleged, "That no previous or other execution upon said

judgment has been levied upon said homestead *except as herein stated*, that in January, 1941, your petitioner commenced proceeding for the appointment of appraisers to appraise said homestead after levy of execution by filing petition for that purpose * * *." (*Italics added.*) It therefore appears that the amended petition, which was filed more than four years after the first petition was filed and more than six months after the final decision in the declaratory relief action, failed to comply with an essential part of said Section 1246.

In *Arighi v. Rule & Sons, Inc.*, 41 Cal. App.2d 852, 107 P.2d 970, the original creditor, Rule & Sons, levied execution on homesteaded property, but did not file a petition for appointment of appraisers within 60 days or at all as required by Section 1245. Thereafter the assignee of Rule & Sons obtained a renewal judgment, and levied execution on the same property, and within 60 days filed a petition for appointment of appraisers. The court said therein at page 857 of 41 Cal.App.2d, at page 973 of 107 P.2d: "The record shows that the original judgment creditor did not comply with the section quoted [Section 1245]. It is not contended that he did. However, appellant, his assignee, did file such a petition, and it was denied. The ruling was proper. The failure on the part of Rule & Sons, Inc., to perfect their levy of execution by a filing of petition for appointment of appraisers with sixty days after the levy, had the effect of extinguishing the lien of the execution, and precluding any subsequent levy of execution against the homestead property based upon that same judgment." Although that case pertained to the failure to file a petition for appointment of appraisers within 60 days as required by Section 1245, it is of value here because the penalty provision of that Section for failure to file the petition within 60 days is identical with the penalty provision of Section 1248, involved herein, for failure to serve the petition within 90 days. The penalty provision in each of those sections is that "the lien of the execution shall cease" and "no execution based upon the same judgment shall thereafter be levied upon the homestead."

In *Palen v. Palen*, 28 Cal.App.2d 602, at page 607, 83 P.2d 36, 38, it was said "[T]he power of a creditor to attack the homestead by forced sale must be strictly limited to the instances specified in the law, in order that the humane objects which the legisla-

ture intended by its enactment shall be effected."

The proceeding herein, under the amended petition, was approximately four years too late.

The order is affirmed.

DESMOND, P. J., and SHINN, J., concur.



72 Cal.App.2d 638

**SACRAMENTO MUNICIPAL UTILITY
DIST. v. PACIFIC GAS &
ELECTRIC CO. et al.**
Civ. 7200.

District Court of Appeal, Third District,
California.

Jan. 22, 1946.

Rehearing Denied Feb. 21, 1946.

Hearing Denied March 21, 1946.

1. Eminent domain ⇨191(7)

The statute requiring condemnation complaint to show location, general route and termini, and to be accompanied by map, applies where right of way is sought and not to condemnation of an integral part of an electric distributing system already established. Code Civ.Proc. § 1244, subd. 4.

2. Eminent domain ⇨167(1)

A condemnation proceeding under Public Utilities Act is a special proceeding, and such act controls over a general code provision that is not clearly applicable thereto. Code Civ.Proc. § 1244, subd. 4; Gen.Laws 1937, Act 6386, § 47(b).

3. Eminent domain ⇨191(1)

The filing of petition is the initial step in special condemnation proceeding under the Public Utilities Act, and therefore the Railroad Commission derives its authority to evaluate property, office of superior court being to determine whether the political subdivision has right and power to take the property. Gen.Laws 1937, Act 6386, § 47(b).

4. Eminent domain ⇨191(1)

Where Railroad Commission finds that description in complaint for condemnation of public utility is sufficient to give it ju-

risdiction to make valuation, and the same description is contained in complaint filed with superior court, description is sufficient to give superior court jurisdiction and sufficient for purposes of the judgment. Code Civ.Proc. § 1244, subd. 4; Gen.Laws 1937, Act 6386, § 47(b).

5. Eminent domain ⇨191(7)

A complaint seeking condemnation of public utility is sufficient if location, general route and termini of incidental rights of way are determinable and in fact have been determined by skilled persons from description in the complaint. Code Civ. Proc. § 1244, subd. 4; Gen.Laws 1937, Act 6386, § 47(b); Civ.Code, § 3538.

6. Eminent domain ⇨191(1)

The maxim "that is certain which can be made certain" applies to petition or complaint in eminent domain proceedings. Code Civ.Proc. § 1244, subd. 4; Gen.Laws 1937, Act 6386, § 47(b); Civ.Code, § 3538.

7. Eminent domain ⇨243(2)

Where Railroad Commission decides that complaint for condemnation of public utility was sufficient generally, and as to description of property involved, the question was not in issue before superior court or reviewing court.

8. Eminent domain ⇨234(2)

Railroad Commission's finding that properties to be condemned are of a specified value necessarily contained implied finding that properties had been accurately identified, and that description in complaint was sufficient.

9. Eminent domain ⇨234(2)

In proceeding to condemn public utility, Railroad Commission had authority to make implied finding, and hence also express finding on sufficiency of description of the property in the complaint.

10. Eminent domain ⇨243(1)

In making appraisal of public utility property to be condemned, Railroad Commission acts judicially and its findings and determination are binding and conclusive and may not be inquired into, save by Supreme Court to limited extent on timely application for review. Gen.Laws 1937, Act 6386, § 47(b).

11. Estoppel ⇨68(4)

Where electric company successfully maintained, in opposing utility district's petition to Supreme Court for review of

Railroad Commission's condemnation award, that the commission had regularly pursued its authority, it could not subsequently, on appeal from judgment in condemnation action, take a contrary position and could not attack directly or collaterally the validity of proceedings before the commission, including sufficiency of the description and identification of the properties involved. Code Civ.Proc. § 1244, subd. 4; Gen.Laws 1937, Act 6386, § 47(b).

12. Eminent domain ⇨241

Description of public utility property condemned in the judgment need not vary from description in the petition and complaint to take care of subsequent changes. Gen.Laws 1937, Act 6386, § 47(b).

13. Eminent domain ⇨241

The description in condemnation judgment must follow that of the complaint or award.

14. Eminent domain ⇨124

The Legislature may fix the time when right to condemnation shall be deemed to have accrued as of the time of institution of the proceeding, and may change designation of that time.

15. Evidence ⇨48

The court may take judicial notice of Railroad Commission's practice of preparing inventories in condemnation proceedings so as to reflect changes in properties condemned as of the time of such preparation, and of seeing that descriptions are amended accordingly.

16. Eminent domain ⇨241

Where public utility properties described in condemnation judgment were the properties which condemnor set out to condemn and which were appraised, and judgment provided that sum to be paid was subject to modification, condemnee was sufficiently protected against changes in the properties pending the condemnation. Gen.Laws 1937, Act 6386, § 47(b).

17. Eminent domain ⇨9

Rights of way in or over political subdivisions outside corporate limits of the condemning public corporation may be condemned.

18. Eminent domain ⇨9

A municipality may condemn property wholly outside its corporate limits in order to serve its inhabitants.

19. Eminent domain ⇨9

Part of an electric distributing system can be condemned by a political subdivision, although balance of the system is situated outside boundaries of such subdivision. Gen.Laws 1937, Act 6386, § 47(b).

20. Constitutional law ⇨33

The constitutional provision expressly authorizing political subdivision to furnish services for light, heat and power outside its boundaries is self-executing, and Legislature cannot limit such authorization. Const. art. 11, § 19.

21. Municipal corporations ⇨277

The constitutional provision authorizing political subdivision to furnish light, heat and power outside its boundaries is not restricted to surplus energy. Const. art. 11, § 19.

22. Eminent domain ⇨9

The broad grant of power to municipal utility districts to condemn property without the district is not limited by subsequent subdivision which authorizes disposition of surplus energy outside district, but districts are given plenary powers and may put their energies to the fullest capacity and co-operate widely and extensively with other political subdivisions and agencies of government. Gen.Laws 1937, Act 6386, § 47(b).

23. Eminent domain ⇨196

Substantial evidence sustained determination that retention of facilities in particular area was necessary or convenient for service to inhabitants of public utility district, empowering district to condemn properties in such area, as against contention that such properties were sought solely to save money. Gen.Laws 1937, Act 6386, § 47(b).

24. Eminent domain ⇨14

The making of financial profit alone may not authorize condemnation, but economy and prevention of excessive expenditures may be considered in determining necessity or convenience. Const. art. 1, § 14; art. 12, §§ 8, 23a; Gen. Laws 1937, Act 6393, § 12, subd. 4.

25. Eminent domain ⇨49

A public utility company's right to joint use of certain poles was a "substan-

tial right" which was subject to condemnation. Gen.Laws 1937, Act 6386, § 47(b).

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial Right".

26. Eminent domain ⇨243(2)

The Railroad Commission in fixing compensation for condemnation of joint or common interests can only attempt to equalize such interests as best it may, and in absence of showing that it has acted arbitrarily, capriciously or with intent to discriminate unfairly, its action must be sustained.

Appeal from Superior Court, Sacramento County; C. J. Goodell, Judge.

Action by the Sacramento Municipal Utility District against the Pacific Gas & Electric Company and others to condemn lands for public use. From an adverse judgment, the named defendant appeals.

Affirmed.

Thos. J. Straub, Chaffee E. Hall, Robert H. Gerdes, Brobeck, Phleger & Harrison, and Hall, Henry & Oliver, all of San Francisco, for appellant.

Downey, Brand & Seymour, Stephen W. Downey, and Martin McDonough, all of Sacramento, for respondent.

PEEK, Justice.

This is an appeal by Pacific Gas & Electric Company (hereinafter sometimes called the company) from a judgment of the Superior Court determining the right of respondent Sacramento Municipal Utility District (hereinafter sometimes called the district) to condemn for public use "lands, properties and rights" of the company described in the judgment, and fixing the compensation to be paid therefor. These lands, properties and rights consist in general of lands, substations, pole-lines, duct-lines, franchises, rights of way and electrical equipment (or of fractional interests therein or rights of use thereof), constituting parts of the electrical distribution system of the company within the boundaries of the district and also parts of the electrical distribution system of the company outside the boundaries of the district.

Respondent Sacramento Municipal Utility District was organized under the Municipal Utility District Act, Stats. 1921, p.

245, ch. 218, Deering's General Laws, Act 6393, pursuant to constitutional authorization, Const.Art. XI, § 19, for the purpose of supplying electrical energy to the inhabitants of the district and for any other purpose found to be properly incidental thereto. The boundaries of said district comprise all of the county of Sacramento and part of the county of Placer, including the cities of Sacramento and North Sacramento, excepting therefrom an area comprising the Municipal Utility District of Carmichael. In 1934 the voters of the respondent district authorized it to incur a bonded indebtedness of \$12,000,000, for the acquisition of an electric distribution system to supply its inhabitants with electricity. Immediately following the bond election and in accordance with the provisions of said Municipal Utility District Act, the district instituted an action in the superior court of Sacramento County to determine the validity of the bonds. The appellant company, which owns the existing electric distribution system in the area, intervened in that proceeding and challenged the validity of the bonds on numerous grounds. The judgment of validation rendered by the trial court was affirmed by the Supreme Court, on April 26, 1936. Thereafter, the company commenced injunction proceedings in the federal District Court, 17 F.Supp. 685, a judgment adverse to it was affirmed by the Circuit Court of Appeals, 92 F.2d 365 and its petition for certiorari was denied by the United States Supreme Court, 303 U.S. 640, 58 S.Ct. 610, 82 L.Ed. 1100. On May 21, 1938, the district, pursuant to a resolution of its board of directors, instituted this proceeding in eminent domain to condemn and acquire that portion of the distribution system of the company which serves the respondent and the Carmichael districts, by filing a petition with the Railroad Commission requesting a valuation of the properties sought to be acquired. An order to show cause was served on the appellant, and on the American Trust Company and the City Bank Farmers Trust Company by virtue of their interest in the properties under certain deeds of trust. The three companies appeared and filed a motion to dismiss. Attack was made, among other things, upon the sufficiency of the description of the properties sought and on the constitutionality of the Public Utilities Act, particularly section 47(b), under which the proceeding was being tak-

en. The commission denied the motion (41 R.C.R. 633), took evidence, and issued its finding and award, authorizing the district to take possession of the properties upon the payment of \$11,632,000.00. 44 R.C.R. 467, 490. Both parties filed petitions for rehearing, appellant reiterating the points made in its return to the order to show cause. Both petitions were denied. The district then filed a petition for writ of review which was denied by the Supreme Court on March 1, 1943 (S.F. 16887). The company filed a brief in opposition to respondent's petition but took no affirmative steps of its own to secure a review of the order. Thus it apparently acquiesced in the commission's determination.

On January 21, 1943, pursuant to section 47(b) of the Public Utilities Act, Deering's General Laws, Act 6386, the district filed a complaint in the superior court praying for a judgment of condemnation, the company having refused to stipulate to accept the compensation fixed by the commission. The company's demurrer to the complaint was overruled. It then answered, and, at the conclusion of the hearing, findings of fact, conclusions of law and judgment were entered in favor of the respondent district. Pursuant to stipulation, the judgment provided that the award should be paid to the American Trust Company as trustee for the company.

The briefs filed on both sides show conspicuous care and ability, commensurate with the importance of the case, and, in the main, discuss the three principal grounds urged by appellant for reversing the judgment. However, included therein are additional points which do not fall strictly within the declared scope of any of the chief topics. The main grounds are:

1. The insufficient or defective character of the description of the properties involved in the proceedings;
2. The want of power in the respondent district to condemn that part of the company's distributing system which is in the Carmichael area;
3. The absence of a right in the respondent district to condemn a mere use of certain poles as distinguished from the poles themselves.

While a fourth main ground was advanced in appellant's briefs (the alleged unconstitutionality of section 47(b) of the

Public Utilities Act), it was abandoned at the time of oral argument.

As the proper principles to be applied in eminent domain proceedings depend largely on the statutory provisions under which the proceeding is brought, it is appropriate at this point to refer to the applicable constitutional and statutory provisions.

Section 14 of Article I of the Constitution of California reads in part: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner."

Section 8 of Article XII of the Constitution provides that: "The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the Legislature from taking the property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals * * *."

The Municipal Utility District Act, section 12, provides in part:

"Any municipal utility district incorporated as herein provided shall have power:

* * * * *

"Fourth. To * * * condemn in proceedings under eminent domain * * * real and personal property of every kind within or without the district necessary to the full or convenient exercise of its powers * * *."

Section 23a of Article XII of the Constitution of California reads as follows: "The Railroad Commission shall have and exercise such power and jurisdiction as shall be conferred upon it by the Legislature to fix the just compensation to be paid for the taking of any property of a public utility in eminent domain proceedings by the State or any county, city and county, incorporated city or town, municipal water district, irrigation district or other public corporation or district, and the right of the Legislature to confer such powers upon the Railroad Commission is hereby declared to be plenary and to be unlimited by any provision of this Constitution. All acts of the Legislature heretofore adopted which are in accordance herewith are hereby confirmed and declared valid."

The present proceeding was instituted under the provisions of section 47 of the

Public Utilities Act, which section, as amended in 1913, Stats.1913, p. 683, chap. 339, was confirmed and declared valid by said section 23a of Article XII of the Constitution.

Subdivision (b) of section 47 of the Public Utilities Act provides, in part, that any political subdivision, including a public utility district or any other public corporation, may file with the Railroad Commission a petition setting forth its intention to acquire under eminent domain proceedings "the lands, property and rights of any character whatsoever of any public utility, or any part or portion thereof." Upon the filing of the petition, the Railroad Commission is charged with the duty, after appropriate proceedings, to fix the just compensation to be paid by the political subdivision for said properties or portion thereof and its finding determining the compensation to be so paid "shall be final and shall not be subject to modification, alteration, reversal or review by any court of this state." Section 67 of the Act provides in part: "The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as hereinafter provided [referring to review by the Supreme Court]; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination."

Appellant first assails the sufficiency of the description of the property involved in these proceedings in three respects:

1. "Because the complaint fails to show the location, general route and termini of rights of way sought and because it is not accompanied by a map thereof", as provided in the Code of Civil Procedure, section 1244, subdivision 4.

2. "Because the properties described in the judgment cannot be identified", and

3. "Because the amended petition to the Railroad Commission, the complaint and the judgment each describes properties different from the others."

In considering these questions, the fact may not be overlooked that the properties involved herein are extensive and extremely complex. They comprise an integrated electric distributing system covering an area of approximately 640 square miles and serving a population, at the time of the filing of the petition in 1938, of about

170,000 persons. The judgment sets forth with particularity and by metes and bounds the boundaries of the system and describes in great detail the properties to be taken, incorporating by reference a number of printed volumes containing more than two thousand pages of descriptive material. Said properties consist of both real and personal property and intangibles as well as tangibles, such as franchises, easements and the sundry rights, interests and privileges which go to make up a distribution system of this kind.

[1] With respect to the objection that the description of the properties as contained in the judgment does not conform to the requirements of the Code of Civil Procedure, section 1244, subdivision 4, it is to be noted that such subdivision relates to a case where a right of way is sought. Respondent district is not seeking a right of way but an integral part of an electric distributing system already established, the location, general routes and termini of which are well known to the condemnee.

[2-4] In the second place, this is a proceeding under section 47(b) of the Public Utilities Act, which has been held to be a special proceeding in eminent domain and one which controls over a general code provision that is not clearly applicable to such a proceeding. *Marin Mun. Water Dist. v. Marin Water and Power Co.*, 178 Cal. 308, 314, 317, 173 P. 469. Section 47(b) requires only that the petition shall contain "a description of the lands, property and rights, or of the part or portion thereof, which the political subdivision intends to acquire." The filing of the petition is the initial step in this special proceeding (*Marin Mun. Water Dist. v. Marin Water and Power Co.*, supra), and therefrom the Railroad Commission derives its authority to evaluate the property, it being the office of the superior court to determine whether the political subdivision has the right and power under the law to take "said lands, property and rights, or said part or portion thereof" sec. 47(b) subd. 8, that is, the lands and property which the petitioner avowedly intends to acquire and which the Railroad Commission has evaluated accordingly. Where the commission finds that the description is sufficient to give it jurisdiction to make the valuation, and the same description is contained in the complaint filed with the superior court, it would seem to follow that

such description is sufficient to give the superior court jurisdiction to perform its special duties and sufficient also for the purposes of the judgment.

What we have said with regard to the inapplicability of section 1244, subd. 4, Code Civ.Proc., pertains likewise to the requirement of said section that a map accompany the complaint. In fact this very question appears to have been decided (at least indirectly) by the Supreme Court on a petition for a writ of review of an award of the Railroad Commission (L.A. No. 13620). There the petitioner complained of the illegibility of the maps which described the properties. In its briefs the commission took the position that "the addition of the maps in question * * * was unnecessary and surplusage, in any event, since the properties were adequately described without the aid of the maps * * *" Although the Supreme Court denied the petition without opinion it thereby inferentially approved the position taken by the commission. See *Southern California Edison Co. v. Railroad Commission*, 6 Cal.2d 737, 756, 59 P.2d 808.

[5,6] By what has been said in the course of this discussion we do not wish to be understood as intimating that the location, general route and termini of any rights of way incident to the system intended to be acquired by the respondent district are not adequately shown in the description contained in the complaint herein. On the contrary, it appears that these facts are determinable, and have in fact been determined, by skilled persons from the same description as that contained in the complaint—and this is all that is necessary under the Code. As the court stated in the case of *Madera County v. Raymond Granite Co.*, 139 Cal. 128, 133, 134, 72 P. 915, 917, 989: "A surveyor could, with the description and the map, have no difficulty in definitely locating the road, and this is sufficient." Likewise the maxim "That is certain which can be made certain", Civ.Code, § 3538, applies to a petition or complaint in eminent domain proceedings. *Lewis on Eminent Domain*, 2d Ed., vol. 2, p. 827, § 350.

[7] As far as the general sufficiency of the description to identify the property under condemnation is concerned (and while appellant attacks the judgment of the superior court herein in this regard, it would appear to be immaterial whether the attack is made on the judgment or the complaint, or on the order of the com-

mission or the petition filed therewith, since the description is virtually the same through the proceedings), we are of the opinion that inasmuch as this question has been decided against appellant by the commission, it must be deemed to be set at rest and cannot be reexamined by this court, just as it was not properly put in issue before the superior court.

In this regard it should be noted that the commission in its interim opinion (41 R.C.R. 633, 634) stated: "The various properties sought to be valued are specified with great particularity"; and in its final opinion (44 R.C.R. 467, 468) used this language: "However, the record is clear to the effect that the properties described in the petition, as amended, have not only been identified and inventoried by the Commission's Valuation Division, but that the properties, so inventoried, are the properties sought by the district and described in the petition, as amended."

[8,9] Logically, a correct description of the property to be condemned is a necessary predicate for a correct valuation thereof. Therefore a finding by the Railroad Commission that the properties to be taken are of a specified value necessarily contains the implied finding that they have been accurately identified—in short, that the description is sufficient. In the case of *City of Los Angeles v. Pomeroy*, 124 Cal. 597, at page 615, 57 P. 585, at page 591, the Supreme Court stated: "Undoubtedly it was necessary that the jury should be correctly instructed as to the quantity and extent of the estate and interest of the defendants in the land, in order that they might correctly estimate its value * * *. These were an essential preliminary to the judgment * * *." The doctrine of implied findings is well established in our law. *Haigler v. Donnelly*, 18 Cal.2d 674, 677, 678, 117 P.2d 331; *Rankin v. Newman*, 107 Cal. 602, 608, 40 P. 1024, 41 P. 304; *Bank of Tehama Co. v. Crumley*, 74 Cal. 461, 462, 16 P. 207; *Cole v. Bacon*, 63 Cal. 571, 574; *Jones v. Pleasant Valley Canal Co.*, 44 Cal.App.2d 798, 804, 805, 113 P.2d 289; *National Funding Corporation v. Stump*, 57 Cal.App.2d 29, 35, 133 P.2d 855. It must follow also that, having the power to make an implied finding with regard to the sufficiency of the description, the Railroad Commission had the authority to make the express finding which it made on that issue in the present case.

Indeed, that the Railroad Commission does have jurisdiction to decide this question appears to have been directly ruled on by the Supreme Court in the case of *Southern Cal. Edison Co. v. Railroad Commission*, L.A. 13620, wherein the question of the sufficiency of the description was squarely put in issue and said court in effect confirmed the right of the commission to determine the same when it denied a petition for a writ of review. See, *Southern California Edison Co. v. Railroad Comm.*, supra, 6 Cal.2d at page 742, 59 P.2d 808.

[10] It is clear that under the Public Utilities Act the Railroad Commission in making its appraisal of property to be condemned acts judicially, and its findings and determination are binding and conclusive and may not be inquired into, save by the Supreme Court to a limited extent on timely application for review. *Southern California Edison Co. v. Railroad Comm.*, supra, 6 Cal.2d at page 749, 59 P.2d 808; *Marin Mun. Water Dist. v. Marin Water and Power Co.*, supra, 178 Cal. at pages 311, 317, 173 P. 469. The same result would follow under the general doctrine of *res judicata*, *Western Canal Co. v. Railroad Commission*, 216 Cal. 639, 645, 646, 15 P.2d 853, certiorari denied 289 U.S. 742, 53 S.Ct. 688, 77 L.Ed. 1489; *Blymer v. Sutter Butte Canal Co.*, 217 Cal. 572, 577, 20 P.2d 320; *People v. Lang Transportation Co.*, 217 Cal. 166, 169, 170, 17 P.2d 721; *City of Oakland v. El Dorado Terminal Co.*, 41 Cal.App.2d 320, 326, 106 P.2d 1000; *Goodspeed v. Great Western Power Co.*, 33 Cal.App.2d 245, 265, 91 P.2d 623, 92 P.2d 410; and it would be immaterial whether the finding and determination were express or implied, *Freeman on Judgments*, 5th Ed., vol. 2, pp. 1465-1468, § 693.

It seems apparent therefore, that there was no real issue before the superior court as to the sufficiency of the description to identify the properties involved in these proceedings, and that anything relating to such an issue in its findings, conclusions, or judgment may and should be disregarded. *Goodspeed v. Great Western Power Co.*, supra, 33 Cal.App.2d at page 265, 91 P.2d 623, 92 P.2d 410.

But more than this—if the description had been insufficient to identify the properties and, notwithstanding such fact, the commission had gone ahead and attempted to value them, it could not be said

that the commission was regularly pursuing its authority. This would be the case, for instance, if the commission only thought it was evaluating the properties sought to be condemned, as appellant contends in its reply brief. Yet, not only did appellant refrain from attacking the procedure of the commission by an application for a writ of review to the Supreme Court, but, on the contrary, appellant actively resisted respondent's application for such a writ, insisting that the commission had regularly pursued its authority and had arrived at the valuation by the application of correct principles. Appellant's Brief in Opposition to Writ in the case of *Sacramento Municipal Utility District v. Railroad Commission*, S.F. 16887. Respondent's petition for the writ of review was denied March 1, 1943, and appellant's position inferentially sustained. This rule applies likewise to a number of highly technical objections raised by appellant to the sufficiency of the description of certain franchises, easements and interests therein, including the objection to the use of the term "or" instead of "and", in particular cases, and the occasional use of the expression "and/or".

[11] Therefore, having taken the position before the Supreme Court which we have indicated above, and having successfully maintained it, appellant may not now be heard to take a contrary position, but is precluded from attacking directly or collaterally the validity of the proceedings before the commission, including the sufficiency of the description and identification of the properties involved therein. *Estate of Davis*, 38 Cal.App.2d 579, 584, 101 P.2d 761, 102 P.2d 545; *John H. Spohn Co. v. Bender*, 18 Cal.App.2d 447, 452, 64 P.2d 152; *Donegan v. City of Los Angeles*, 109 Cal.App. 673, 685, 293 P. 912; *California Land Co. v. Town of Corte Madera*, 97 Cal.App. 393, 396, 275 P. 866; 31 C.J.S., *Estoppel*, § 117, p. 375; 21 Cor. Jur. §§ 227, 232, pp. 1223, 1228; 19 Am. Jur. pp. 704-708, § 72.

The last attack made on the description of the properties involved herein is to the effect that said description should have been changed to meet the changing conditions that have occurred since the time of the original appraisal.

While ostensibly this is an attack on description, actually, as developed by appellant, it is an attack on the valuation fixed by the commission, or more precisely, on

the method of valuation provided by the statutes, it being appellant's contention apparently that the properties should be revalued as of a time subsequent to the making of the original inventories; namely, the time of the filing of the complaint and the time of the filing of the judgment.

[12] With respect to the proposition directly advanced by appellant—that the description in the judgment should vary from that in the petition and complaint, to take care of subsequent changes—there is no merit whatever, although it does amount to a concession that the property which the district will be entitled to take over is the system in its altered condition, not confined to the properties described in the petition, complaint and judgment.

[13] That the description as contained in a judgment of condemnation must follow that of the complaint or award is the universal rule in eminent domain proceedings. 29 C.J.S. Eminent Domain, § 322, p. 1360; *County of Madera v. Raymond Granite Co.*, supra, 139 Cal. at pages 133, 134, 72 P. 915, 989; *Hoch v. Candler*, 190 Ga. 390, 9 S.E.2d 622, 625; *Chicago, etc. R. Co. v. Rausch*, 245 Ill. 477, 92 N.E. 300, 303; *Chicago, etc., R. Co. v. City of Chicago*, 132 Ill. 372, 23 N.E. 1036, 1037.

[14] Insofar as appellant's argument assails the validity of the rule that the time as of which values are to be determined in a proceeding of this character is the date of the application to the Railroad Commission (or of the hearing thereon), subject to a supplemental valuation to take care of subsequent changes, the answer has been furnished by the decided cases in a very definite manner. *City of Pasadena v. Porter*, 201 Cal. 381, 390, 257 P. 526, 53 A.L.R. 679; *Marin Mun. Water Dist. v. Marin Water and Power Co.*, supra, 178 Cal. at page 314, 173 P. 469; *City of Los Angeles v. Oliver*, 102 Cal.App. 299, 318, 319, 283 P. 298; appeal dismissed for want of a substantial federal question [*Woodruff v. City of Los Angeles*] 283 U. S. 787, 51 S.Ct. 348, 75 L.Ed. 1415. Therein it is made clear that it is entirely competent for the Legislature to fix the time when the right to compensation shall be deemed to have accrued as the time of the institution of the proceeding, and that the Legislature also may at will change the designation of that time.

[15] In a case where the properties of a going utility are being condemned, it is inevitable that the properties as described in the petition will have undergone some changes by the time they are actually taken over by the condemnor. To obviate this as far as possible, it is the practice of the Railroad Commission (of which we may take judicial notice) to prepare the inventories so as to reflect the changes as of the time of such preparation and to see that descriptions are amended accordingly. See R.C.D. No. 29266, reported in 40 R.C.R. 204, 208; R.C.D. No. 24434, reported in 37 R.C.R. 117, 119, petition for writ of review denied, L.A. 13619. This was done in the present case. 44 R.C.R. 467.

The second method of compensating for the discrepancy mentioned is provided by the statute itself, by furnishing a special procedure whereby increases or decreases may be estimated long after the original appraisement has been made, and the amount of the compensation may be adjusted accordingly. In the present case the groundwork has been laid for a modification of the award. The judgment of the trial court designates the sum which is to be paid for "said" lands, properties and rights (i. e., those described in the judgment which are the same as those that were described in the complaint and therefore in the petition). It then specifically provides: "which sum is subject to modification by reason of such increase or decrease as may hereafter be certified to this Court by the Railroad Commission of the State of California as provided by Part (9) of Section 47(b) of the Public Utilities Act." The part of the act thus referred to furnishes a complete formula for the determination and valuation of the betterments and improvements that have been added to the system since the taking of the original inventories. See, 21 R.C.R. 658.

[16] It thus appears that while the properties described in the judgment are the properties which the condemnor set out to condemn and which were appraised in accordance with the description, the condemnnee may be compensated on the basis of the properties which are actually to be taken over by the condemnor. No injustice is evident either in the mode of procedure which has been provided or in the result to be attained thereby.

Another principal objection to the judgment raised by appellant relates to the power of respondent district to condemn those properties of the company which lie in the Carmichael area outside the district and which comprise about 1.25% of the area served by the total integrated system. Originally the Carmichael district was organized as a public utility district as well as an irrigation district, but it does not furnish its inhabitants with electric service, nor does it own or operate any facilities for doing so, such service being furnished by the company. This area is entirely surrounded by the property of respondent district. The findings show that if the properties in Carmichael are not condemned, service to that area would be cut off and service to some consumers in the respondent district would be terminated and service to others impaired, although equivalent service within Carmichael could be restored by an expenditure of \$42,300 and equivalent service within the district could be restored by an expenditure of \$17,000. The evidence shows that the portion of the company's system situated within the Carmichael area is an integrated part of the system serving respondent district.

[17, 18] There is no constitutional objection to the condemnation of rights of way in or over political subdivisions outside the corporate limits of the public corporation seeking to exercise the right of eminent domain, *City of Los Angeles v. City of South Gate*, 108 Cal.App. 398, 291 P. 654 [hearing in Supreme Court denied]; *City of Los Angeles v. City of Huntington Park*, 32 Cal.App.2d 253, 89 P.2d 702, and a municipal corporation may condemn property wholly outside its corporate limits in order to serve its inhabitants. See, *City of Los Angeles v. Aitken*, 10 Cal. App.2d 460, 52 P.2d 585 [hearing in Supreme Court denied].

[19] Likewise, a part of an electric distributing system can be condemned by a political subdivision, although the balance of the system is situated outside the boundaries of such subdivision. *Southern California Edison Co. v. Railroad Comm.*, supra, 6 Cal.2d at pages 742, 743, 59 P.2d 808.

It also has been held to be no obstacle to a condemnation that the facilities of and equivalent service within the district part to serve territory outside the corporate limits, where such use is incidental

to the principal use. *Southern California Edison Co. v. Railroad Commission*, L.A. 13620, denying a petition for a writ of review.

[20] Moreover, the Constitution expressly authorizes a political subdivision, such as respondent district herein, to furnish services for light, heat and power to inhabitants outside its boundaries. Const. Art. XI, sec. 19. This section of the Constitution is self-executing, and the Legislature could not, even if it would, limit such authorization. *City of Mill Valley v. Saxton*, 41 Cal.App.2d 290, 294, 295, 106 P.2d 455.

[21] One of the contentions advanced by appellant in this connection, to the effect that it is only the surplus energy that may be used for the service of persons outside the district, does not find support in the authorities. It is held that this is not the theory on which such service may be provided, but it is rather the theory that in taking over facilities serving another area, the district must, on principles of fairness and justice, continue the service which was furnished outside the district, where this can be done efficiently and economically. "In these operations the municipality is not selling surplus or excess waters to the prior users. The purchase of the system is impressed with a trust * * *." *Durant v. City of Beverly Hills*, 39 Cal.App.2d 133, 137, 102 P.2d 759, 761. In another case more directly in point, and dealing with an eminent domain proceeding, the Supreme Court disposed of a contention similar to the one advanced by appellant based on asserted limitations contained in the Municipal Utility District Act as well as the general code provisions, in part as follows: "It is also further alleged that about 93 per cent. of the water is supplied to people within the district and about 7 per cent. to people outside the district. Whether or not it be the declared policy of the district to continue such outside use, it would be its legal duty to do so as the successor of the East Bay Water Company. * * * The petitioner has the power to acquire the works and system outside the district. If it should do so it would acquire such property subject to the burden or servitude of continuing the service, and on no just principle could it continue to hold the property outside the district discharged thereof. * * * To acquire the property with the burden so attached would not therefore be in excess

of the powers of the district." *East Bay Mun. Utility Dist. v. Railroad Commission*, 194 Cal. 603, 620, 621, 229 P. 949, 955.

[22] The foregoing decisions appear to dispose of appellant's contention that the broad grant of power contained in the Municipal Utility District Act, section 12, subdivision 4, to condemn "property of every kind * * * without the district", should be deemed to be limited by subdivision 5 which authorizes a disposition of surplus energy to persons, firms and corporations outside the district. Even without the aid of these precedents, from a reading of the entire section with a view to determine the purposes and objects of the act it is quite evident that the purpose of the Legislature in enacting said section of the act was to give plenary powers to municipal utility districts within the broad confines of constitutional authorization; to allow such districts to put their energies to the "fullest capacity"; and to permit wide and extensive cooperation with other political subdivisions and agencies of government.

Furthermore, if that part of the company's system which occupies the Carmichael area, when taken over by respondent district, were not used to furnish service to the inhabitants of Carmichael, then the district would have surplus energy for distribution. Appellant's argument, based on the finding that "there is now no surplus of light, power or heat", is entirely specious, since said finding relates only to the present time and not to the time when respondent shall have taken possession of the company's system.

Another contention advanced by appellant on this phase of the case, viz., that respondent district did not have the power to condemn the company's properties in the Carmichael area because they are neither necessary nor convenient to the service to be furnished to the inhabitants of the district itself, but are sought to be acquired solely for the purpose of saving expenditure of funds, is likewise without merit.

[23, 24] There is substantial evidence to sustain a determination that retention of the facilities in that area is necessary or convenient for service to the inhabitants of the district. While the making of a financial profit alone may not authorize a taking, as cases cited by appellant indicate, it does not follow that considerations of economy and the prevention of excessive expenditures may not be taken in-

to account in determining necessity or convenience. See, *Los Angeles Ry. Corporation v. City of Los Angeles*, 16 Cal.2d 779, 787, 108 P.2d 430; *Southern California Edison Co. v. Railroad Comm.*, supra, 6 Cal.2d at pages 756, 757, 59 P.2d 808; *Postal Telegraph-Cable Co. v. Railroad Commission*, 197 Cal. 426, 438, 241 P. 81.

Appellant's further argument questioning the right of respondent district to condemn a joint use in certain poles comprising a part of the company's system is predicated on the theory that no right or interest known to the law is being acquired by such condemnation, since the use in question cannot be regarded as an easement in land.

[25] There is no substantial foundation for such a contention. It is clear that one may have a right to use a fixture such as a telephone pole without owning any interest in the land to which it is attached. In the case of *Balestra v. Button*, 54 Cal.App.2d 192, at pages 196, 197, 128 P.2d 816, at page 818, the court stated: "We are of the opinion that the right to maintain such a line [a telephone line] or to own an interest therein, does not necessarily depend upon the ownership of any lands. The owner of such right may or may not own lands. The right to cross over the lands of another is an easement, but no dominant tenement is necessary to support it * * *." Again in *Rothschild v. Wolf*, 20 Cal.2d 17, 22, 123 P.2d 483, 485, 154 A.L.R. 75, a case which involved a right granted to the owner of one building to use a stairway in an adjoining building of the other, it was held that "such a grant of the use of a stairway constitutes an easement and does not necessarily attach to the underlying soil." And in the same case, Mr. Chief Justice Gibson, in a dissenting opinion, based on the ground that no distinction should be made between a case where the building to which the easement attaches is destroyed voluntarily and one where it is destroyed involuntarily, stated (20 Cal.2d at page 23, 123 P.2d at page 486, 154 A.L.R. 75): "The right to use a stairway on the property of another constitutes a grant in the nature of an easement. The easement, however, is in the building rather than in the land upon which the building is located."

Nor can there be any doubt that the joint use of a pole is a substantial right. See, 29 C.J.S., *Electricity*, § 16, p. 528. Such a right has been recognized by statute,

Borough of Midland v. Steubenville etc. Traction Co., 300 Pa. 134, 150 A. 300, 302, and has been held to be the proper subject of a contract. Borough of Houston v. Washington & C. R. Co., 234 Pa. 245, 83 A. 108, 109, 110. It is a compensable item in the acquisition of an electric distribution system. Wisconsin Power & Light Co. v. Public Service Comm., 219 Wis. 104, 261 N.W. 711, 717, 262 N.W. 257.

A familiar example of joint use is the interest created by a party-wall agreement, which is held to be in the nature of an easement operating for the mutual advantage of the parties. In the early case of McCarthy v. Mutual Relief Ass'n, 81 Cal. 584, 586, 22 P. 933, 934, the court stated that "Each party owned the half of the wall which was upon his land, subject to an easement in the other. This easement was merely to use the wall as a party-wall between the two buildings." See also, Frowenfeld v. Casey, 139 Cal. 421, 425, 73 P. 152.

However, the precise legal designation which should be given to a joint use of a telegraph, telephone, or power-line pole, need not be determined herein. If the right to a joint or common use in a pole constitutes a substantial right—and we hold it does—then such a right is subject to condemnation. The Public Utilities Act, section 47(b), specifically authorizes the condemnation of "rights of any character whatsoever of any public utility, or any part or portion thereof."

In this connection, appellant complains particularly of the fact that respondent district is condemning a mere use in the poles in question instead of the fee therein or the poles themselves. Appellant has not shown that the value placed on such use by the commission is less than that of the poles, or that appellant will be in any way injured by such a qualified taking. We find nothing in the case of Klinker v. City of Los Angeles, 219 Cal. 198, 206, 211, 25 P.2d 826, 90 A.L.R. 148, cited and relied upon by appellant, which in any way militates against the right of respondent herein to condemn the use of the poles rather than the fee therein. On the contrary, that case shows definitely that the condemner need condemn only an easement in part of the property, if that is all that is needed, while condemning the fee in the remainder.

[26] Where joint or common interests are concerned, the commission in fixing compensation can do no more than attempt to equalize them as best it may, Postal Telegraph-Cable Co. v. Railroad Comm., supra, 197 Cal. at pages 438, 439, 241 P. 81 and, in the absence of a showing that it has acted arbitrarily, capriciously, or with an intent to discriminate unfairly, its action must be sustained. Appellant had the opportunity to point out any injustice that would result from the compensation awarded, and if the action of the commission was in excess of its powers appellant could have so shown in the Supreme Court. Instead, appellant insisted that the commission had regularly pursued its authority, and it may not now in this collateral proceeding ask us to usurp a function that has been invested in neither the superior court nor this court, but only in the Supreme Court on proceedings timely taken by an application for a writ of review.

The judgment is affirmed.

ADAMS, P. J. and THOMPSON, J., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.



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PERRETT v. SOUTHERN PAC. CO.

Civ. 12973.

District Court of Appeal, First District,
Division 1, California.

Feb. 11, 1946.

Rehearing Denied March 13, 1946.

Hearing Denied April 11, 1946.

1. Master and servant ⇐87

The Federal Employers' Liability Act is not a compensation act, and liability of employer is predicated upon negligence. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

2. Master and servant ⇐180(1), 204(1), 228(1)

An action under the Federal Employers' Liability Act differs from the old common-law action in tort between master and servant in that the so-called common-law defenses are not applicable. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

3. Trial $\hookrightarrow$ 295(1)

Instructions would be read as a whole in determining whether they were erroneous.

4. Master and servant $\hookrightarrow$ 90

Custom and usage are not conclusive evidence of due care by employing railroad company. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

5. Courts $\hookrightarrow$ 97(5)

The district court of appeal was bound by the United States Supreme Court interpretation of the Federal Employers' Liability Act. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

6. Master and servant $\hookrightarrow$ 204(1)

Under amendment to Federal Employers' Liability Act abolishing assumption of risk doctrine, interjecting into a case the doctrine of assumption of risk, however disguised, is error. Federal Employers' Liability Act, § 4, as amended by Act Aug. 11, 1939, 45 U.S.C.A. § 54.

7. Master and servant $\hookrightarrow$ 295(4)

In action by brakeman under Federal Employers' Liability Act, where factual issue was whether brakeman was thrown from freight car by jerk of train caused by improper handling of engine, instructions which, construed together, told jury that brakeman assumed the risk when work was done in the ordinary way without negligence of employer and that brakeman could recover only upon proof of an unusual jerk, were erroneous as injecting doctrine of assumption of risk abolished by the amendment to the act. Federal Employers' Liability Act, § 4, as amended by Act Aug. 11, 1939, 45 U.S.C.A. § 54.

8. Trial $\hookrightarrow$ 237(3)

In action under Federal Employers' Liability Act, instruction that railroad could be held liable only upon proof which satisfied jury's mind that brakeman's injuries were proximately caused by some negligence upon its part, was erroneous since in a civil case the degree of proof is a preponderance of the evidence and not proof to the satisfaction of the jury. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.; Code Civ.Proc. § 2061.

9. Master and servant $\hookrightarrow$ 291(9)

In action under the Federal Employers' Liability Act, the words "satisfactory foundation" appearing in instruction on

burden of proof reciting that where the testimony leaves the matter uncertain and shows that any one of several things might have brought about injury, the jury was not left to speculate as to true cause of accident when there was no "satisfactory foundation" in the testimony for a conclusion, were improper because possibly confusing. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.; Code Civ.Proc. § 2061.

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action under the Federal Employers' Liability Act by Samuel E. Perrett against the Southern Pacific Company for injuries sustained in course of employment. Judgment for defendant and plaintiff appeals.

Reversed.

Hildebrand, Bills & McLeod, of Oakland (Louis H. Brownstone, of San Francisco, of counsel), for appellant.

Johnson & Rickson, of Oakland, for respondent.

PETERS, Presiding Justice.

The plaintiff, while working in the course and scope of his employment with defendant, was run over by a freight car when he fell while attempting to board the moving train, his leg being severed below the knee. Defendant was admittedly then engaged in interstate commerce. This action was brought under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. The jury brought in a verdict for defendant. Plaintiff appeals, his sole ground of complaint being that certain instructions offered by defendant and given by the trial court, were prejudicially erroneous. With this contention we agree.

The complaint charges two separate acts of negligence on the part of defendant. The first of these was dismissed at the trial. The charge of negligence upon which the cause was tried alleges that the plaintiff was thrown from the freight car in question as a result of the negligent operation of the train by the employees of defendant. Defendant, in addition to denying this charge, affirmatively pleaded contributory negligence on the part of plaintiff. At the trial the factual issue simmered down to whether plaintiff was thrown from the side of the freight car as the result of a jerk of the train, caused

by improper handling of the engine, or whether he fell or slipped through no fault of his employer. A reading of the record demonstrates that the evidence on this basic issue was in sharp conflict and would have supported a verdict either way.

The accident occurred at about 4:40 p. m. on February 8, 1944. It was raining. Plaintiff, then age 42, had fourteen years of railroading experience. On the day in question he was acting as brakeman on a westbound freight, consisting of ninety-nine cars and an engine of the heaviest type used by the Southern Pacific Company. This train pulled into a siding at El Monte to permit an eastbound freight to pass. Plaintiff was in charge of cars 40 to 60 in the middle of the train, and was required to make a rolling inspection of his cars to ascertain whether there were any sliding wheels or dragging brakes. Since such an inspection can only be made from the ground while the train is moving, brakemen, after making such an inspection, are required to board the freight while the train is moving. A company rule provides that when a freight train starts up, its speed must not exceed eight miles per hour for a distance sufficient to permit such a rolling inspection. Plaintiff, after making such an inspection of some of his cars, attempted to board the freight car from which he fell. He testified, and there is some corroborating testimony, that the train was then going in excess of 15 miles per hour. Defendant's testimony was that the train was then proceeding between 8 to twelve miles per hour. Several of defendant's witnesses fixed the speed at ten or more miles per hour. Plaintiff testified that he was safely aboard the car with both feet in the stirrup and both hands gripping a grab iron when he was thrown off by a most violent and unusual jerk of the train. Defendant's testimony was to the effect that the train started slowly and smoothly and that there was no unusual jerk. It was plaintiff's theory that the alleged jerk was caused by improperly controlled slack action in the train. There is approximately six inches of slack between each freight car, the mechanism by which the cars are attached having that much spring or give. In a train ninety-nine cars long the total slack will be in excess of three car lengths in extent. This slack may be bunched in one part of the train, that is, cars may be closer together in one part of the train than in another. In starting,

if the engine is not properly handled, the slack may be stretched out too fast, resulting in a jerk which, like the cracking of a whip, is cumulative in force as it progresses through the train. It may be violent enough to break the train in two. Under certain conditions it may be felt in one part of a long train and not in other parts. Even if the engine is properly handled there is some slack action, but it can be reduced to a minimum. There is a company rule relating to slack action which states that "the heavier the engine and the longer the train, the greater is the care required." Conditions arising out of slack action are aggravated by a too rapid starting of the train.

It is an admitted fact that there is a saucer grade at the El Monte siding, and that starting therefrom there is a long steep grade westward. The result was that some of the cars were still going down hill while the engine and front cars were going uphill, a situation that may aggravate slack action.

It is obvious, and the parties admit, that in this state of the record the evidence would support a finding either way on the basic issue as to whether defendant was negligent.

[1,2] As already indicated, this action was properly filed under the Employers' Liability Act. That statute is not a compensation act. Liability of the employer is predicated upon negligence. *Tennant v. Peoria & P. U. R. Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; 45 U.S.C.A. § 51. The action differs from the old common-law action in tort between master and servant in that the so-called "common-law" defenses are not applicable. The fellow servant rule has been eliminated. Contributory negligence is not a defense except to mitigate damages. Before 1939 the plea of assumption of risk was available as an absolute defense to the employer except where the employer's violation of a safety act proximately contributed to the injury. The result was that the cases prior to 1939 drew a sharp distinction between contributory negligence and assumption of risk. In 1939 § 54 of the act was amended to abolish the defense of assumption of risk. That amendment reads as follows: "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injury to, or the death of, any of

its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *." It is admitted by all concerned that before, and since, the 1939 amendment negligence of the employer was, and is, the basis of liability under the act.

The trial court instructed at length on this issue and in no uncertain language told the jury, quite properly, that plaintiff could not recover unless he proved that defendant was negligent and that such negligence proximately caused the injury. But, in addition, at the request of defendant, the trial court instructed that: "In cases of this kind, the law imposes upon the employee the burden of assuming the ordinary risks of injury which are incident to his employment, when the work is being done in the usual and ordinary way, and without negligence on the part of the defendant. If, from all the evidence in the case, you find that there was no sudden, unusual or violent jerking out of the ordinary in connection with the handling of the cars on which Mr. Perrett was working at the time of his injury, then your verdict must be in favor of the defendant, Southern Pacific Company."

The court also instructed at the request of defendant that:

"If it appears from the evidence in this case that the jerk of the train complained of by the plaintiff, was due to what has been referred to in the evidence as 'slack action,' and that such slack action and such jerk are a normal and usual incident to the starting of a train such as that involved in this case, when ordinary care is used, then the defendant was not guilty of any negligence in the matter of the movement of the train at the time the start was being made.

"If, in the usual and normal conduct of reasonably prudent persons in the operation of trains, a jerk or running in of slack, such as claimed by plaintiff in this case, is an incident to the starting of a train of the type and kind referred to, in the evidence, neither the Southern Pacific Company nor any of its employees, can be found guilty of negligence because of such jerk or such slack action."

[3-5] These instructions when read as a whole were clearly erroneous. The last

two paragraphs quoted imply that no matter how dangerous and unreasonable it may have been to operate this type of train, if the actual handling of the train was reasonably prudent, plaintiff could not recover, even though a prudent person would not operate the type of train involved. The questions that were before the jury were whether the jerk, if any, was caused by the negligence of the railroad company, and, if so, whether such jerk was the proximate cause of the accident. These instructions withdrew from the jury the inference that the operation of this type of engine and train might itself be negligence. Custom and usage, of course, are not conclusive evidence of due care. *Haskins v. Southern Pac. Co.*, 3 Cal.App.2d 177, 39 P.2d 895. When these instructions are read with the first quoted instruction, and particularly the first sentence of that instruction, there can be no doubt that the jury was erroneously instructed. That sentence, when read in the light of the next sentence, and in view of the other quoted instructions, told the jury that plaintiff assumes the risk when work is done in the ordinary way without negligence on the part of the employer and that the plaintiff could recover only upon proof of an unusual jerk. Such instructions inserted into the proceeding an entirely false issue, in direct violation of the 1939 amendment to the statute as interpreted in the leading case of *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610, 143 A.L.R. 967. See Annotation in 143 A.L.R. 978 where later cases are collected and discussed. This being a federal enactment, this court is, of course, bound by the United States Supreme Court interpretation of the statute. The holding in this case is conclusive on this appeal.

In the *Tiller* case the employee was engaged at night in inspecting seals on a train moving slowly on one track when he was hit and killed by a train backing on another track. No special warning was given, although a brakeman with a lantern was riding on the rear car on the side opposite the employee. The employer denied negligence, pleaded contributory negligence in mitigation, and affirmatively pleaded that the decedent had assumed all the risks normally and necessarily incident to his employment. Defendant's motion for a directed verdict was granted by the District Court on the grounds that the cause of death was speculative and that

there was no evidence of actionable negligence. The Circuit Court affirmed (4 Cir., 128 F.2d 420), holding that the deceased had assumed the risk of his position, distinguishing between assumption of risk as a defense by employers against the consequence of their own negligence and assumption of risk as negating the conclusion that negligence existed at all. The United States Supreme Court reversed the case. 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610, 143 A.L.R. 967. The majority opinion, in which apparently all of the Justices, with the exception of Mr. Justice Frankfurter, concurred, was written by Mr. Justice Black. After referring to the Circuit Court holding the opinion states (318 U.S. at page 58, 63 S.Ct. at page 446, 87 L.Ed. 610, 143 A.L.R. 967): "We find it unnecessary to consider whether there is any merit in such a conceptual distinction between aspects of assumption of risk which seem functionally so identical, and hence we need not pause over the cases cited by the court below, all decided before the 1939 amendment, which treat assumption of risk sometimes as a defense to negligence, sometimes as the equivalent of non-negligence. *We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.'*" (Italics added.)

The opinion contains an interesting discussion of the origin and growth of the doctrine of assumption of risk, and of the different meanings of the phrase. It is pointed out how difficult it is to draw the line between assumption of risk and contributory negligence. The court then holds (318 U.S. at page 64, 63 S.Ct. at page 449, 87 L.Ed. 610, 143 A.L.R. 967): "It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, *releasing the employee from the burden of assumption of risk by whatever name it was called. The result is an Act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed.*" (Italics added.) After discussing the legislative history of the 1939 amendment, Mr. Justice Black states (318 U.S. at page 66, 63 S.Ct. at page 451, 87 L.Ed. 610, 143 A.L.R. 967):

"The doctrine of assumption of risk can not be 'abolished in toto' and still remain in partial existence as the court below suggests. The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label in the common law lexicon. The Act of 1908 and the amendment of 1939 abolish the post-Priestly v. Fowler [3 M. & W. 1] defenses and authorize comparison of negligence instead of barring the employee from all recovery because of contributory negligence. They leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury.

"In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done." (Italics added.)

Mr. Justice Frankfurter wrote a concurring opinion, in which he agreed that the granting of the directed verdict was error, but in which he vigorously disagreed with the reasoning in the majority opinion. He argues, as does the defendant in this case, that the 1939 amendment did not repeal the doctrine of assumption of risk in the sense that the employee assumes the risk of injury from hazards of his employment which no amount of care on the part of the employer can avoid. After developing this point at some length Mr. Justice Frankfurter states (318 U.S. at page 72, 63 S.Ct. at page 453, 87 L.Ed. 610, 143 A.L.R. 967): "'Assumption of risk' as a defense where there is negligence has been written out of the Act. But 'assumption of risk,' in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law. *Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded.*" (Italics added.)

[6,7] The respondent's argument in this case amounts to rearguing the Tiller case, and reiterates the arguments advanced by Mr. Justice Frankfurter. There can be no doubt but that under the majority opinion it is error of a most serious nature to interject into a case, since 1939, the doctrine of assumption of risk, however disguised. There can be no doubt that since 1939 an employee cannot recover unless he pleads and proves negligence on the part of the employer. There can be no doubt that before and since 1939 the employer was and is not liable if the cause of injury is some hazard of the employment that reasonable care could not have protected against. While it may be generally true, therefore, that the employee "assumes" the risk of hazards not due to the employer's negligence, that does not mean that the jury should be so instructed. Even Mr. Justice Frankfurter recognized that the phrase "assumption of risk" is a highly ambiguous one, and that its use in instructions "is bound to create confusion," and that "it should therefore be discarded." That this is so seems obvious. The issues before the jury are whether the defendant was negligent, and whether such negligence proximately caused the injury. The mere fact that the risk was an ordinary or usual one is a false factor. As already pointed out, the real question is whether the risk to which the employee is subjected could be eliminated in the exercise of ordinary care. To interject into the case the thought that the employee assumes the risks of usual and ordinary dangers cannot help but confuse what otherwise would be a simple issue. When the jury is told that defendant can be held liable only upon proof of negligence, the defendant has received all of the protection to which it is entitled. To further tell the jury that the plaintiff assumes the risks of injury incident to his employment when the work is being done in the usual and ordinary way and without negligence on the part of defendant and that unless there was an unusual jerk out of the ordinary the jury must find for the defendant, is to assume that a "normal" jerk cannot be the result of negligence. That is not the law since 1939. What is ordinary may also be negligent. That issue was erroneously taken from the jury by the instruction.

The Tiller case has been frequently cited and its rule followed. *Pratt v. Louisiana & A. R. Co.*, 5 Cir., 135 F.2d 692; *Stewart v. Baltimore & O. R. Co.*, 2 Cir., 137 F.2d 527; *Chicago Great Western R. Co. v. Peeler*, 8 Cir., 140 F.2d 865; *Leet v. Union Pacific R. Co.*, 60 Cal.App.2d 814, 142 P.2d 37.

[8] There is another instruction that was clearly erroneous. At the request of defendant the jury was instructed that the defendant could be held liable only "upon proof which satisfies your mind that the plaintiff's injuries were proximately caused by some negligence upon its part." Of course, in a civil case the degree of proof is a preponderance of the evidence and not proof to the satisfaction of the jury. Code Civ.Proc. § 2061.

[9] A somewhat similar error appears in another instruction on the burden of proof which, after correctly telling the jury that the happening of the accident creates no presumption of negligence, continues: "Where the testimony leaves the matter uncertain and shows that any one of several things might have brought about an injury for some of which the employer is responsible and for some of which he is not, the jury is not left to speculate or to guess as to what the true cause of the accident was when there is no satisfactory foundation in the testimony for a conclusion." The use of the words "satisfactory foundation" might be confusing and should be avoided on the retrial.

The judgment appealed from is reversed.

ATTERIDGE, J. pro tem., concurs.

WARD, Justice.

I concur.

The opinion prepared by the Presiding Justice is based upon the decision in *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610, 143 A.L.R. 967. I do not think that opinion is logically sound (see concurring opinion in the *Tiller* case), although as a justice of a state appellate court I am bound thereby.

Hearing denied; SHENK, EDMONDS, and SPENCE, JJ., dissenting.

73 Cal.App.2d 15

PEOPLE v. GROSOFSKY et al.

Cr. 3935.

District Court of Appeal, Second District,
Division 3, California.

Feb. 8, 1946.

Rehearing Denied Feb. 19, 1946.

Hearing Denied March 6, 1946.

1. Criminal law ☞5

The Legislature has the power to authorize prosecution to final judgment of acts which were violations of federal rationing restrictions at the time of their commission and to execute judgments of conviction. Penal Code, § 543; St.1943, p. 1008, § 9608.

2. Criminal law ☞15

Under state rationing statutes, the termination of federal gasoline rationing program did not prevent the punishment, after such termination, of a gasoline rationing offense committed prior to such termination. Penal Code, § 543; St.1943, p. 1008, § 9608; St.1944, 4th Ex.Sess., c. 42.

3. States ☞4

The state statute providing for punishment of offenses against the federal rationing program is not unconstitutional as an interference with the exclusive powers or jurisdiction of the United States government. Penal Code, § 543; St.1944, 4th Ex. Sess., c. 42.

4. Criminal law ☞5

A state has authority to protect the public morals and welfare of its citizens by prescribing punishment for black market operations.

5. Criminal law ☞37

"Entrapment" is not a defense unless the intent originates with the officers and the accused is induced to commit a crime which was not contemplated by him.

See Words and Phrases, Permanent Edition, for all other definitions of "Entrapment".

6. Criminal law ☞569

Evidence was insufficient to show that gasoline station operators were entrapped by officials of Office of Price Administration into making an illegal sale of federal gasoline rationing coupons. Penal Code, § 543.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Harry Grosofsky and another were convicted for the illegal sale of gasoline ration stamps, and they appeal from orders denying their motions for new trial and from all other orders.

Orders denying motions for new trial affirmed, and attempted appeal from all other orders dismissed.

Morris Lavine, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Robert S. Morris, Jr., Deputy Atty. Gen., for respondent.

SHINN, Justice.

Defendants were convicted in a court trial of the sale of gasoline ration stamps, in violation of section 543 of the Penal Code. Proceedings were suspended and each defendant was granted probation for a period of three years, on condition that he serve 90 days in the county jail. They made motions for a new trial, which were denied, and they gave notice of appeal from the orders denying the motions "and from all proceedings theretofore had in the case."

Defendants urge the following grounds for reversal of the orders: (1) Termination of gas rationing terminated the authority of the State to further prosecute the case; (2) the State statute is unconstitutional, in that it interferes with the exclusive province of the United States Government; (3) the evidence shows that the defendants were entrapped, and (4) the judgment is contrary to the law and the evidence.

[1,2] Under section 543 of the Penal Code, one who buys, sells, or otherwise acquires or transfers for a valuable consideration coupons, etc., issued by the United States Government or any agency thereof is punishable by imprisonment in the State prison or in the county jail or by fine, or by both fine and imprisonment. Section 2 of Statutes 1944, 4th Extra Session, Chapter 42, which added Chapter 9 entitled, "Offenses Against Rationing," to Title 13 of Part I of the Penal Code, reads as follows: "The chapter of the Penal Code added by this Act shall have no force or effect from and upon the termination of rationing programs pursuant to the laws of the United States of America." Defendants say: "Since the

gas rationing program terminated on or about August 15, 1945, the force and effect of the law terminated and this prosecution should, therefore, be dismissed." The offense was committed August 11, 1944, and the information was filed in the same month—a year before the termination of gas rationing. The case of *United States v. Chambers*, 291 U.S. 217, 50 S.Ct. 434, 78 L.Ed. 763, 89 A.L.R. 1510, relied upon by defendants, did not decide the same question. The court there held only that the adoption of the 21st Amendment to the Constitution, repealing the 18th Amendment without a saving clause, restricted the legislative authority of Congress, and that sentence on a plea of guilty of violation of the National Prohibition Act, 27 U.S.C.A. § 1 et seq., by one defendant should be abated, and that the prosecution should be dismissed as to defendants awaiting trial. There can be no question as to the power of the Legislature to authorize the prosecution to final judgment of acts which were violations of rationing restrictions at the time of their commission, and to execute judgments of conviction. The Legislature has exercised this power by enacting section 9608 of the Government Code, St.1943, p. 1008, which authorizes prosecution in such cases unless the act terminating or suspending the law creating the criminal offense expressly declares a contrary intention. We are concerned here only with the expressed legislative intention, and we find nothing in the language of section 2 which expressly or by implication declares an intention that those who violate the laws governing rationing, prior to their becoming inoperative, should escape their just punishment. We are in accord with the holding of the court and the reasoning supporting the same in *People v. McCord*, 1946, Cal.App., 164 P. 2d 50, in which the same point was decided contrary to the contentions of appellants herein.

[3,4] The State statute is not unconstitutional as an interference with the exclusive powers or jurisdiction of the United States Government. *People v. Kelly*, 1869, 38 Cal. 145, 99 Am.Dec. 360, relied upon by appellants, does not sustain their position. The court there said: "The same act may, in some instances, be an offense against the laws of both [the United States and the State], and it is only as an offense against the State laws that it can be punished by the State, in any event." In that case the court was considering a charge of perjury

based upon false swearing in a matter pending before the Register of the United States Land Office. The statements quoted in the opinion from *State v. Pike*, 1844, 15 N.H. 83, which defendants attribute to our Supreme Court, had to do with a charge of perjury in a bankruptcy proceeding. It was held in both cases that "the acts cannot be regarded as having been done under the sanction of the laws of this State, so as to subject the parties to punishment under those laws." This is not true of the offense under consideration. It is comparable to the offense of counterfeiting, which is a State as well as Federal offense, and may be punished under the State laws. *People v. White*, 1867, 34 Cal. 183. The court there held that the State statute was not repugnant to the Constitution of the United States (Article I, section 8, cls. 5, 6) or the laws of Congress. *People v. McDonnell*, 1889, 80 Cal. 285, 22 P. 190, 13 Am.St.Rep. 159, was another counterfeiting case. A pertinent statement of the court is the following 80 Cal. at page 292, 22 P. at page 192: "The defendant here is not sought to be punished under any federal statute, as such. He has been tried and convicted in a state court, under a state law, having for its object prevention of the passing to her citizens fraudulently, and to their damage, of counterfeit bank-notes of a foreign bank." It seems too clear for argument that a state has authority to protect the public morals and welfare of its citizens by prescribing punishment for black market operations.

The next point urged is that the evidence shows the defendants were entrapped. The argument is that defendants would not have committed the offense had they not been enticed into it by an emissary of the officials of the Office of Price Administration. The following facts were developed by the evidence: defendants operated a gasoline station in Los Angeles; on or about the 15th of July, 1944, one John D. Samuels, an aircraft employee, purchased from Jack Grososky three gallons of gas, surrendering no coupon therefor; a few days later he purchased more gas from Harry Grososky; thereafter he went to the station and told Jack Grososky that he wanted to take a trip and inquired about arranging for some gas, and this defendant replied that he could sell him some tickets any time he wanted them. Later, in July, Samuels had a conversation with Harry Grososky in which the latter stated that Samuels could

get gas tickets from him. Samuels then contacted officials of the O.P.A. and was given three marked \$10 bills with which to purchase gas coupons at the price that had been quoted to him, namely, \$30 for 100 gallons. Samuels went to defendants' station on August 10, 1944, bought 3 gallons of gas from Jack Grososky and told him that he would take 100 gallons worth of tickets—20 stamps. He was told to park beside the station, which he did; Harry Grososky called him into the office and exchanged 20 stamps for \$30. The O.P.A. officers stationed nearby closed in, took the stamps from Samuels and the marked money from Harry Grososky, and arrested the defendants. Samuels was not compensated by O.P.A. officials for his participation in the transaction.

[5] The law on the subject of entrapment is stated in *People v. Malone*, 1931, 117 Cal.App. 629, at page 633, 4 P.2d 287, at page 288. There is no entrapment unless the intent originates with the officers and the accused is induced to commit a crime which was not contemplated by him. The furnishing of money with which to purchase liquor has been held not to constitute entrapment. *People v. Rodriguez*, 1923, 61 Cal.App. 69, 214 P. 452; *People v. Caizza*, 1923, 61 Cal.App. 505, 215 P. 80.

By the serial numbers upon the coupons purchased by Samuels, and which were received in evidence, and by marks upon some of them showing that an attempt had been made to destroy them, it was established that the stamps were such as could not have been lawfully in the possession of defend-

ants. On May 16, 1944, 95,000 gasoline coupons were placed in a vault by O.P.A. operations officers preparatory to their cancellation and destruction. On August 2, other O.P.A. employees took the stamps to the plant of the Fiber Board Products Company, where they were placed in a macerator. Due to the failure of the macerator to do what was expected of it, some of the stamps survived the operation and found their way into circulation. In addition to those sold to Samuels, 45 C—3 coupons and 13 B coupons were found in a small tire repair building at the gas station of defendants on the day of their arrest. These were of the same sequence of numbers as the ones sold to Samuels.

[6] The case was tried upon the evidence adduced at the preliminary hearing. Defendants did not testify. The conclusion is inescapable that the coupons were in the possession of defendants for the purpose of sale. Defendants were not led into the commission of a crime but only into a mistake in the commission of a crime, in that they selected as a customer a knight errant of the O.P.A.

The orders denying the motions for new trial are affirmed. The attempted appeal from all other orders is dismissed.

DESMOND, P. J., and WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

27 Cal.2d 627

WARNER et al. v. KENNY, Atty. Gen.
S. F. 17274.

Supreme Court of California, in Bank.
Feb. 6, 1946.

1. Constitutional law $\Rightarrow$ 29

Legislature has authority to supplement the constitutional provisions for the initiative, with statutes designed to further its purpose and safeguard the process from abuse. Election Code, § 1400 et seq.; Const. art. 4, § 1.

2. Statutes $\Rightarrow$ 35½

Any reasonable legislative regulation which is in furtherance of and not a limitation upon the power of the initiative reserved in the Constitution to the people is valid and enforceable. Election Code, § 1400 et seq.

3. Statutes $\Rightarrow$ 35½

Any doubt as to construction of pertinent statutory provision is to be resolved in favor of initiative and such legislation is to be given the same liberal construction as that afforded election statutes generally. Election Code, § 1400 et seq.

4. Statutes $\Rightarrow$ 181(2)

Where language of statute is fairly susceptible of two constructions, one which in application, will render it reasonable, fair and harmonious with manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted.

5. Statutes $\Rightarrow$ 35½

Prohibition in statute relative to initiative, against accepting first petitions after 90 days from the official summary date refers to petitions on the proposed measure itself, not to petitions on same subject matter when covered by some later measure. Election Code, § 1407.

6. Statutes $\Rightarrow$ 35½

Prohibition in statute relating to initiative, against accepting first petitions after 90 days from official summary date, if interpreted to bar from ballot a proposed measure merely because it is substantially similar to or identical with a previously submitted and lapsed measure would make prohibition void on ground of limiting and restricting initiative power reserved to the people. Election Code, § 1407; Const. art. 4, § 1.

7. Statutes $\Rightarrow$ 35½

Under the Constitution relating to initiative and enabling legislation, a qualified measure should go on the ballot at next succeeding general election, and if a measure does not qualify, entire procedure may be instituted anew and a subsequent similar or identical bill may be proposed either by proponents of prior lapsed measure or by different proponents. Election Code, § 1400 et seq.; Const. art. 4, § 1.

8. Statutes $\Rightarrow$ 35½

Attorney General on initiative petition has no right to exercise discretion in determining validity of proposed enactment before preparing a title and summary therefor, since his duties in this respect are purely ministerial. Election Code, § 1400 et seq.; Const. art. 4, § 1.

9. Statutes $\Rightarrow$ 35½

Where petition for initiative was in proper form and was submitted to Attorney General in accordance with constitutional and statutory requirements as to procedure, Attorney General's refusal to prepare title and summary for proposed measure was not justified. Election Code, § 1400 et seq.; Const. art. 4, § 1.

Proceeding in mandamus by Eric G. Wagner and others against Robert W. Kenny, as Attorney General, etc., to compel issuance of a title and a summary for a proposed initiative measure.

Writ granted.

J. Wesley Cupp and Robert E. Sease, both of Los Angeles, for petitioners.

Robert W. Kenny, Atty. Gen., Charles W. Johnson, Deputy Director, of San Francisco, and Robert O. Curran, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Petitioners seek a writ of mandate to compel the respondent attorney general to forthwith issue a title and summary for a proposed initiative measure.

On October 15, 1945, petitioners submitted to the attorney general a draft of their proposed measure together with the required fee of \$200, and requested the preparation of a title and summary. Elections Code, § 1401. No action was taken by the attorney general until January 2, 1946, when petitioners were notified by let-

ter of his refusal to issue a title and summary on the ground that the measure was substantially the same as a measure which had been duly entitled and summarized in May, 1945, but on which no petitions had been filed within the prescribed 90-day period thereafter. Elections Code, § 1407. Petitioners thereupon instituted the present proceeding.

The question presented is that of proper interpretation of section 1407, *supra*, of which the pertinent portion provides that "No petitions for a proposed initiative measure shall be circulated for signatures prior to the official summary date. First petitions with signatures on a proposed initiative measure shall be filed with the clerk or registrar of voters not later than 90 days from the 'Official summary date' of such proposed initiative measure, and no clerk or registrar of voters shall accept first petitions on such proposed initiative measure thereafter."

The position taken by the attorney general is that if he were to issue a title and summary for a measure which is substantially the same as a previously entitled and summarized measure which has lapsed by reason of the failure of its proponents to qualify it for a place on the ballot, the effect would be to nullify the above-quoted provision of section 1407 prohibiting the acceptance for filing of any first petition on a measure later than 90 days from the official summary date.

[1-4] Unquestionably the Legislature has authority to supplement the constitutional provisions for the initiative, Const. art. IV, § 1, with statutes designed to further its purpose and safeguard the process from abuse see Elections Code, div. IV, and any reasonable legislative regulation which is in furtherance of and not a limitation upon the power reserved in the Constitution to the people is valid and enforceable. *Chesney v. Byram*, 15 Cal.2d 460, 101 P.2d 1106; *Uhl v. Collins*, 217 Cal. 1, 17 P.2d 99, 85 A.L.R. 1370; *Gray v. Kenny*, 67 Cal. App.2d 281, 153 P.2d 961; *Gage v. Jordan*, 23 Cal.2d 794, 147 P.2d 387. However, any doubt as to the construction of a pertinent provision is to be resolved in favor of the initiative and such legislation is to be given the same liberal construction as that afforded election statutes generally. The interpretation adopted must be reasonable, and where the language is fairly susceptible

of two constructions, one which, in application, will render it reasonable, fair, and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted. *Gage v. Jordan*, *supra*, 23 Cal.2d at pages 799, 800, 147 P.2d 387.

[5] Testing the questioned provision of section 1407 in the light of these rules of construction, it at once appears that the plain wording neither expressly nor impliedly manifests any legislative intent to bar from the ballot a proposed measure merely because it is substantially similar to or identical with a previously submitted and lapsed measure. The statute reads as a purely procedural provision designed to aid an orderly administration of necessary ministerial duties leading up to the preparation of the ballot. The prohibition against accepting first petitions after 90 days obviously refers to petitions on the *proposed measure itself*, not petitions on the same *subject matter* when covered by some later measure.

[6] Under the meaning attributed to the language by respondent, the provision would limit and restrict the initiative power reserved to the people by the Constitution, and it would therefore be invalid. It would lead to absurd consequences. An opponent, learning of a measure in course of preparation and desiring to defeat it, would need only to prepare and first submit a similar measure, and then permit it to lapse. The true proponents would be barred. Or a proponent of a submitted measure, discovering some defect of language and desiring to draft and submit a similar and properly worded bill, would find himself barred. The statute was never intended to have this drastic effect and no such meaning may be read into its provisions.

[7] The constitutional plan and the enabling legislation clearly connote that qualified measure shall go on the ballot at the next succeeding general election, and if a measure does not qualify, that the entire procedure may be instituted anew. A subsequent similar or identical bill may be proposed either by the proponents of the prior lapsed measure or by different proponents. Any possible imposition upon the public officials which might result from too numerous demands for titles and summaries for successive similar measures is met by the

provision requiring payment of an adequate fee for this service, Elections Code, § 1401.

[8,9] The attorney general in his return challenges the good faith of petitioners in demanding a title and summary for the proposed measure and contends that he has the right to exercise a discretion in determining the validity of the proposed enactment before preparing a title and summary therefor. We think it is clear that the duties of the attorney general in this respect are purely ministerial. No showing has been made to justify his refusal to prepare a title and summary for the proposed measure, and since it is in proper form and was submitted to him in accordance with the constitutional and statutory requirements as to procedure, petitioners are entitled to have furnished to them a title and summary therefor.

Let a peremptory writ issue forthwith.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



27 Cal.2d 599

PARK & TILFORD IMPORT CORPORATION v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 848, A. F. OF L., et al.

L. A. 18653.

Supreme Court of California, in Bank.
Jan. 31, 1946.

Hearing Denied Feb. 28, 1946.

1. Injunction ⇐101(1) **Torts** ⇐10

A labor union may use various forms of concerted action, such as strike, picketing, or boycott, to enforce an objective that is reasonably related to any legitimate interest of organized labor, but object of concerted labor activity must be proper and it must be sought by lawful means, otherwise the persons injured by such activity may obtain damages or injunctive relief.

2. Master and servant ⇐15(4)

Where unions did not represent a majority of employees in appropriate bargaining unit when unions demanded that employer sign a closed shop agreement and coerce employees to join the unions, employer was under legal duty to reject such unlawful demands. National Labor Relations Act § 8(1, 3), 29 U.S.C.A. § 158(1, 3).

3. Master and servant ⇐15(1)

Where, in employer's proceeding for certification of a bargaining representative, National Labor Relations Board held that employer could not lawfully recognize either union as exclusive bargaining representative of employees because not representing a majority, Supreme Court was not encroaching upon exclusive jurisdiction of board in determining that unions' demands for closed shop agreement were unlawful and that employer was under legal duty to reject such demands. National Labor Relations Act, § 8(1, 3), 29 U.S.C.A. § 158(1, 3).

4. Torts ⇐10

The closed shop is a proper objective of concerted labor activities, even when undertaken by a union that represents none of employees of employer against whom activities are directed.

5. Master and servant ⇐15(4)

Under National Labor Relations Act, a union may engage in concerted activities to win over a majority of employees to a closed shop, notwithstanding union does not then represent a majority or even if union does not include any members who are in employ of particular employer. National Labor Relations Act §§ 1, 2, 7, 8(3), 29 U.S.C.A. §§ 151, 152, 157, 158(3).

6. Master and servant ⇐15(4)

Torts ⇐10

The National Labor Relations Act does not require that union represent a majority during period of its activities for a closed shop, but only that it represent a majority when agreement is made and union may picket and boycott employer's business with object of so discouraging public support of business that nonunion workers will face prospect of loss of their jobs. National Labor Relations Act §§ 1, 2, 7, 8(3), 29 U.S.C.A. §§ 151, 152, 157, 158(3).

7. Torts ⇐10

Unions' abortive attempt to attain closed shop, by means that would have re-

quired employer's unlawful participation in violation of National Labor Relations Act, did not preclude unions from attempting to win over majority of employees necessary to make a valid closed shop agreement by means of picketing and boycotting. National Labor Relations Act §§ 1, 2, 7, 8(3), 29 U.S.C.A. §§ 151, 152, 157, 158(3).

8. Injunction ⇨189

An injunction which was not limited to enjoining unions' unlawful demands, but prohibited unions' concerted activities and thus prevented them from exercising their rights to engage in such activities for a closed shop, was invalid as in effect constituting punishment for past unlawful activities.

9. Injunction ⇨101(1)

Unlawful conduct on part of union in connection with concerted activities in obtaining closed shop agreement does not necessarily call for injunction totally prohibiting the activities, since union may continue its concerted activities if they can be purged of elements that make them unlawful.

10. Injunction ⇨189

Where unlawfulness of unions' conduct lay in their demands that employer sign a closed shop contract with unions and coerce employees to join unions before they had obtained requisite majority, unions' concerted action for a closed shop was lawful when divorced from such demands, and such action was required to be divorced when the unlawful demands were enjoined.

11. Constitutional law ⇨90

Enjoining unions' lawful activities in picketing and boycotting for purpose of obtaining closed shop would deny unions their constitutional right of freedom of speech.

12. Torts ⇨10

Unions' acts, that are lawful under California law and federal law when considered separately, cannot be made unlawful when such laws are considered together without repudiating the policy of each in order to impose state sanctions not wanted by federal government to protect federal law from possible violation. St.1937, p. 208, §§ 921, 923; National Labor Relations Act, 29 U.S.C.A. § 151 et seq.

13. Torts ⇨10

The terms "unfair" and "unfair to organized labor" carry no odious connotation

that an employer is guilty of fraud or dishonorable conduct, but connote only that employer is conducting his business under conditions that union considers unfavorable to its members.

See Words and Phrases, Permanent Edition, for all other definitions of "Unfair" and "Unfair to Organized Labor".

14. Injunction ⇨101(1)

Where labor unions, not representing majority of employees, called a strike of employer's teamsters, established a picket line, and placed employer's name on an "unfair list" because of employer's refusal to sign closed shop agreement with the unions, use of terms "unfair" and "unfair to organized labor" with reference to employer could not be enjoined. St.1937, p. 208, §§ 921, 923; National Labor Relations Act, 29 U.S.C.A. § 151 et seq.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Park & Tilford Import Corporation against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., and others, to enjoin defendants from listing plaintiff as unfair to organized labor and from taking concerted action to compel the plaintiff to violate the National Labor Relations Act. From a judgment for plaintiff, defendants appeal.

Modified and, as modified, affirmed.

Prior opinion 155 P.2d 16.

V. P. Lucas and David Sokol, both of Los Angeles, and Joseph A. Padway, of Washington, D. C., for appellants.

Clarence E. Todd, of San Francisco, amicus curiae on behalf of appellants.

O'Melveny & Myers, Louis W. Myers, Pierce Works, W. B. Carman, Jr., and Jackson W. Chance, all of Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff, a New York corporation engaged in the manufacture, importation and sale of alcoholic beverages, maintains its local and western division offices in Los Angeles. All of its merchandise in California is brought into the state. Four per cent of the goods from its local warehouse is sold and shipped to other states and the rest is

sold to customers in California. It is admittedly engaged in interstate commerce within the meaning of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq. National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 32, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352; Lyons v. Eagle-Picher Lead Co., 10 Cir., 90 F.2d 321. Its California employees include a division manager, secretary, book-keeper, warehouse superintendent, fifteen salesmen, four office clerks and two teamster-warehousemen.

In January, 1941, plaintiff's salesmen formed a union called the Park & Tilford Salesmen's Association. In the same year, one teamster joined defendant Local 848; the other joined defendant Local 595. In January, 1942, representatives of Local 595, with plaintiff's permission, interviewed the office clerks and asked them to join the union. They refused. Toward the end of February, 1942, representatives of Local 595 requested plaintiff to sign a closed shop contract covering the clerks. When plaintiff refused, the union threatened to call the teamsters out on strike, establish a picket line, and boycott plaintiff unless it signed the contract. Plaintiff again refused and in March, 1942, Local 848 was asked by Local 595 to organize the salesmen. With plaintiff's permission Local 848 interviewed the salesmen, but they refused to join. Local 848 then submitted a closed shop contract to plaintiff, which it refused to sign upon the ground that to do so would be an unfair labor practice under the National Labor Relations Act, since the union did not represent the salesmen. On March 20, 1942, the Park & Tilford Salesmen's Association admitted the office clerks and changed its name to Park & Tilford Mutual Association. Additional requests by the unions failed to induce plaintiff to sign the contracts, and the unions called the teamsters out on strike and began to picket plaintiff's place of business. A boycott was instituted June 14, 1942. The Los Angeles Food and Drug Council published plaintiff's name and business in its "Unfair List" and defendant notified many of plaintiff's customers verbally and by circular letter that plaintiff was "unfair" and requested them not to purchase plaintiff's products.

On September 1, 1942, plaintiff filed a petition with the National Labor Relations Board for the certification of a bargaining agent for its employees, and on September 2, 1942, brought an action in the superior

court for an injunction. On September 3, 1942, Local 595 filed charges with the National Labor Relations Board that plaintiff was guilty of an unfair labor practice, namely, the domination of the Park & Tilford Mutual Association. The Regional Director refused to issue a complaint that plaintiff was guilty of an unfair labor practice, and his action was sustained by the board on an appeal by Local 595. Plaintiff's petition before the National Labor Relations Board was dismissed on the grounds that neither defendant labor unions nor the Park & Tilford Mutual Association presented any request for recognition and that plaintiff could not lawfully recognize defendants as exclusive bargaining representatives of plaintiff's employees since they did not even claim to represent a majority. 47 N.L.R.B., No. 55. In the superior court action, the court found that plaintiff suffered irreparable damage and will continue to do so unless the picketing and boycotting cease; that all activities of defendants have been peaceful; that no violence or threats of violence have occurred; and that no false or fraudulent statements were published by the unions other than the statement that plaintiff was "unfair to organized labor" and the publication of plaintiff's name and business on the "Unfair List" of the Food and Drug Council. The prayer of the complaint was that the defendants be enjoined from (1) denominating or listing plaintiff as unfair to organized labor or to defendants; (2) taking any concerted action that would affect the sale or delivery of plaintiff's products, "for the purpose of inducing or compelling plaintiff to violate the National Labor Relations Act." The complaint does not on its face seek to restrain defendants from organizing plaintiff's employees, or to prevent the use of picketing, boycott, strike, or other concerted action for the purpose of securing membership in the Locals. The judgment, however, goes far beyond the relief sought in the complaint. The judgment expressly enjoins defendant: (1) From denominating or listing plaintiff as "unfair." "(2) From interfering with or preventing or attempting to interfere with or to prevent, whether by picket * * * or other threat of concerted action, the sale or delivery of products manufactured or distributed by Park & Tilford Import Corporation." "(3) From any and all picketing or boycotting of plaintiff or of plaintiff's business, products or merchandise." Defendants appeal.

[1] In this state "a union may use the various forms of concerted action, such as strike, picketing, or boycott, to enforce an objective that is reasonably related to any legitimate interest of organized labor" but "the object of concerted labor activity must be proper and * * * must be sought by lawful means, otherwise the persons injured by such activity may obtain damages or injunctive relief." *James v. Marinship Corporation*, 25 Cal.2d 721, 728, 729, 155 P.2d 329, 334, and authorities there cited.

Plaintiff contends that if it entered into a closed shop agreement with defendants or coerced its employees to join defendant unions it would commit an unfair labor practice under the National Labor Relations Act¹ and that defendants' activities were therefore directed at an unlawful objective. It relies on section 794 of the Restatement of Torts, which declares that it is not a proper objective of concerted labor activities to induce an employer to commit an act that would violate a legislative enactment or be contrary to public policy.

[2,3] Defendants concede that they did not represent a majority of plaintiff's employees in an appropriate bargaining unit when they demanded that plaintiff sign a closed shop agreement and coerce its employees to join defendant unions. It cannot be seriously questioned that their demands were not only ill-advised but unlawful, and that plaintiff not only had the right but was under the legal duty to reject those demands. There is no merit in the contention that in reaching this conclusion this court is encroaching upon the exclusive jurisdiction of the National Labor Relations Board, for in the proceeding initiated by plaintiff for the certification of a bargaining representative the board held that "the Company could not lawfully recognize either Local 595 or Local 848 as exclusive bargaining representatives of its employees,

since they do not even claim to represent a majority." It does not follow, however, that because their demands were unlawful, defendants were precluded from taking concerted action for a closed shop in plaintiff's business. Even though the defendants sought to have the employer commit an unlawful act by joining forces with them in organizing plaintiff's employees, there is a legitimate basis for concerted action by defendants.

[4] The closed shop is recognized as a proper objective of concerted labor activities, even when undertaken by a union that represents none of the employees of the employer against whom the activities are directed. *McKay v. Retail etc. Union No. 1067*, 16 Cal.2d 311, 319, 322, 106 P.2d 373; *Shafer v. Registered Pharmacists Union*, 16 Cal.2d 379, 382, 106 P.2d 403; *C. S. Smith Met. Market Co. v. Lyons*, 16 Cal.2d 389, 106 P.2d 414; *Sontag Chain Stores Co. v. Superior Court*, 18 Cal.2d 92, 113 P.2d 689; see *Fortenbury v. Superior Court*, 16 Cal. 2d 405, 106 P.2d 411; *Steiner v. Long Beach Local No. 128*, 19 Cal.2d 676, 682, 123 P.2d 20; *Emde v. San Joaquin County etc. Council*, 23 Cal.2d 146, 155, 143 P.2d 20, 150 A.L.R. 916; *Lisse v. Local Union, 2* Cal.2d 312, 41 P.2d 314; *In re Lyons*, 27 Cal.App.2d 293, 81 P.2d 190; *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann. Cas. 1165; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 P. 324.

[5,6] Under the National Labor Relation Act a union may engage in concerted activities to win over a majority of the employees to a closed shop, even though it does not then represent a majority. In section 1 of the National Labor Relations Act, 29 U.S.C.A. § 151, Congress declared it "to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce * * * by encouraging the practice and

¹ Section 8(3) of the National Labor Relations Act, 29 U.S.C.A. 158(3) makes it an unfair labor practice for an employer "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in sections 151-166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action de-

fined in sections 151-166 of this title as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made." Section 8(1), 29 U.S.C.A. 158(1), declares it to be an unfair practice for an employer "To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." As part of that policy employees were guaranteed the right "to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." § 7, 29 U.S.C.A. § 157. The act recognizes among other rights, peaceful picketing and boycotting of an employer by a labor union, whether or not its members are employed by him. Such rights may be exercised to secure a closed shop, for the act specifically designates the closed shop as one of the objectives of collective bargaining. § 8(3), 29 U.S.C.A., § 158(3). Section 2 of the act, 29 U.S.C.A. § 152, defines the term "employee" as "not * * * limited to the employees of a particular employer" and thus makes it clear that the right of employees under section 7 of the act "to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection" can be exercised by a union that does not represent the majority required for a closed shop contract or that does not even include any members who are in the employ of the particular employer. *National Labor R. Board v. Peter Cailler Kohler Swiss Chocolates Co.*, 2 Cir., 130 F.2d 503, 506; *Montgomery Ward Employees Ass'n v. Retail Clerks etc. Ass'n*, D.C., 38 F.Supp. 321; see *Wallace Corporation v. National Labor R. Board*, 323 U.S. 248, 65 S.Ct. 238; *National Labor R. Board v. Dahlstrom etc. Co.*, 2 Cir., 112 F.2d 756, 758; *National Labor R. Board v. Karp etc. Co.*, 2 Cir., 134 F.2d 954. Thus the National Labor Relations Act does not require that a union represent a majority during the period of its activities for a closed shop, but only that it represent a majority when the agree-

ment is made. A union may picket and boycott an employer's business with the object of so discouraging public support of the business that the nonunion workers will face the prospect of the loss of their jobs.² If a union could not do so unless it had the majority necessary for a closed shop agreement, it would be deprived of one of the most effective means of obtaining that majority.

[7-10] Plaintiff contends, however, that such activities are divested of their lawfulness in this case by the findings of the trial court as to their purpose. The trial court found all allegations of the complaint to be true. The complaint alleges that defendants threatened to undertake concerted action "for the purpose of inducing plaintiff to violate the National Labor Relations Act by coercing its salesmen and clerical employees to join unions which had not, at the time said threats were made, and have not at any time, been designated as collective bargaining agent by the majority of either said salesmen or said clerical employees." The complaint also alleges that "Thereafter and in pursuance of such statements and threats, and by reason of such refusal on the part of plaintiff, and with the intent and purpose of coercing plaintiff into interfering with the rights of self organization of its salesmen and clerical employees, as hereinbefore set forth, said Locals 595 and said Council, and each of them, took the following action * * *"

The trial court, like the plaintiff, assumed that since defendants undertook their concerted activities after the rejection of their demands, the purpose of the activities was simply to compel acceptance of the demands. The demands, however, were but a means to an end, and that end was the closed shop. When they failed and other means were undertaken, the end was still the closed shop. It was not scaled down to an immediate and lesser end. There is no

² The Senate Report on the Wagner Act stated: "There is an even more important reason why there should be no insertion in the bill of any provision against coercion of employees by employees or labor organizations. Courts have held a great variety of activities to constitute 'coercion.' A threat to strike, a refusal to work on material of nonunion manufacture, circularization of banners and publications, picketing, even peaceful persuasion. In some courts closed-shop agreements or strikes for such agreements are condemned

as 'coercive.' Thus to prohibit employees from 'coercing' their own side would not merely outlaw the undesirable activities which the word connotes to the layman, but would raise in federal law the ghosts of many much-criticized injunctions issued by courts of equity against activities of labor organizations, ghosts which it was supposed Congress had laid low in the *Norris-La Guardia Act.*" (Sen.Rep.No. 573, p. 16, 74th Cong., 1st Sess.; House Rep.No.1174, p. 16, 74th Cong. 1st Sess.)

evidence that defendants were preoccupied with so futile a purpose as compelling plaintiff's acceptance of their demands merely to place it in the position of violating the law. They were not seeking an empty victory; they were seeking to surmount successfully the hurdles that stood between them and the closed shop. In the early stages of the struggle for a closed shop they made demands that the employer was bound to reject. Having failed in their attempted short-cut to a closed shop, they turned to picketing and boycotting, long recognized as legitimate activities, to achieve that objective. Their abortive attempt to attain the closed shop by means that would have required plaintiff's unlawful participation did not preclude defendants from attempting to win over the majority of plaintiff's employees necessary to make a valid closed shop agreement. Defendants were then like any other union that does not have the required majority and takes concerted action to pave the way for a closed shop agreement. An injunction that makes workers forfeit their right to take such action because of previous demands, in a confusion of the lawful objective still unachieved with the means originally attempted to achieve it, is concerned, not with the prevention of unlawful activities in the future but with the punishment of unlawful activities in the past. See *Nann v. Raimist*, 255 N.Y. 307, 174 N.E. 690, 73 A.L.R. 669; *J. H. & S. Theatres, Inc. v. Fay*, 260 N.Y. 315, 183 N.E. 509; *May's Furs And Ready to Wear Inc. v. Bauer*, 282 N.Y. 331, 26 N.E.2d 279. There is evidence that after defendants undertook their concerted activities, one Laney, who was connected with defendant union 848, stated to plaintiff's branch manager that a closed shop contract should be signed "without any further trouble, and that would wash the entire thing up." The injunction, however, was not limited to enjoining such demands but prohibited defendant's concerted activities and thus prevented defendants from exercising their right under the law of this state and of the federal government to engage in such activities for a closed shop. Unlawful conduct in connection with concerted activities does not necessarily call for an injunction totally prohibiting the activities. A union may continue its concerted activities if they can be purged of the elements that make them unlawful. *Lisse v. Local Union No. 31*, supra, 2 Cal.2d 312, 318, 41 P.2d 314; *May's*

Furs and Ready to Wear Inc. v. Bauer, supra, 282 N.Y. 331, 343, 26 N.E.2d 279; *J. H. & S. Theatres, Inc. v. Fay*, supra, 260 N.Y. 315, 321, 183 N.E. 509. In the present case, the unlawfulness of defendants' conduct lies in their demands that plaintiff sign a closed shop contract with them and coerce its employees to join defendant unions before they have obtained the requisite majority. Their concerted action for a closed shop is lawful when divorced from these demands; it must be divorced when the demands are enjoined.

Picketing and boycotting unquestionably entail a hardship for an employer when they affect his business adversely. The adverse effect upon the employer's business that may result from the competition among workers for jobs is comparable to the adverse effect on his business that may result from his own competition with other employers. It is one of the risks of business. See *C. S. Smith Met. Market Co. v. Lyons*, 16 Cal.2d 389, 398, 106 P.2d 414. "The law * * * permits workers to organize and use their combined power in the market, thus restoring, it is thought, the equality of bargaining power upon which the benefits of competition and free enterprise rest. Accordingly, the propriety of the object of workers' concerted activity does not depend upon a judicial determination of its fairness as between workers and employers." 4 Restatement: Torts, p. 118. In *Stillwell Theatre Inc. v. Kaplan*, 259 N.Y. 405, 182 N.E. 63, 65, 84 A.L.R. 6, an employer, bound by a closed shop agreement with one union, suffered great hardship when his theatres were picketed by another that sought to win over his employees. The New York Court of Appeals denied injunctive relief, declaring: "The Court of Appeals has for many years been disposed to leave the parties to peaceful labor disputes unmolested when economic rather than legal questions were involved. The employer, if threatened in his business life by the violence of the unions or by other wrongful acts, might have the aid of the court to preserve himself from damage threatened by the recourse to unlawful means, but the right of the workman to organize to better their condition has been fully recognized. The fact that such action may result in incidental injury to the employer does not in itself constitute a justification for issuing an injunction against such acts." See *United States v. Hutcheson*, 312 U.S. 219, 232, 61 S.Ct. 463, 85 L.Ed. 788; *Fur Workers' Union No.*

72 v. Fur Workers' Union No. 21238, 70 App.D.C. 122, 105 F.2d 1.

[11] The outcome of concerted activities for a closed shop depends largely on public sentiment. No competitive business can endure indefinitely without good will; no group of workers can long define the terms of its employment without public support. In seeking to enjoin defendants' lawful activities, plaintiff in effect asks the court to preclude any possibility that public sentiment will crystallize in favor of a closed shop in plaintiff's business. The court could not do so without denying to defendants their constitutional right of freedom of speech. American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855; Cafeteria Employees Union v. Angelos, 320 U.S. 293, 296, 64 S.Ct. 126, 88 L.Ed. 58; Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Carlson v. People of State of California, 310 U. S. 106, 60 S.Ct. 746, 84 L.Ed. 1104.

Injunctions in labor disputes have not generally proved to be an effective means of settling them; frequently they have ag-

gravated rather than allayed a conflict. They have the deceptive appeal of the quick and easy and therein lies their danger, for disputes between workers and employers, now often complicated by internecine disputes among workers themselves, are not always of a comparable simplicity. There are many currents of conflict in the mainstream of labor relations, variable, unpredictable, subsiding at times as quickly as they arise. For the most part they can best be controlled, not by the courts but by the Legislature, whenever the necessity arises and to whatever degree the public interest requires.

Invoking section 8(3) of the National Labor Relations Act instead of sections 921 and 923 of the California Labor Code, St.1937, p. 208, in support of the trial court's injunction, plaintiff seeks to revive an issue settled by this court in McKay v. Retail etc. Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 106 P.2d 403 and C. S. Smith Met. Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414.³ It was there contended that the concerted activities were

³ The sameness of the issues in those cases and the present one is manifest. The arguments advanced by plaintiff in this case echo the dissenting opinion in the McKay case that, "the conclusion is inescapable that the activities in which the Retail Automobile Salesmen's Local Union, No. 1067, are engaged are directed toward a coercion of the employer, Howard Automobile Company, to compel the members of its automobile sales force to join the Retail Automobile Salesmen's Local Union, No. 1067. Any other statement of the purpose of such activities is merely an evasion of the issue. The question may, therefore, be more correctly stated as follows: Is it lawful for a labor union to picket an employer's place of business for the purpose of compelling the employer to coerce his employees to join the picketing union, when the employees are definitely opposed to joining said union, and there is no controversy between the employer and those employees?"

"While sections 921 and 923 of the Labor Code * * * remain on the statute books in California, the answer, in our opinion, must be in the negative. Section 921 of the Labor Code provides:

"Every promise made after August 21, 1933, between any employee or prospective employee and his employer, prospective employer or any other person is contrary to public policy if either party thereto promises any of the following:

"(a) To join or to remain a member of a labor organization or to join or remain a member of an employer organization,

"(b) Not to join or not to remain a member of a labor organization or of an employer organization,

"(c) To withdraw from an employment relation in the event that he joins or remains a member of a labor organization or of an employer organization.

"Such promise shall not afford any basis for granting of legal or equitable relief by any court against a party to such promise, or against any other persons who advise, urge, or induce, without fraud or violence or threat thereof, either party thereto to act in disregard of such promise."

"Section 923 of the Labor Code furnished the rule of construction for the interpretation of section 921 and the other two sections which comprise this chapter of the Labor Code. Said section is as follows: 'In the interpretation and application of this chapter, the public policy of this State is declared as follows:

"Negotiations of terms and conditions of labor should result from *voluntary* agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized work-

unlawful on the ground that their purpose was to compel the employer to violate sections 921 and 923 of the California Labor Code which, like the National Labor Relations Act, gives employees the right of association, self-organization, and designation of representatives free from the interference of employers. In rejecting this contention in *Shafer v. Registered Pharmacists Union*, supra, the court stated: "The argument is * * * made that it is absurd to suppose that these provisions were written with the intention of restraining the employer from influencing his employee, while at the same time conferring upon other individuals the right 'to coerce' the same employee through the employer. But the right of workmen to organize for the purpose of bargaining collectively would be effectually thwarted if each individual had the absolute right to remain 'unorganized,' and using the term adopted by the appellants to designate the economic pressure applied against them through the employer, coercion may include compulsion brought about entirely by moral force. Certainly such compulsion is not made contrary to public policy by any statute of this state and is a proper exercise of labor's rights. *Senn v. Tile Layers' Union*, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229; *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 58 S.Ct. 578, 82 L.Ed. 872; *Fur Workers' Union No. 72 v. Fur Workers' Union No. 21238*, 1940, 70 App.D.C. 122, 105 F.2d 1, affirmed 308 U.S. 522, 60 S.Ct. 292, 84 L.Ed. 443.

"The argument that provisions similar to those now being considered guarantee employees freedom 'from all interference' in their selection of a collective bargaining agent has been accepted by several state courts. *Roth v. Local Union etc.*, 216 Ind. 363, 24 N.E.2d 280; *Fornili v. Auto Mechanics' Union*, 200 Wash. 283, 93 P.2d 422. Such reasoning was also adopted by the

circuit court of appeals in its decisions in *Lauf v. E. G. Shinner & Co.*, 7 Cir., 82 F.2d 68; *Id.*, 90 F.2d 250, and by the dissenting members of the supreme court upon a review of the case, but was rejected by the majority. 303 U.S. 323, 58 S.Ct. 578, 82 L.Ed. 872. It is not in accordance with the law of this state, as judicially declared for many years, nor is it based upon a fair construction of sections 920 to 923 of the California Labor Code, considering their history and purpose. These sections lay no statutory restraints upon the workers' efforts to secure a closed shop contract from an employer, hence the appellants' picketing was lawful and should not have been enjoined." 16 Cal.2d at pages 387, 388, 106 P.2d at page 408; see, also, *McKay v. Retail etc. Union*, supra, 16 Cal.2d at page 327, 106 P.2d 373; *C. S. Smith Met. Market v. Lyons*, 16 Cal.2d 389, 392, 396, 400, 106 P.2d 414.

The dilemma in these cases arises from a failure to understand that the basic conflict is between the union and nonunion workers. Until that conflict is resolved, the employer is in the unhappy position of a neutral suffering its repercussions. When he seeks to enjoin concerted union activities for a closed shop on the ground that their purpose is to drive him to unlawful interference with his nonunion employees, he is in fact seeking to translate a conflict between groups of workers in which union workers have an even chance of achieving their objective lawfully, into a conflict in which he would become the contestant ad hoc for the nonunion workers, armed with a formula that would make the very objective of the union workers unlawful. The real issue of the closed shop would thus be shunted off the field to be replaced by the meretricious issue of the nonunion workers' right to freedom from employer interference. That right, evaluated within the con-

er is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collec-

tive bargaining or other mutual aid or protection.'

"Section 921(a) of the Labor Code plainly declares a promise by an employee to an employer to join a labor organization or to remain a member of a labor organization to be contrary to public policy. This being so, a boycott or strike or picketing by a labor organization to coerce an employer into an agreement to procure such promise from present and prospective employees becomes an act for the furtherance of an illegal purpose, and therefore properly enjoined." 16 Cal.2d at pages 338-340, 106 P.2d at page 387.

text of the right of workers and unions to take concerted action for a closed shop, does not include the right to freedom from the risk of employer interference induced by the pressure of such action. Employees are not free from concerted union activities to organize them directly; they are free to resist such activities. Similarly they are not free from concerted union activities designed to affect the employer's business adversely and thereby to organize them indirectly, and the employer is free to resist such activities. There is always the risk that he will yield if his business is adversely affected but the employees cannot be given absolute protection against that risk at the cost of vitiating the right of workers to organize for a closed shop.

Substantial protection to the employees is afforded by the National Labor Relations Act, which makes it unlawful for an employer to compel his employees to accept a closed shop when the union demanding the closed shop does not represent the required majority. Though the employer may run the gamut of inconveniences and uncertainties, and even disruption of his business, he is under the harsh duty to maintain his position as a neutral. "Economic hardships imposed upon an employer as a result of jurisdictional labor disputes do not excuse the employer from compliance with the [National Labor Relations] Act." National Labor R. Board v. John Engelhorn & Sons, 3 Cir., 134 F.2d 553, 557; National Labor R. Board v. Hudson Motor Car Co., 6 Cir., 128 F.2d 528; McQuay-Norris Mfg. Co. v. National Labor R. Board, 7 Cir., 116 F.2d 748, 752, certiorari denied 313 U.S. 565, 61 S.Ct. 843, 85 L.Ed. 1524; National Labor R. Board v. Star Pub. Co., 9 Cir., 97 F.2d 465, 470. Nevertheless he is as free as any group of workers to inform the public fully as to the difficulties of his position and to enlist public opinion to speed the settlement of the conflict by lending its support to one side or the other as he cannot. Settlement may also be expedited if the National Labor Relations Board exercises its power under section 9 (c) of the National Labor Relations Act to take a secret ballot of the employees to determine which group has the required majority. The employer may apply to the board to hold an election and to certify the bargaining agent designated by the majority of employees. Sec. 203.1 of the Rules and Regulations implementing the National Labor Relations Act, 29 U.S.C.A.

appendix. Since neither the defendant unions nor the Park & Tilford Mutual Association requested recognition in this case, the board denied plaintiff's application to institute certification proceedings.

If this court assumed the task of protecting the policy of Congress enacted in section 8(3) of the National Labor Relations Act regarding the employer's duty not to interfere with his employee's union affiliations, by enjoining all union activities to preclude the possibility of their inducing the employer to violate that duty, it would go far afield to obtrude sanctions that would run counter to the policy of Congress to safeguard the right of workers, to engage in concerted activities, and to its declared intention to make this policy prevail over others in the event of conflict. See *Hill v. State of Florida*, 325 U.S. 538, 65 S.Ct. 1373; *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 65 S.Ct. 1533; *United States v. Hutcheson*, 312 U.S. 219, 231, 232, 61 S.Ct. 463, 85 L.Ed. 788; *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 329, 58 S.Ct. 578, 82 L.Ed. 372; *Yoerg Brewing Co. v. Brennan*, D.C., 59 F.Supp. 625.

[12] If the legality of defendants' concerted action is determined on the basis of state law without regard to federal law, *Shafer v. Registered Pharmacists Union*, 16 Cal.2d 379, 106 P.2d 403, and the other California cases cited above are controlling. If their legality is determined on the basis of federal law without regard to state law, the National Labor Relations Act, and the numerous federal cases cited above are controlling. Acts that are lawful under the law of this state and of the United States when considered separately cannot be made unlawful when those laws are considered together without repudiating the policy of each in order to impose state sanctions not wanted by the federal government to protect federal law from possible violation.

[13,14] Plaintiff, relying on *Magill Bros. v. Building Service etc. Union*, 20 Cal. 2d 506, 127 P.2d 542, contends that references to it as "unfair" and "unfair to organized labor" were untruthful and that the use of these terms and the placing of its name on the "Unfair List" of defendants' trade paper should be enjoined. In the *Magill* case, the signs carried by the pickets stated: "This house on strike. A. F. L." There was in fact no strike; the statements were held to be false; and defendants were enjoined from making them. In the pres-

ent case there has been no falsification of facts. It has been repeatedly held that the terms "unfair" and "unfair to organized labor" carry no odious connotation that an employer is guilty of fraud or dishonorable conduct, but connote only that an employer is conducting his business under conditions that the union considers unfavorable to its members. "In reference to the word 'unfair,' it clearly appears that, as employed by the defendants and labor organizations generally, it has a technical meaning * * *. Such declaration means, and in this instance was understood by all parties concerned to mean, not that the plaintiff had been guilty of any fraud, breach of faith, or dishonorable conduct, but only that it had refused to comply with the conditions upon which union men would consent to remain in its employ or handle material supplied by it." *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 592, 98 P. 1027, 1031, 21 L.R.A., N.S., 550, 16 Ann.Cas. 1165, quoted in *C. S. Smith Met. Market Co. v. Lyons*, 16 Cal.2d 389, 395, 106 P.2d 414; *Emde v. San Joaquin County etc. Council*, 23 Cal.2d 146, 158, 159, 143 P.2d 20, 150 A.L.R. 916; *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 295, 64 S.Ct. 126, 88 L.Ed. 58; *Steffes v. Motion Picture Machine Operators Union*, 136 Minn. 200, 202, 161 N.W. 524; *Labor Review Publishing Co. v. Galliher*, 153 Ala. 364, 373, 374, 45 So. 188, 15 Ann. Cas. 674; *John R. Thompson Co. v. Delicatessen & C. W. Union, Local 410*, 126 N.J.Eq. 119, 123, 8 A.2d 130; *Cinderella Theater Co. v. Sign Writers' Union, D.C.*, 6 F.Supp. 164, 172; *Watters v. Retail Clerks' Union No. 479*, 120 Ga. 424, 427, 47 S.E. 911; *Campbell v. Motion Picture Mach. Operators' Union*, 151 Minn. 220, 226, 186 N.W. 781, 27 A.L.R. 631; see 1 Teller, op. cit. § 126, pp. 389, 392, § 152, pp. 472-473; See 43 Words and Phrases, Perm. Ed. 1940, p. 195. In *Cafeteria Employees' Union, etc., v. Angelos*, supra, the Supreme Court of the United States reversed the judgments of the New York Court of Appeals, which had approved an injunction restraining peaceful picketing in which the term "unfair" had been used, declaring: "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political contro-

versies—like 'unfair' * * * is not to falsify facts."

Since defendants, in connection with their concerted activities, made unlawful demands that plaintiff sign a closed shop contract and coerce its employees to join defendant unions, it was permissible for the trial court to enjoin defendants from making such demands. The judgment is therefore modified by limiting the injunction to the enjoining of defendants from making demands in connection with their concerted activities that plaintiff sign a closed shop contract with defendants or coerce its employees to join defendant unions so long as they do not represent the requisite majority of plaintiff's employees. As so modified the judgment is affirmed.

GIBSON, C. J., and CARTER and SCHAUER, JJ., concurred.

EDMONDS, Justice (concurring).

I concur in the conclusion of my associates that the demands of the unions were ill-advised and unlawful, and that the employer was under the legal duty to reject them. But under those circumstances, and in view of the uncontradicted evidence that, after both the picketing and the boycott had been instituted the unions continued to demand a closed shop contract, in my opinion, the judgment should be affirmed.

The decision modifying the judgment, in effect, declares that because the unions might picket the employer and institute a boycott for the purpose of influencing its employees to join their organizations and thereby obtain a closed shop, the same activities may not be enjoined when carried on to achieve an end openly and admittedly unlawful. Labor unions, as well as employers, should be required to deal in good faith and held accountable in accordance with their stated purposes. The judgment of the trial court was based upon uncontradicted evidence concerning the demands made by the unions and should not now be modified by approving the economic pressure upon grounds different from those declared.

SHENK and SPENCE, JJ., concurred.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

27 Cal.2d 595

**THOMPSON et al. v. MOORE DRYDOCK
CO. et al.**
S. F. 17109.

Supreme Court of California, in Bank.
Jan. 29, 1946.

Rehearing Denied Feb. 25, 1946.

1. Appeal and error ⇨954(2)

An appellate court will not interfere with an order denying the preliminary injunction, unless there is an abuse of discretion.

2. Equity ⇨65(2)

Negro shipyard workers could maintain action on their own behalf to enjoin alleged discriminatory practices by unions, as against contention that they did not act in good faith in that they did not represent other Negro workers.

3. Trade unions ⇨4

Negro shipyard workers were not barred from maintaining action for injunction against alleged discriminatory practices by unions because they had accepted or applied for membership in union auxiliaries, thereby agreeing to be bound by rules of regular union, since such agreement could not bind them to rules and practices which were contrary to public policy.

4. Trade unions ⇨4

Negro shipyard workers could maintain action against unions to enjoin alleged discriminatory practices although action may not have been brought promptly, in absence of any showing of prejudice, since delay alone does not constitute laches, and mere fact that workers were willing to work for a limited time under discriminatory conditions did not forever bar them from seeking relief.

5. Trade unions ⇨4

In action by Negro shipyard workers against international union and affiliated locals to enjoin alleged discriminatory practices, where workers were denied membership in local unions because of their race, and as a condition to employment in closed shop were compelled to join auxiliary lodges, and affidavits of unions showed that in addition to the adoption of discriminatory rules, certain admitted conduct of the local unions was discriminatory, preliminary injunction should have been issued.

Appeal from Superior Court, Alameda County; Ezra W. Decoto, Judge.

Action by Raymond F. Thompson and others against the Moore Drydock Company and others, to enjoin certain alleged discriminatory practices. From a judgment of dismissal in favor of the named defendant and from an order denying a preliminary injunction against the other defendants, the plaintiffs appeal.

Judgment and order reversed.

Andersen & Resner, George R. Andersen, and Herbert Resner, all of San Francisco, for appellants.

Brobeck, Phleger & Harrison, Marion B. Plant, and Charles J. Janigian, all of San Francisco, and William H. Hollander, of Oakland, for respondents.

GIBSON, Chief Justice.

The plaintiffs in this action, as in the companion case of *Williams v. International Brotherhood of Boilermakers*, Cal.Sup., 165 P.2d 903, seek to enjoin an international union and affiliated locals from discriminating against them on account of race and color and to restrain their employer from assisting the unions in carrying out the alleged discriminatory practices. The demurrer of the employer, Moore Dry Dock Company, was sustained without leave to amend. The demurrers of the other defendants were overruled but plaintiffs' application for a preliminary injunction against them was denied. Plaintiffs appeal from the judgment of dismissal in favor of the employer and from the order denying a preliminary injunction.

The cause of action alleged in the complaint is almost identical with that pleaded in the *Williams* case, and under the rules announced in that decision the judgment in favor of the employer here must be reversed.

With regard to the union defendants, however, the present action differs from the *Williams* case in that there the trial court dismissed all of the defendants and denied the application for a preliminary injunction without considering the matter on its merits, whereas here a preliminary injunction was refused although the demurrers of the union defendants were overruled. The union defendants contend that material allegations of the complaint were controverted and that, therefore, the trial

court acted within its discretionary powers in denying the application for a preliminary injunction.

[1] An appellate court will not interfere with an order denying a preliminary injunction unless there is an abuse of discretion (see *People v. Black's Food Store*, 16 Cal.2d 59, 61, 105 P.2d 361; 14 Cal.Jur. 180-183), but such an order will be reserved if the evidence does not afford a sufficient basis to support it. *Isert v. Riecks*, 195 Cal. 569, 234 P. 371; *Ellis v. American Federation of Labor*, 48 Cal.App.2d 440, 120 P.2d 79; *Carolina Pines, Inc. v. Catalina Pines*, 128 Cal.App. 84, 16 P.2d 781; see 14 Cal. Jur. 182, 183.

Plaintiffs are Negroes employed as skilled shipyard workers by defendant, Moore Dry Dock Company, which has a closed shop contract with the International Brotherhood. It is undisputed that they are denied membership in the local unions because of their race and color, and that as a condition to employment, they were compelled to join certain auxiliary lodges. The union defendants admit that all the business and activities of the locals and the auxiliaries are conducted in accordance with the "Constitution and By-Laws" and the "By-Laws Governing Auxiliary Lodges" of the International Brotherhood. These instruments, which are incorporated in the record as exhibits to defendants' affidavits, contain the same rules which were held to be discriminatory in *James v. Marinship Corporation*, 25 Cal.2d 721, 736-739, 155 P.2d 329. The affidavits of defendant unions also show that, in addition to the adoption of the foregoing rules, certain admitted conduct of the local unions is discriminatory.

[2] The unions contend that the trial court could properly have found that plaintiffs did not act in good faith since it is denied that they brought the action as representatives on behalf of other Negro shipyard workers. Even if we assume that plaintiffs do not represent the other Negro workers, this would not deprive plaintiffs of the right to maintain the action on their own behalf.

[3] It is also claimed that the court could have found that plaintiffs are not acting in good faith because it is alleged they accepted or applied for membership in the auxiliaries, thereby agreeing to be bound by the rules of the International Brotherhood. Such an agreement, however, cannot bind them to accept or retain membership in the auxiliaries under union rules and practices which are contrary to public policy. Cf. *Cameron v. International Alliance of Theatrical Stage Employees*, 1935, 118 N.J.Eq. 11, 176 A. 692, 97 A.L.R. 594.

[4] It is next contended that there is evidence from which the court could have found that this action was not prosecuted with diligence. Although it may be that the suit was not brought promptly, mere delay does not constitute laches in the absence of a showing of prejudice. *Austin v. Hallmark Oil Co.*, 21 Cal.2d 718, 735, 134 P.2d 777; cf. *Maguire v. Hibernia S. & L. Soc.*, 23 Cal.2d 719, 735, 736, 146 P.2d 673, 151 A.L.R. 1062. No such showing has been made here, and the mere fact that plaintiffs were willing to work for a limited time under discriminatory conditions does not forever bar them from seeking relief.

[5] The undisputed facts justify the issuance of a preliminary injunction, and defendants have shown no equitable ground upon which relief could properly be denied. It should be noted in this connection that when the trial court passed upon the questions of law and fact involved here it did not have the benefit of our decision in *James v. Marinship Corporation*, 25 Cal.2d 721, 155 P.2d 329, which determined for the first time in California important questions bearing directly upon the issues of this case.

The judgment of dismissal in favor of defendant Moore Dry Dock Company and the order denying a preliminary injunction are reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

27 Cal.2d 586

WILLIAMS et al. v. INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS AND HELPERS OF AMERICA et al.**S. F. 17127.**

Supreme Court of California, in Bank.

Jan. 29, 1946.

Rehearing Denied Feb. 25, 1946.

1. Trade unions ⇐4

A state has power to prohibit discrimination on account of race, creed or color by any labor union, with respect to membership or union services.

2. Action ⇐2

Where persons are subjected by others to conduct which is deemed unfair and contrary to public policy, the courts may afford necessary protection in the absence of statute.

3. Trade unions ⇐4

The failure to allege monopoly of labor in entire locality was not fatal to cause of action wherein Negro shipyard workers sought injunctive relief against alleged discriminatory practices by unions which had closed shop agreement with employer and required Negroes to join auxiliary to be eligible to work.

4. Contracts ⇐116(1)

An arbitrarily closed union combined with a closed shop is in the nature of an anti-social monopoly, whether limited to a single plant or covering an entire community.

5. Trade unions ⇐4

The right of an individual worker to protection against arbitrary and discriminatory exclusion from union membership should be recognized wherever membership is a necessary prerequisite to work, since the public interest is involved.

6. Master and servant ⇐3(2)

A closed shop agreement with a single employer is in itself a form of monopoly which though not improper carries with it certain responsibilities in which the public has an interest to prevent abuse.

7. Master and servant ⇐15(4)

A union selected in accordance with the National Labor Relations Act as the bargaining agent of employees has duty to represent all employees, without discrim-

ination because of race or color, and may be compelled to do so by judicial action. National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

8. Trade unions ⇐4

In action by Negro shipyard workers to enjoin alleged discriminatory practices by unions which had closed shop agreement with employer and required Negroes to join Negro auxiliary, complaint did not fail to state cause of action because not alleging that unions had a monopoly of labor supply in the locality.

9. Trade unions ⇐4

In action by Negro shipyard workers for injunction against unions which had closed shop agreements with employer and required Negroes to join Negro auxiliary, complaint alleging that affairs of auxiliaries were handled by locals without representation sufficiently alleged unreasonable discrimination.

10. Master and servant ⇐15(5)

The National Labor Relations Act does not give a union the authority to maintain a closed shop agreement with an arbitrarily closed union membership. National Labor Relations Act, § 9(a), 29 U.S.C.A. § 159(a).

11. Master and servant ⇐15(1)

Where Negro shipyard workers sought injunction against alleged discriminatory practices by unions which had closed shop agreement with employers and excluded Negroes from membership in union, though it permitted them to join auxiliary, trial court did not lack jurisdiction over subject matter on ground that if injunction were granted, it would destroy closed shop contract and interfere with rights of collective bargaining granted by the National Labor Relations Act. National Labor Relations Act, § 9(a), 29 U.S.C.A. § 159(a).

12. Injunction ⇐101(1)

An employer may be enjoined from indirectly assisting a union in carrying out discriminatory practices against Negroes through a closed shop contract.

13. Injunction ⇐118(3)

In action by Negro shipyard workers for injunctive relief against alleged discriminatory practices, complaints alleging that employers had enforced or threatened to enforce closed shop contract by requiring workers to join auxiliary lodges, thus

subjecting them to discriminatory union rules, stated cause of action against employers, as against contention that injunction would place employers in dilemma by requiring them to determine when union had ceased its discriminatory practices, since employer could rely on statements of officials of union which would have primary responsibility for compliance with court's order.

14. Appeal and error ⇐1198

Where preliminary injunction was refused on ground that complaint did not state a cause of action, but judgment of dismissal was reversed on appeal, the application for preliminary injunction was to be reconsidered by trial court on the merits in accordance with the Supreme Court's views.

Appeal from Superior Court, City and County of San Francisco; Peter J. Mullins, Judge.

Action by Wilbert Williams and others against the International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America, and others, to restrain interference with plaintiffs' employment or re-employment. From a judgment dismissing the action and from an order discharging an order to show cause why preliminary injunction should not issue, the plaintiffs appeal.

Reversed.

Andersen & Resner, George R. Andersen, and Herbert Resner, all of San Francisco, for appellants.

Charles J. Janigian, of San Francisco, Thomas M. Carlson, of Richmond, and Thelen, Marrin, Johnson & Bridges, of San Francisco, for respondents.

GIBSON, Chief Justice.

Plaintiffs, skilled Negro shipyard workers, brought this action on behalf of themselves and approximately 2,000 other Negro workers similarly situated, to restrain defendants from interfering with their employment or re-employment because they are not members of certain local labor unions affiliated with the defendant International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America. The trial court sustained the demurrers of all defendants, discharged an order to show cause why a preliminary injunction should not issue and dismissed the action. Plain-

tiffs have appealed from the order of discharge and from the judgment of dismissal.

The complaint alleges in substance as follows: Plaintiffs are employees and former employees of defendants Permanente Metals Corporation and Kaiser Company, Inc. A written contract containing a provision for a closed shop is in effect between the employers and the International Brotherhood, which dispatches workers for employment at the shipyards through the agencies of defendant local unions. Negroes are not admitted to membership in the local unions, but plaintiffs were dispatched for employment at the shipyards without permitting or requiring them to become members. Subsequently, however, the unions attempted to compel plaintiffs and other Negro workers to become members and pay dues to Negro lodges established under the authority of the International Brotherhood as auxiliaries to the local unions. These auxiliaries, it is alleged, are not bona fide labor unions but constitute schemes and devices whereby the defendant unions segregate Negro from non-Negro workers and discriminate against Negroes, the sole reason for the segregation and discrimination being race and color. Various practices of the unions, provided for in the By-Laws Governing Auxiliary Lodges of the International Brotherhood, are set forth in the complaint and are challenged as discriminatory. Plaintiffs are willing to join the local unions upon the same terms and conditions as non-Negro workers, but they are not willing to join or pay dues to the auxiliary lodges.

The gravamen of the complaint is that the unions assert the right to obtain the discharge of the Negro workers under the closed shop contract because they are not members of the unions, although at the same time the unions will not admit Negroes to membership except under discriminatory and unequal conditions. In *James v. Marinship Corp.*, 25 Cal.2d 721, 155 P.2d 329, which was decided after the trial court acted in the present case, we held that an arbitrarily closed or partially closed union membership is incompatible with a closed shop; that a denial of union membership to Negroes on terms of equality with other workers is tantamount to wholly closing the union to them; and that injunctive relief will lie to prevent the maintenance of an arbitrarily closed union together with a closed shop.

Defendants point out, however, that the complaint filed herein does not allege that either the International Brotherhood or its local affiliates had attained a monopoly of labor in the locality, and, therefore, they contend, the complaint does not state a cause of action under the decision in the James case. Although it is true that the court in the James case treated the existence of such a monopoly as an important reason for granting relief, the decision, contrary to defendants' contention, was not made dependent thereon. The question was expressly reserved for future determination, but we noted, however, that some states, by statute, have declared *all* labor unions to be affected with a public interest and thus subject to regulation. 25 Cal.2d at page 734, 155 P.2d 329.

[1] It is now established by a decision of the Supreme Court of the United States rendered since the James case, that a state has the power to prohibit discrimination on account of race, creed or color by any labor union with respect to membership or union services. *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 65 S.Ct. 1483, 89 L.Ed. 2072. The contention was there made that a New York statute which prohibits a union from denying membership or equal treatment to anyone by reason of race, color or creed was contrary to the Fourteenth Amendment in that it abridged property rights and liberty of contract. The court replied that to so hold "would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to [discriminate] on the basis of race or color," and, particularly applicable to the present case, the court stated that there was "no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees." (Italics added.) 65 S.Ct. at page 1487. Further, it should be noted that the New York statute was not limited in operation to unions having closed shop agreements, and no question of a labor monopoly in the locality was involved in the Corsi case.

[2] Although the relief granted in the Corsi case was derived from legislative authority, nevertheless, it is established that, where persons are subjected to certain conduct by others which is deemed unfair and

contrary to public policy, the courts have full power to afford necessary protection in the absence of statute. *James v. Marini Ship Corp.*, 25 Cal.2d 721, 740, 155 P.2d 329.

[3] The failure to allege a monopoly of labor in the entire locality is not fatal to plaintiffs' cause of action insofar as the authorities relied upon in the James case are concerned. Although it is true that certain of the cases cited emphasize the fact that such a monopoly existed (see, for example, *Wilson v. Newspaper & Mail Deliverers' Union*, 1938, 123 N.J.Eq. 347, 197 A. 720; *Carroll v. Local No. 269*, 1943, 133 N.J.Eq. 144, 31 A.2d 223), in only one case was it stated that relief must be denied because of the failure to show that the union had obtained a monopoly over the labor market. *Walter v. McCarvel*, 1941, 309 Mass. 260, 34 N.E.2d 677. In other jurisdictions relief has been granted against the maintenance of a closed shop and an arbitrarily closed union without requiring proof of a labor monopoly in the area. *Dorrington v. Manning*, 1939, 135 Pa. Super. 194, 4 A.2d 886; *Wills v. Local No. 106*, 26 Ohio N.P.,N.S., 435; cf. *Lucke v. Clothing Cutters' & T. Assembly No. 7507, K. of L.*, 1893, 77 Md. 396, 26 A. 505, 19 L.R.A. 408, 39 Am.St.Rep. 421.

These decisions are based upon the theory that such collective labor activity does not have a proper purpose and constitutes an unlawful interference with a worker's right to employment. The Restatement of Torts, section 810, has adopted this view, stating: "Workers who in concert procure the dismissal of an employee because he is not a member of a labor union satisfactory to the workers * * * are liable to the employee if, but only if, he desires to be a member of the labor union but membership is not open to him on reasonable terms." This rule is not founded upon the presence of a labor monopoly in the entire locality, and the reasoning is simply that it is unfair for a labor union to interfere with a person's right to work because he does not belong to the union although he is willing to join and abide by reasonable union rules and is able to meet all reasonable conditions of membership. No purpose appropriate to the functions of a labor organization may be found in such discriminatory conduct. Here the union's efforts are directed, not toward advancing the legitimate interests of a labor union, but rather against other workers solely on the basis of race and color.

[4] The reasons why an arbitrarily closed union should not be permitted to exist together with a closed shop are stated in 1 Teller, *Labor Disputes and Collective Bargaining* (1940), at page 285, as follows: "Labor unions which close their ranks to the public thereby assume a sovereignty which is not theirs to assume. * * * The closed shop as an instrumentality of a labor union, membership wherein is reasonably open to the public, establishes a desirable rule governing industrial enterprise. The closed shop at the hands of a labor union which substantially excludes the public from its benefits, on the other hand, is a means whereby an anti-social monopoly is foisted upon the industrial body politic." This reasoning is applicable whether the monopoly is limited to a single plant or covers an entire community.

[5, 6] The public interest is directly involved because the unions are seeking to control by arbitrary selection the fundamental right to work. While the need for protection may be greater where the union has secured closed shop contracts covering all the jobs in the locality, this is only an aggravated phase of the general problem. The individual worker denied the right to keep his job suffers a loss, and his right to protection against arbitrary and discriminatory exclusion from union membership should be recognized wherever membership is a necessary prerequisite to work. A closed shop agreement with a single employer is in itself a form of monopoly, giving a third party, the union, control over at least the plant of the signatory employer, and although such a labor monopoly is not in itself improper, it carries with it certain responsibilities, and the public clearly has an interest in preventing any abuse of it. As pointed out in the *Corsi case*, 326 U.S. 88, 65 S.Ct. 1483, 1487, 89 L.Ed. 2072, a labor union functioning under the protection of the state holds itself out to represent the general business needs of employees, and if, as it was there held, a state may protect workers from exclusion by any labor union, it is clearly warranted in doing so wherever union membership is a condition to employment although only a single employer is involved.

[7] It is assumed in connection with another phase of the case that the shipyards are industries affecting interstate commerce and that the parties hereto are subject to the National Labor Relations Act. 49 Stats. 449, 29 U.S.C.A. § 151 et

seq. The act affords a further reason for granting relief because under its provisions it is unnecessary to show that the unions have a labor monopoly in the locality. The union as the bargaining agent of the employees selected in accordance with the act has the duty to represent *all* employees, without discrimination because of race or color and it may be compelled to do so by judicial action. Cf. *Steele v. Louisville & Nashville R. R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173; *Tunstall v. Brotherhood of Locomotive Firemen & Engineers*, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187. The National Labor Relations Board has stated that where a union has obtained a contract requiring membership as a condition of employment, it does not have the right to compel the discharge of employees who are discriminatorily denied membership. See *In re Larus & Bro. Co. Inc.*, June 30, 1945, 62 N.L.R.B. No. 134; *In re Rutland Courts*, 44 N.L.R.B. 587.

[8] The complaint, therefore, does not fail to state a cause of action merely because it does not allege that the union defendants have attained a monopoly of the supply of labor in the locality.

[9] The union defendants contend that their demurrers were properly sustained on the ground that the complaint did not allege unreasonable discrimination against Negro workers. They say that the International Brotherhood is open to Negro members if they consent to segregation into separate auxiliaries and that this is not unreasonable discrimination. In addition to segregation, however, the complaint alleges specific provisions of the by-laws of the International Brotherhood which would operate to place members of the auxiliaries in an unequal and disadvantageous position as compared with members of the local unions. Plaintiffs charge, for example, that the locals control, manage, and supervise all of the affairs and business of the auxiliaries whereas the auxiliaries have no voice or vote in the affairs of the supervising locals; that the auxiliaries are not allowed business agents or grievance committees to act for their members but must seek representation through the business agents of the local unions, "who refuse to act for the members of said auxiliaries"; and that members of the auxiliaries are dispatched to employment only through the agencies of the local unions and cannot obtain a change of classification of work from helper to journeyman without their

approval. These union rules and practices were held discriminatory in *James v. Marinship Corp.*, 25 Cal.2d 721, 737-739, 155 P.2d 329, where it was further declared that since the Negroes were denied union membership on terms of equality with other workers, the effect was the same as wholly denying them membership.

[10, 11] The union defendants next contend that the trial court did not have jurisdiction over the subject matter because, they assert, if an injunction were granted it would in effect destroy their closed shop contract and affect the status of the employees of the shipyards, and it would thus interfere with the rights of collective bargaining granted by the National Labor Relations Act. This contention was determined adversely to defendants in the *James* case. They now rely upon *Hill v. State of Florida*, 325 U.S. 538, 65 S.Ct. 1373, which was decided after the *James* case. It was there held that a state has no power to impose conditions upon the rights of a union and its representatives to function as collective bargaining agents under the National Labor Relations Act.

There is nothing in the *Hill* case, however, that precludes a state court from enforcing against a labor union such rights of individual workers as are consistent with the provisions of the federal act. That act clearly does not give a union the authority to maintain a closed shop agreement together with an arbitrarily closed union membership. Moreover, the rights which plaintiffs seek to enforce not only are consistent with the provisions of the federal act but appear to be affirmatively granted thereby. Section 9(a) provides that the union selected by a majority of the employees of a bargaining unit "shall be the exclusive representatives of all the employees in such unit", 49 Stats. 453, 29 U.S.C.A. § 159(a), and it is difficult to see how a union can fairly represent all employees of a bargaining unit if it arbitrarily excludes some from membership thereby depriving them of the opportunity to vote for union leaders and to participate in determining union policies. See *James v. Marinship Corp.*, 25 Cal.2d 721, 735, 155 P.2d 329.

[12, 13] An additional contention made by the employer in *Thompson v. Moore Dry Dock Co.*, Cal.Sup., 165 P.2d 901, should be considered here, since the allegations in the complaints are substantially the same and the cases were argued together in this

court. It is contended that a cause of action is not stated against the employers because it does not appear that they have committed or threatened any wrong against plaintiffs. The complaints allege that the employers have enforced, or threaten to enforce, the closed shop contracts against plaintiffs by requiring them, upon penalty of discharge, to join the auxiliary lodges, thus subjecting them to discriminatory and unequal union rules set forth in the complaint. As held in the *James* case, an employer may be enjoined from indirectly assisting a union in carrying out discriminatory practices against Negroes through a closed shop contract. 25 Cal.2d 721, 742, 155 P.2d 329. It is argued, however, that an injunction would place the employers in a dilemma in that it would require them to judge whether, after such an order, the union had ceased its discriminatory practices, and they argue that they would thereby be subjected either to a claim by a Negro that the injunction was being violated or to a claim by the union that it no longer discriminated against Negroes. The employers, however, will not be compelled to make such a decision. They need not look behind the notice from the union that an employee is not a member in good standing. They may accept the statements of the union officials who are in charge of providing work clearances not only to the effect that a particular worker is not a member in good standing but also to the effect that the union has ceased all unequal and discriminatory treatment within the terms of the injunction. Upon receipt of such a statement the employers may refuse to hire the Negro workers, and if the union has not given truthful information and if it has continued the enjoined discriminations, it alone, and not the employers, will be subject to a charge of contempt. The primary responsibility for compliance with the order of the court is thus placed where it belongs—directly on the union. With the duties and responsibilities of the employers thus limited, there remains no force to their objection that they will be placed in an inescapable dilemma.

[14] Defendants further contend that the trial court had discretionary power to deny a preliminary injunction. The record shows, however, that the order to show cause was discharged upon the sustaining of the demurrers without leave to amend and the injunction was refused solely on the ground that the trial court concluded

that the action had to be dismissed because the complaint did not state a cause of action. Since the judgment of dismissal must be reversed, the trial court should consider the application for a preliminary injunction on the merits in accordance with the views set forth in this opinion.

The judgment of dismissal and the order discharging the order to show cause why a preliminary injunction should not issue are reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



27 Cal.2d 570

IRVINE CO. v. CALIFORNIA EMPLOYMENT COMMISSION et al.

L. A. 19074.

Supreme Court of California, in Bank.

Jan. 29, 1946.

Rehearing Denied Feb. 25, 1946.

1. Master and servant ☞78

The Unemployment Insurance Act was adopted as a part of a national plan of social welfare and is designed to work closely with similar federal legislation. Gen.Laws, Act 8780d, § 2; 26 U.S.C.A. Int.Rev.Code, § 1607(c) (1) (I); Social Security Act, §§ 901-910, 42 U.S.C.A. §§ 1101-1110.

2. Internal revenue ☞1129

"Agricultural labor," as used in Social Security Act, is used in a broad sense and embraces agricultural labor of every kind. Gen.Laws, Act 8780d; Social Security Act, §§ 901-910, 42 U.S.C.A. §§ 1101-1110; 26 U.S.C.A. Int.Rev.Code, § 1607(I).

See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural Labor".

3. Statutes ☞212

Court, in determining what Legislature meant by excluding "agricultural labor" from the Unemployment Insurance Act would assume that Legislature, in using such a broad term as a base exclusion, was cognizant of and took account of meaning ascribed to that term under Workmen's Compensation Act in which it was similarly

used. Gen.Laws, Act 8780d; Labor Code, § 3201 et seq.

4. Statutes ☞212

Legislature, in legislating with regard to an industry or an activity, must be regarded as having had in mind the actual conditions to which act would apply, that is, the customs and usages of such industry or activity.

5. Statutes ☞212

Where there were many large ranches producing agricultural crops by employment of mechanized equipment, with a division of labor and use of irrigation, reclamation and drainage processes when Legislature adopted the Unemployment Insurance Act, Legislature, in using the general term "agricultural labor" to describe an exception from the act, presumably had such ranches in mind as well as smaller farms. Gen.Laws, Act 8780d.

6. Taxation ☞219

Where a person's services are performed on a farm while a regular employee of owner or tenant of farm and such services are essential for the purpose of producing agricultural crops under system of work established in furtherance of that purpose, such services are "agricultural labor" exempt from Unemployment Insurance Act regardless of fact that particular services might ordinarily be classed otherwise if performed under different circumstances. Gen.Laws, Act 8780d, § 7(a).

7. Taxation ☞219

The Legislature, in using the term "agricultural labor" to describe an exemption under the Unemployment Insurance Act, contemplated conditions existing at time of passage of act and well known to Legislature, and contemplated that term should broadly apply to business of agriculture in its entirety rather than that exemption be limited to agricultural labor under primitive conditions. Gen.Laws, Act 8780d, § 7(a).

8. Taxation ☞219

Clerical and administrative workers on a ranch, whose services are directly concerned with business of keeping records of crop production and with management and supervision of farming enterprise, are included in "agricultural labor" exempt from Unemployment Insurance Act. Gen.Laws, Act 8780d, § 7(a).

9. Taxation ☞319(I)

Rule of State Employment Commission that specialized services not closely connect-

ed with agriculture do not constitute agricultural labor exempt from Unemployment Insurance Act, though performed on a farm by employee of owner or tenant, is unreasonable, arbitrary and discriminatory in so far as it purports to exclude from agricultural labor classification work essential to or directly connected with growing of agricultural crops on a large ranch. Gen. Laws, Act 8780d, § 7(a).

10. Taxation ⇨219

Where a landlord leases part of its land to increase its own agricultural production, such leasing is an "agricultural function", with respect to exemption from the Unemployment Compensation Act. Gen. Laws, Act 8780d, § 7(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural Function".

11. Taxation ⇨219

Where rancher leased parts of ranch on a crop-sharing basis to increase total production of ranch, services of ranch employees in connection with drainage and reclamation of land in operating sprinkler system for irrigation and making repairs which tenant had no facility to do and harvesting tenant's grown crop, for which services either no charge was made or charge was computed on a cost basis, were exempt from Unemployment Insurance Act as "agricultural labor." Gen.Laws, Act 8780d, § 7(a).

12. Taxation ⇨59

A third person who furnished men to shovel salt, who received entire pay for particular work and in turn paid the men and furnished them with living accommodations, and who was instructed merely where work was to be done, was an "independent contractor" and general employer was not liable for contributions under Unemployment Insurance Act for such men. Gen. Laws, Act 8780d, § 45.10.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

13. Appeal and error ⇨1011(I)

Where evidence adduced by appellant created no more than a conflict in the evidence and the possible inferences that might be drawn by trial court as trier of facts, trial court's finding on such conflict would not be disturbed.

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Consolidated actions by Irvine Company against California Employment Commission, etc., and others for refund of contributions under the Unemployment Insurance Act paid under protest. Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion, 158 P.2d 257.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellants.

Rogers & Clark, John H. Painter, and Verne-Marie Freeman, all of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff instituted several actions under section 45.10 of the Unemployment Insurance Act, Stats.1935, p. 1226, as amended, Deering's Gen.Laws 1937, Gen.Laws Supp. 1939, Act 8780d, for the refund of certain contributions paid under protest in 1939, 1940 and 1941, upon the theory that the services performed constituted "agricultural labor," and that the 1940 amendment to the commission's rule 7.1 is invalid insofar as it would exclude such services from the concept of "agricultural labor," a base exception under the act. The actions were consolidated for trial, judgment was rendered in favor of plaintiff, and defendants prosecute this appeal.

Respondent owns and operates a large ranch of which some 97,000 acres are used for farming purposes. About 6,000 acres are devoted to citrus fruit and other orchards; about 4,500 acres to grain and field crops; about 60,000 acres to grazing; and about 26,000 acres have been leased to tenant farmers, largely on a share basis, and are used to raise citrus fruits, vegetables, grains and other crops. When respondent acquired this property in 1894, it was used principally as a cattle and sheep range. Over the passing years the productive capacity of the ranch has been gradually and greatly increased by developing irrigation, draining swampland, washing out alkali and developing a system of soil erosion in various portions of the land. This has required the installation of a large number of electrically operated pumps, and the building of some dams, many miles of canals and pipe lines, roads, and terraces to control the movement of water in certain areas.

Respondent purchases electricity from a power company which is delivered at a single metering point at the edge of the ranch. It has installed and maintains its own distributing system within the confines of the ranch, using the electricity to operate pumping plants and motors and for lighting purposes. Respondent also furnishes electricity to some of its tenant farmers and employees, to some co-operative marketing associations located on the ranch, and to one private concern off the ranch, in that case trading electricity for sewage water. These other users of electricity are charged only the cost thereof, and it is conceded that no profit is made from the arrangement. Respondent's reason for leasing portions of the ranch is that in those cases greater production can be obtained through the closer attention given by share tenants having a personal interest in the crops.

While respondent is principally engaged in agriculture, it operates, or is interested in, a few comparatively small industrial or commercial enterprises, mostly along the ocean, including a salt works. Contributions assessed in connection with such activities have been paid, and no controversy exists relative thereto, with the exception of one item which will be considered later. No question is raised here with regard to a large portion of respondent's employees who are engaged in the work of actually tilling the soil, it being conceded that such services are "agricultural labor" within the meaning of the act.

To facilitate its work of preparing the land for cultivation, raising and marketing crops, maintaining buildings and equipment, and keeping records, respondent has, for greater efficiency, arranged a division of labor by assigning special duties to certain of its employees. One group called the "Cummings crew," after its foreman, consists of some twenty men who maintain and operate the irrigation, drainage and reclamation systems. Specifically, they install, operate and keep pumps in working order, repair dams and ditches, drill some wells, construct terraces, remove silt deposits from orchards, level land in preparation for irrigation, run a portable sprinkler system, and build and maintain private roads over the property to serve ranch purposes. At times they handle some ten different kinds of heavy mechanical equipment requiring some degree of skill, and then again they do miscellaneous work, including the use of a pick and

shovel when the occasion arises. Most of these men were ordinary laborers when they joined this crew. In connection with this group's work, respondent employs a surveyor, with occasionally a trained assistant, to determine grades, plan the course for ditches and pipe lines, and perform other services of a similar nature to promote the more efficient operation of the ranch. Another group of workers consists of electricians, who repair and maintain the electric lines on the ranch, do the necessary wiring, and repair and maintain the various motors on the irrigation pumps and in certain tool shops. Still another group consists of carpenters, painters and plumbers. There are 245 large buildings on the ranch and 180 small sheds. These are located generally in twelve units which constitute the various operating centers for the ranch. While all major construction work is done by outside contractors, respondent does maintain a small carpenter shop as a nucleus plant for this group in its work of repairing and maintaining the various buildings and fences on the ranch.

The extensive farm acreage and the diversification of products necessitate the operation of a tremendous amount of mechanical farming equipment, such as tractors, trucks, automobiles, trailers, harvesters, spray rigs, and numerous other machines and equipment, most of which are tractor drawn. Another separate group of workers, consisting of three or four blacksmiths and eight mechanics, are engaged in repairing and maintaining this type of equipment, including the sharpening of tools. And another group of workers consists of bookkeepers, stenographers, a timekeeper, a selling and purchasing agent, and other office help. There are also foremen, superintendents, and managers of various kinds. The trial court found that 85 per cent of the services performed in office work, and of the services of the various supervisors and managers, are essential to and directly connected with the growing of agricultural crops by respondent on this ranch and the farming of the property. The court further found that the work done by all of the other employees above mentioned is necessary and essential to and directly connected with the growing of agricultural crops on this ranch.

The point of special concern on this appeal is the classification of certain specialized services rendered for the most

part, not in the actual cultivation of the soil, but in maintaining and keeping in repair the buildings and equipment of the ranch; in caring for and operating the irrigation and reclamation systems; in operating some of the heavier types of farm machinery; in managing, supervising and furnishing supplies and food for the men working the land; in keeping the necessary books and records—all of which work is incidental and essential to the development, cultivation and operation of the ranch.

By its terms "agricultural labor" is excluded from the operation of the Unemployment Insurance Act. § 7(a). The point of dispute is whether these specialized services should be classified as "agricultural labor" within the import of the statutory exemption. Appellants argue that "the rationale of the agricultural labor exemption is based on the concept of a small family farm"; that respondent's agricultural enterprise, because of its size, should be considered as industrial or commercial in nature; and that the services here involved are such specialized activities as to be, from their very nature, industrial or commercial even when performed on a farm by employees of the owner thereof and in connection with farming operations. It is further argued that in any event such services do not constitute "agricultural labor" because of a special proviso added in 1940 to the commission's rule 7.1 in connection with its definition of the act's base exception. That provision reads as follows: "Where the nature of the services is such that it might be properly said of the individual performing it that he is pursuing a special trade, calling, or occupation not closely connected with agriculture, the service does not constitute 'agricultural labor' even though the service may be performed on a farm by an employee of the owner or tenant thereof. Typical of such services are those performed by managers, supervisors, foremen, carpenters, painters, blacksmiths, mechanics, or engineers, time-keepers, bookkeepers, or other clerical workers, watchmen, janitors, cooks and gardeners."

[1,2] This act was adopted as a part of a national plan of social welfare and was designed to work closely with similar federal legislation enacted in the same year, 1935. California Employment Comm. v. Butte County Rice Growers

Assn., 25 Cal.2d 624, 630, 154 P.2d 892; 42 U.S.C.A. §§ 1101-1110. Originally, the federal act and the federal administrative definition contained no "special trade" provision. In 1937 and 1939 such a provision was adopted by the federal administrative authorities (Federal Bureau of Internal Revenue, Rulings, 127 S.S.T. 125, C.B. 1937-1397; 423 S.S.T. 368, C.B. 1939-1, Part 1298); yet in three cases where the question of classification arose with reference to services performed during those years, it was held that persons employed by farmers and for farm purposes were engaged in agricultural labor even though it might properly be said that they were pursuing special trades. *Jones v. Gaylord Guernsey Farms*, 10 Cir., 128 F.2d 1008; *Stuart v. Kleck*, 9 Cir., 129 F.2d 400; *Lattimer v. United States*, D.C., 52 F.Supp. 228. These federal decisions, in effect, reject, without express mention, the "special trade" provision as out of line with the broad policy of exclusion envisaged by Congress in its use of a term of as general import as "agricultural labor"—a term "intended * * * to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections of the United States where the act operates * * * [as] its generality reasonably extends to. Definitions of agriculture in standard texts and treatises and in decisions in these latter years, have had the widest content. * * * An examination of the cases cited in Words and Phrases, Fifth Series, Vol. 1, p. 339 et seq., under agriculture and in 3 C.J.S., Agriculture, pages 361, 365 and 366, § 1, under 'agricultural' and 'agriculture', convinces that in modern usage this is a wide and comprehensive term and that statutes using it without qualification, must be given an equally comprehensive meaning." *United States v. Turner Turpentine Co.*, 5 Cir., 111 F.2d 400, 404, 405.

The governing factors entering into the decision of the three above-cited federal cases, which project in bold relief the comprehensive interpretation given to the statutory exception of "agricultural labor" under the federal act, despite administrative limitations sought to be engrafted upon the term, recommend their brief review at this point. In *Jones v. Gaylord Guernsey Farms*, supra, a large dairy enterprise was involved, and among the challenged services performed for the owner of the

dairy farm were those of the carpenters, whose "duties consisted of building and repairing sheds and fences, as well as doing repair work generally." [128 F.2d 1010.] With respect to these services it was aptly said at page 1011 of 128 F.2d: "Repairing fences and buildings is a necessary incident to actual farming operations. Without fences, cattle cannot be raised, and without barns and granaries which will hold the grain, there would be no object in planting or harvesting it." (Like-wise in *Stuart v. Kleck*, supra, 129 F.2d at page 403, the exemption was held to attach to "services performed" by "employees * * * actually employed on a farm in preparing land for the planting of agricultural crops thereon; in seeding the lands; in constructing dams and reservoirs for impounding water to be used for watering livestock; and in operating farm machinery in connection with the work." In passing, it should be noted that the *Kleck* decision was made without regard to the status of the employer—there an independent contractor furnishing employees to various farmers to perform the services mentioned, while here the owner of the land having its own employees do the work on its farm—a fortifying distinction in favor of respondent.

And finally, in *Latimer v. United States*, supra, the scope of the exception was considered in relation to work done by employees of Rancho Sespe, a corporation operating a 4,100-acre ranch devoted in the main to citrus fruit growing. As noted at page 232 of 52 F.Supp., "the ranch had * * * 250 to 400 employees, who lived in the ranch village, or in neighboring towns. On the ranch there were located blacksmith shops, carpenter and paint shops, implement sheds and packing sheds." So far as here pertinent, the disputed services were those performed by the blacksmith "who shod horses and repaired the various farm implements"; the carpenters "who repaired the ranch buildings, made drying trays, hayracks, and did some mechanical work"; and the mechanics "who maintained the automotive equipment of the ranch tractors and gas engines, consisting of about 50 machines, including automobiles and spray machines and who also helped in general farm operations." All these employees worked full time for the ranch. In considering the classification of these services, the court at page 236 of 52 F.Supp. refers first to the case of *Jones v. Gaylord Guernsey Farms*, su-

pra, as authority for holding the carpenters to be engaged in "agricultural labor." It then continues: "There is no reason for excluding mechanics on the farm from being 'agricultural' workers if carpenters on the farm are so classified. Their work in maintenance of farm machinery is as incidental to farming operations as is the upkeep of a shed or the repair of a hayrack on the farm. The dominant purpose and business of Rancho Sespe was farming citrus products and the fact that it engaged in correlated activities, all, however, being incidental to farming and all on the farm, in no way changes the 'agricultural' aspect of the functions of the plaintiff Rancho Sespe. The size of the rancho and the utilization of mechanical instrumentalities of agriculture do not require that its operations be classified as manufacturing or commercial activities. They still remain ordinary farming operations within the ordinary meaning of the term and within the meaning of the regulations."

To continue with the chronology of pertinent legislation—in 1939, Congress amended the federal act and provided that services "In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment" should be considered "agricultural labor." 42 U.S.C.A. § 1107, transferred in 1939 to Internal Revenue Code, 26 U.S.C.A.Int.Rev.Code, § 1607(*l*). To conform to this definition an administrative rule was adopted repeating substantially this language and providing that such services may include, for example, those performed "by carpenters, painters, mechanics, farm supervisors, irrigation engineers, bookkeepers, and other skilled or semi-skilled workers which contribute in any way" to the management and conduct of a farm which is operated by the person employing them. § 403.208 U.S. Treas. Regs. 107, effective January 1, 1940.

In 1943, the Legislature of this state passed a bill, one of the purposes of which was to amend section 7 of our act so as to define agricultural labor in conformity with the federal definition and in such a way as to include, as agricultural, special services which contribute to the conduct of a farm operated by the employer. Assembly Bill No. 347, 55th Session of the California Legislature. This bill was vetoed by the Governor. In 1945, the Leg-

islature passed another bill, one of the purposes of which was to classify such special services as agricultural if performed "in the employ of the owner or tenant of a farm" and "as incident to ordinary farming operations." Senate Bill No. 615, 56th Session of the California Legislature. It was pocket-vetoed by the Governor. Though these bills failed to become law, the legislative action in connection with the subject under discussion is of some significance as evidencing the continuity of legislative intent regarding the use of the broad term "agricultural labor."

The commission's rule purporting to define the term "agricultural labor," as unexpanded in the state act, was changed five times between 1936 and 1940. The commission's varying constructions of that term have been "neither uniform nor of long standing" (cf. *Whitcomb Hotel, Inc., v. California Employment Comm.*, 24 Cal. 2d 753, 758, 151 P.2d 233, 236, 155 A.L.R. 405) and, as above noted, legislative action subsequent to the commission's 1940 "special trade" ruling has evinced disapproval, rather than approval, of such limitation. Moreover, as indicating further vacillation in administrative interpretation of the term, in a letter dated November 10, 1939, an employee of the commission advised respondent's counsel that " * * * it appears to be a well settled point of law in this state that any person who is performing services on a farm and contributing to the operation of the farm is engaged in 'agricultural labor,' regardless of the fact that due to the size of the farm and the use of modernized equipment his services are highly specialized. * * *"

The only case parallel in statutory and administrative considerations that counsel have cited, and independent research has revealed, is *Equitable Life Insurance Co. v. Iowa Employment Sec. Comm.*, 231 Iowa 889, 2 N.W.2d 262, 139 A.L.R. 885. There the question of the interpretation of the term "agricultural labor" arose in connection with the propriety of a claim for benefits under the Iowa Employment Security Law. The decision expressly turns on the factual situation as recited at page 263 of 2 N.W.2d: "Equitable Life Insurance Company of Iowa, through foreclosure of mortgages * * *, had secured a number of farms which * * * it was trying to sell as rapidly as possible and in the meantime was leasing to various tenants. To make these farms more rentable and

salable, the Equitable engaged a crew of men which went from farm to farm making repairs, improvements and replacements of buildings thereon. [For six years] claimant * * * had worked for the Equitable as a member of such crew, being paid by the hour. His work was principally that of a carpenter, consisting of constructing houses, barns, cribs and other buildings upon the farms and repairing and improving old buildings thereon. He also worked at excavating for several foundations, putting in the foundations and a few odd jobs of painting. His work did not include tilling or cultivating the soil or harvesting crops or the building of fences."

The Iowa Commission's definition of "agricultural labor" contained a "special trade" provision in substantially the same language as is here involved. In applying such provision to the facts before it, the court held that "claimant's employment was not 'agricultural labor' as * * * defined." However, in reaching its decision it is significant that the court at page 266 of 2 N.W.2d, "observed that none of the work done by claimant in the case at bar was incident to ordinary agricultural labor. Such service was more incident to the business of the insurance company of preparing the farms for early sale and in the meantime renting them to better advantage." This clear-cut factual distinction detracts from, rather than adds to, appellants' position, for it must be remembered that the services here in question were performed on the farm by employees of the owner of the farm, as part of the owner's regular farming operations, and for the sole purpose of producing and marketing crops. The distinctive factor in classification is noted in *State v. Christensen*, 18 Wash.2d 7, 137 P.2d 512, 520, 146 A.L.R. 1302, as follows:

"The courts * * * have had difficulty with this type of case, and some of this difficulty * * * has, in our opinion, arisen because the courts have attempted to pick out some particular phase of the operation as determinative of whether it was agricultural, industrial, or commercial, instead of looking primarily to the main general purpose of the operation."

Prior to the enactment of our Unemployment Insurance Act the term "agricultural labor" had been construed in the leading case of *Miller & Lux Inc., v. In-*

dustrial Acc. Comm., 1919, 179 Cal. 764, 178 P. 960, 7 A.L.R. 1291, to include services performed by an employee of a farmer in connection with farming operations, even though it might be said that the employee was "pursuing a special trade, calling or occupation." The case arose under the Workmen's Compensation Act, which excluded from its operation persons engaged in "farm, dairy, agricultural, viticultural or horticultural labor." The single question for decision was stated at page 766 of 179 Cal., at page 961 of 178 P., 7 A.L.R. 1291, to be "whether or not a workman, whose sole duty is to repair wagons in a shop operated on a farm for the purpose of keeping the agricultural implements and vehicles used on the farm in order, is engaged in farm or agricultural labor within the meaning of" said act. At page 767 of 179 Cal., at page 961 of 178 P., 7 A.L.R. 1291, the court said: "The law of California has exempted the farming industry from the operation of this statute, and if a worker upon a farm may be reasonably classified as one engaged in agriculture, his employer is clearly entitled to the benefit of this exemption. While it is true that an employer may be engaged in several sorts of industry, some of them within and some of them without the purview of the Compensation Act, and that an employe may at different times do work of one kind or the other, it is equally a fact that, where from the great extent and complexity of farming operations on a given rancho, the work of the farmers is classified, and each is given a limited, rather than a diversified, duty, that circumstance alone will not make some of them artisans rather than agriculturists. Numerous illustrations suggest themselves. If the mower who stops to use a whetstone on his scythe remains a farmer, is the boy who is set to work sharpening all the farming tools used on the place engaged in an occupation entirely outside of farming? Clearly not." And at page 769 of 179 Cal., at page 962 of 178 P., 7 A.L.R. 1291, the court in the course of its review of pertinent cases from other jurisdictions noted that "while the authorities * * * are somewhat in conflict, the weight and the better reasoning support the contention * * * that the repairing of farming machinery on the farm, in a shop devoted to such repairs, is an agricultural pursuit."

[3] While differences in nature, reason and purpose, as well as in statutory de-

tails, between workmen's compensation and unemployment compensation laws necessarily detract from the assistance that otherwise might be afforded through unqualified interchangeable application of the decisions in the respective fields as to the import of the common exemption "agricultural labor" (*H. Duys & Co. v. Tone*, 125 Conn. 300, 5 A.2d 23, 27, 28), yet where proper, a general pervading principle of interpretation would be of material assistance in construing common language found in the provisions of acts operating in the two fields. Consistent with this observation, it is reasonable to assume that the Legislature, in using the broad term "agricultural labor" as a base exemption under our Unemployment Insurance Act, was cognizant and took account of the meaning ascribed to that term under our Workmen's Compensation Act, Labor Code, § 3201 et seq., as discussed some sixteen years earlier in the *Miller & Lux* case, *supra*. *Carroll v. California Horse Racing Board*, 16 Cal.2d 164, 168, 105 P.2d 110; *Marculescu v. City Planning Commission*, 7 Cal.App.2d 371, 375, 46 P.2d 308.

[4-6] Moreover, and as an independent consideration, it is a settled principle of statutory construction that a Legislature in legislating with regard to an industry or an activity must be regarded as having had in mind the actual conditions to which the act will apply; that is, the customs and usages of such industry or activity. At the time the Unemployment Insurance Act was adopted in this state in 1935, there were many large ranches producing agricultural crops by the employment of mechanized equipment, with a division of labor, and by using irrigation, reclamation and drainage. When then, the Legislature, in adopting the language of the act, created an exception by use of the general term "agricultural labor," it must have had the large ranches in mind as well as the smaller farms; and while the base words are not defined in the act, they are also not limited, so that it is unreasonable to suppose that it was intended to narrow the exemption to small farms or to hand labor or to any particular part of the labor then being generally used on ranches and farms by the owners or tenants thereof. It is easy to say that a carpenter remains a carpenter, a mechanic is still a mechanic, and a bookkeeper continues to be a bookkeeper no matter where or for whom he

is working—thus isolating the individual from the overall employment of which he is a part. But it must be remembered that the problem at hand is the meaning of a particular statute. The act does not include or exclude a carpenter because he is a carpenter or an unskilled laborer because he is such. Irrespective of his particular trade or skill, it is the work that he is doing and the circumstances under which he does it that brings him within or without the provisions of the act. If his services are performed on a farm while a regular employee of the owner or tenant of the farm, and if such services are essential for the purpose of producing agricultural crops under the system of work established in furtherance of that purpose, such services must be classed as "agricultural labor" regardless of the fact that the particular services of such employee might ordinarily be classed otherwise if performed under different circumstances.

[7] Agriculture, like industry, has developed, changed and grown under modern conditions incident to the adoption of new methods and the advent of improved machinery, including the use of electrical power and the internal combustion engine. This has also brought about, in some cases, changes in the methods and ways of doing the necessary work in carrying on agricultural operations. While, of course, there still exists the small farm operated mainly by hand labor and horse-drawn implements, the use of power machinery and more varied equipment is now general on large and medium-sized farms, and to some extent even on smaller farms. A large part of agricultural production now takes place on large farms, the efficient operation of which would, in many instances, have been impossible a generation ago, and which systematically utilize modern methods and machinery. But despite such changes in methods and means of operation, they still are agricultural enterprises and are operated for the purpose of producing agricultural crops. It may fairly be said that the determinative consideration here is whether the act in question contemplated "agricultural labor" under the conditions then actually existing and well known to the Legislature, and as broadly applying to the business of agriculture in its entirety, or whether the general exemption was intended to be limited to "agricultural labor" under primitive conditions or as pursued a century or

more ago, and to apply only insofar as those conditions and methods may still survive. Reasonably viewing the generality of the term, it would seem that it was intended to cover and apply to the conditions prevailing when the act was adopted and under which agriculture now flourishes throughout the state.

[8] To the extent that this classification would include as "agricultural labor" within the meaning of the act, various clerical and administrative workers on respondent's ranch whose services were directly concerned with the business of keeping records of crop production and with the management and supervision of the farming enterprise, our decision is contrary to some of the views expressed in *Jones v. Gaylord Guernsey Farms*, 10 Cir., 128 F.2d 1008, 1011, and *Latimer v. United States*, D.C., 52 F.Supp. 228, 237. But there seems to be no reasonable basis for distinguishing that type of specialized service from any other "special trade, calling or occupation" which constitutes an integral part of an entire agricultural enterprise and is essential to its efficient operation. In this regard the rationale of the case of *Matter of Butler*, 258 App.Div. 1017, 16 N.Y.S.2d 965, is pertinent. There the court was construing the term "farm labor" under the New York Unemployment Insurance Law—a term which is universally acknowledged to be more restrictive than "agricultural labor." The farm in question consisted of 470 acres and the principal business was the production and sale of milk from the dairy enterprise. In holding the employees to be "farm laborers" and so within the statutory exemption, the court aptly said at page 966 of 16 N.Y.S.2d: "*Farming, when conducted in a business-like manner, does not lose its identity. An employee who keeps records concerning the production of farm produce and its sale is engaged in tilling the soil as well as the employee who stirs the surface of the earth with a hoe. The acts are interrelated and on a farm of the size owned by this employer, conducted as he conducted the business, the scrivener and accountant are as necessary as the cultivator.*" (Italics added.)

[9] Consistent with these observations, the trial court properly concluded, with respect to the several groups of respondent's employees under discussion, that insofar as rule 7.1 "purports to exclude from the classification of 'agricultural labor'

work which is necessary and essential to and directly connected with the growing of agricultural crops upon plaintiff's said ranch and other similar ranches, it is unreasonable and arbitrary and discriminates against plaintiff and against others engaged in operating large ranches in this state."

Appellants further contend that the trial court erred in holding as exempt from the operation of the act certain services performed by some of these employees of respondent on land leased by it to tenants, mostly on a crop-sharing basis. These services consist of work in connection with the drainage and reclamation of the land to make it more productive, for which no charge is made, it being a part of respondent's general program of improving the ranch; of operating a "rain-making" sprinkler system for irrigation, and making certain repairs where the tenant has no facilities for doing the work and for which a nominal charge is made to defray costs; and work performed in harvesting tenant-grown grain on a cost basis.

[10, 11] Where a landlord leases part of its land to increase its own agricultural production, such leasing is deemed an agricultural function. *State v. Nelson*, 145 Minn. 123, 176 N.W. 164; *Criger v. Mustaba Investment Co.*, 224 Iowa 1111, 276 N.W. 788; *Smythe v. Phoenix*, 63 Idaho 585, 123 P.2d 1010; *First National Bank & Trust Co. v. Beach*, 301 U.S. 435, 57 S.Ct. 801, 802, 81 L.Ed. 1206. For example, in the last-cited case the status of Beach was considered in relation to the Bankruptcy Act, § 75, 11 U.S.C.A. § 203, which defines a farmer as "any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations." Beach owned a farm where he lived and engaged in farm production work; however, he rented three-fourths of the farm for grazing and cultivation, and the rentals constituted the greater part of his income. It was held that Beach was "primarily engaged in farming" though his income receipts from his own operations on the farm were scant; that he did not step into another business because he leased land to tenants for farm work. Thus the court said at page 440 of 301 U.S., at page 803 of 57 S.Ct., 81 L.Ed. 1206: "* * * the farming is still the business; the leases are then investments, more profitable than the business, but leaving it unchanged."

Appellants argue that by leasing part of its land to agricultural tenants for cultivation, respondent is performing a commercial function and the farm services performed by respondent's employees for the tenants lose their agricultural character when furnished in pursuance of a commercial operation. For this proposition they cite such cases as *North Whittier Heights Citrus Ass'n v. National Labor Relations Board*, 9 Cir., 109 F.2d 76, and *Equitable Life Insurance Co. v. Iowa Employment Sec. Comm.*, supra, 231 Iowa 889, 2 N.W.2d 262, 139 A.L.R. 885, which are clearly distinguishable on their facts. In the first case cited, the services found to be nonagricultural were packing-house activities which were performed in processing for market already-harvested products grown by other employers on farms not owned by the employer in question. No landlord-tenant relationship was present. In the second case cited and above reviewed, while the landlord-tenant relationship existed, the purpose of the insurance company as the landlord-employer, in furnishing its carpenter and building crew to make repairs and improvements on the leased farms, was to maintain its real estate investment until it could be liquidated—totally unconnected with farm production. In contrast are the services furnished by respondent's employees to its farm tenants in furtherance of their cultivation of the land and harvest of their crops so as to increase the entire output of respondent's agricultural enterprise. Moreover, as a practical matter from the record here, the exemption operates under section 7(l)(10) of the act, which provides that where an employee performs two kinds of services, the classification shall be based upon the one in which more than half of the time is spent in a given period.

[12] Finally, there is a controversy with respect to one item relating to the operation of the salt works, a nonagricultural activity. One Madrid furnished certain men for work in this connection. In relieving respondent from liability for tax contributions under the act for wages paid to these men, the court found that Madrid was an independent contractor, and that the men were not employees of respondent. Appellants contend that this finding is not supported by the evidence, but the record does not sustain their position.

The work consisted in shoveling salt into cars and payment was made at a fixed rate

per ton. The men were not on respondent's payroll, but the money therefor was all paid to Madrid, who then paid it to the men as they decided upon the distribution among themselves. Madrid paid the premiums for carrying workmen's compensation insurance on the men, and he furnished them with living accommodations at his "boarding-house" and with transportation to different parts of respondent's ranch according to the work assignment. There is evidence that the only instructions given to these men by respondent were as to the place where they should work, and that no instructions were given as to the method of doing the work.

[13] While appellants point to certain portions of the record as supporting their position in challenge of Madrid's status as an independent contractor, such testimony created no more than a conflict in the evidence and the possible inferences that might be drawn by the trial court as the trier of the facts. Under these circumstances the trial court's finding with respect to Madrid's status will not be disturbed. *S. A. Gerrard Co. v. Industrial Acc. Comm.*, 17 Cal.2d 411, 414, 110 P.2d 377; *Lee v. Nanny*, 38 Cal.App.2d 90, 94, 100 P.2d 832.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



27 Cal.2d 546

CALIFORNIA EMPLOYMENT COMMISSION v. KOVACEVICH.

L. A. 19333.

Supreme Court of California, in Bank.
Jan. 29, 1946.

Rehearing Denied Feb. 25, 1946.

1. Master and servant $\hookrightarrow$ 78

The Unemployment Insurance Act is to be liberally construed so as to afford all the relief which the language of the act indicates that Legislature intended to grant, but interpretation should not exceed limits of the statutory intent. *Gen.Laws, Act 8780d*.

2. Constitutional law $\hookrightarrow$ 70(1), 77

In view of the express statutory intent to except "agricultural labor" from the Unemployment Insurance Act, referring to such classification in general terms without reference to status of employer, any labor which is essentially agricultural in nature and which cannot be otherwise regarded by reason of any change in the custom of doing it should not be included within operation of act by administrative or judicial legislation under the guise of liberal interpretation. *Gen.Laws, Act 8780d, § 7*.

3. Taxation $\hookrightarrow$ 319(1)

The rule of Employment Commission defining "agricultural labor," requires construction that services mentioned in first subdivision constitute agricultural labor regardless of who may be employer, while services mentioned in second subdivision constitute agricultural labor only in event such services are performed by employees of owner or tenant of farm. *Gen. Laws, Act 8780d, § 7(a)*.

4. Taxation $\hookrightarrow$ 319(1)

Employment Commission has no authority by regulation to restrict the meaning of the expression "agricultural labor" as used by the Legislature in the Unemployment Insurance Act to describe a particular field exempt from application of Act. *Gen.Laws, Act 8780d, § 7*.

5. Officers $\hookrightarrow$ 103

An administrative agency may not, under the guise of its rule-making power, exceed the scope of its authority and act contrary to statute which is source of its authority.

6. Master and servant $\hookrightarrow$ 78

The Unemployment Insurance Act was adopted as a part of a national plan of social welfare and is designed to work closely with similar federal legislation. *Gen. Laws, Act 8780d, § 2*; 26 U.S.C.A.Int.Rev. Code, § 1607(c) (1), (1); *Social Security Act, §§ 901-910, 42 U.S.C.A. §§ 1101-1110*.

7. Taxation $\hookrightarrow$ 59

No change in the custom or method of doing work in the actual production of agricultural crop can make such labor anything other than "agricultural labor" within exclusion clause in Unemployment Insurance Act even though work be done by employees of a person or corporation whose business is industrial or commercial rather than agricultural in nature. *Gen.Laws, Act 8780d, § 7(a)*.

8. Taxation Ⓒ219

Field services rendered by fruit packer consisting in girdling, thinning and harvesting crops are essentially "agricultural labor" and are exempt from the Unemployment Insurance Act. Gen.Laws, Act 8780d, § 7(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural Labor".

9. Taxation Ⓒ59

Labor classified as office help and as packing house labor in connection with the packing of fruit performed off the farm following the harvest is not "agricultural labor" within exclusion clause of Unemployment Insurance Act unless performed by an employee of owner or tenant of farm on which fruit was produced and as an incident to ordinary farming operations, as distinguished from manufacturing or commercial operations. Gen.Laws, Act 8780d, § 7(a).

10. Landlord and tenant Ⓒ20, 323

In distinguishing between a lease and a cropping agreement, transfer of possession, special reservation of a right of re-entry for limited purpose only, covenant by tenant to repair at his own expense, creation of a definite term, especially for several years, and an arrangement to deliver owner's share of crops to him off the premises, are indicative of a "lease", while retention of possession by owner indicates a "cropping agreement".

See Words and Phrases, Permanent Edition, for all other definitions of "Cropping Agreement" and "Lease".

11. Sales Ⓒ12

Growing crops, as well as other personal property, are subject to contract for and absolute sale.

12. Sales Ⓒ3**Taxation** Ⓒ219

Transaction by which fruit packer purported to purchase and farmer purported to sell growing crops and under which packer agreed to do all girdling, thinning and harvesting while farmer would cultivate, irrigate and do general farming, and which merely gave packer right to control and hasten maturity of growing crops incident to purchase thereof, constituted a sale, and not a transfer of any leasehold interest and hence packer, with respect to such crops, was an independent entrepreneur and his packing house labor and office

employees were not exempt from the Unemployment Compensation Act as "agricultural labor". Gen.Laws, Act 8780d, § 7.

CARTER and SCHAUER, JJ., dissenting in part.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by California Employment Commission, formerly Unemployment Reserve Commission, against John Kovacevich, Jr., as administrator of the estate of John Kovacevich, Sr., deceased, to recover contributions alleged to be due under the Unemployment Insurance Act. Judgment for defendant, and plaintiff appeals.

Reversed with directions.

Prior opinion, 157 P.2d 416.

Robert W. Kenny, Atty. Gen., Clarence A. Linn and Doris H. Maier, Deputies Atty. Gen., Forrest M. Hill and Ralph R. Planteen, both of Sacramento, and Miriam E. Wolff, of San Francisco, for appellant.

Iener W. Nielsen, of Fresno, and Calvin H. Conron, Jr., of Bakersfield, for respondent.

Ivan G. McDaniel, of Los Angeles, amicus curiae, on behalf of respondent.

SPENCE, Justice.

This is an action to recover contributions claimed to be due under the Unemployment Insurance Act, Stats.1935, p. 1226, as amended, Deering's Gen.Laws 1937, Gen. Laws Supp.1939, Act 8780d, upon the basis of wages paid employees by John Kovacevich, Sr., during the years 1939 and 1940.

John Kovacevich, Sr., who has since died, was engaged in the business of packing and shipping grapes and plums, operating under the name of "The Arvin Fruit Distributors." He handled no fruit except his own. He owned no land during 1939 but bought some late in 1940. Most of the fruit that he handled was obtained by purchasing the crops of various growers under contracts by which he agreed to buy, and the owner of the land agreed to sell, the crops on the land for that year at a fixed sum payable in installments, the last installment being due about harvest time. Under most of the contracts Kovacevich undertook to do the "girdling, thinning and harvesting" at his own expense and the seller agreed to do the cultivat-

ing, irrigating and other farm labor, but under a few of the contracts Kovacevich also undertook to do the pruning and irrigating or other parts of the work of raising the crops. Each of the contracts was made between January and May of the year in which Kovacevich purchased the particular crop covered by such contract.

Kovacevich operated in Arvin a packing house, conveniently located in relation to the various ranches and containing the usual machinery and equipment, at which he packed and loaded the fruit on cars for shipment. On his payroll records, his employees were divided into three general classifications: (1) "packing house labor," covering employees engaged in packing and shipping the fruit; (2) "field labor," covering those employed in picking and harvesting and such other services as were performed on the various farms; and (3) "office help." The assessment of contributions here involved was based upon the wages paid to employees in all of these classifications, and the record fails to show the exact amounts paid to the employees in each of the respective classes.

The trial court adopted defendant's theory that in operating this business Kovacevich was not acting as a commercial packer or shipper but was packing and shipping his own fruit which he had grown and harvested, that his activities concerned solely the growing and marketing of his own produce, and that the entire enterprise was exempt from contributions under the act in question. Accordingly, judgment was entered in favor of defendant and plaintiff commission prosecutes this appeal.

Appellant takes the position that none of the services here involved—either in connection with growing or picking the fruit or in connection with packing and shipping it—constitutes "agricultural labor" within the purport of section 7(a) of the act nor within the meaning of rule 7.1 adopted by the commission as an administrative aid in defining the term; that most of these services were performed at the packing house and removed from the farms; that the remainder was closely connected therewith and essential thereto; that Kovacevich was engaged in an entrepreneurial enterprise, commercial rather than agricultural in character; that he purchased crops from various farms but was not a tenant of those farms; that such work as he did on the land was directed solely to the furtherance of his commercial

enterprise of getting fruit of a better quality and of earlier maturity, adding "buyer appeal" to the produce shipped to market; that such work was not done for the owners or tenants of the farms; and that such work was done not as an incident to ordinary farming operations but as an incident to a commercial undertaking. It is further argued that this act, as an unemployment insurance measure, is remedial in character and should be liberally construed to the end that its coverage and benefits be extended to as many workers as possible.

[1, 2] While it is true that such legislation should be liberally construed so as to afford all the relief which the language of the act indicates that the Legislature intended to grant (California Employment Comm. v. Butte County Rice Growers Ass'n, 25 Cal.2d 624, 630, 154 P.2d 892), the interpretation should not exceed the limits of the statutory intent. By section 7(a), the Legislature has expressly excepted "agricultural labor" from the operation of the act, without limiting or defining the term. In *Stuart v. Kleck*, 9 Cir., 129 F.2d 400, a case involving the consideration of comparable federal legislation, the Social Security Act, 42 U.S.C.A. § 301 et seq., in relation to the classification of farming services performed by employees of an independent contractor, the court said at page 402 of 129 F.2d: "When the Congress * * * made use of the broad term 'agricultural labor,' this expression, used by itself, must be given a meaning wide enough to include agricultural labor of any kind, as generally understood throughout the United States." And further, at pages 402, 403, of 129 F.2d: "Accordingly, the exemption attaches to the 'services performed,' which refers to the type of work that is being done, and is not dependent on the form of the contract or whether the employee is employed by the owner or tenant of the farm or an independent contractor." Similarly, our statute refers in general terms to the type of work in excepting "agricultural labor" and makes no reference to the status of the employer. It recognizes that the same employee may be engaged in both industrial and agricultural work and provides in section 7(l) (10) that his classification shall be determined by the kind of service in which he spends the greater part of his time. In view of the express statutory intent to except "agricultural labor,"

any labor which is essentially agricultural in nature, and which cannot be otherwise regarded by reason of any change in the custom of doing it, should not be included within the operation of the act by administrative or judicial legislation under the guise of liberal interpretation.

[3] This distinct concept based upon the kind of service performed and its locale is recognized by the language and arrangement of the commission's rule 7.1 defining "agricultural labor." The commission adopted this rule effective February 14, 1937, which was in force during the period here involved. So far as here material, the rule defined the term "agricultural labor" to include all services performed:

"(1) By an employee on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops, the raising, feeding, management of livestock, poultry and bees; which includes, among others, the spraying, pruning, fumigating, fertilizing, irrigating, and heating which may be necessary and incident thereto;

"(2) By an employee in connection with the drying, processing, packing, packaging, transportation, and marketing of materials which are produced on the farm or articles produced from such materials, providing such drying, processing, packing, packaging, transporting, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

"The services hereinabove set forth do not constitute agricultural labor unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced. Such services, however, do not constitute agricultural labor if they are carried on as an incident to manufacturing or commercial operations."

To analyze the definition of "agricultural labor" in rule 7.1, it will be observed that subdivision (1) embraces all services performed *on the farm* "in connection with the cultivation of the soil, the raising and harvesting of crops"; and that subdivision (2) embraces services "in connection with the drying, processing, packing, packaging, transporting or marketing of materials * * * produced on the farm," providing certain conditions are met but without regard to place of performance. The conditions are stated in two paragraphs.

The first paragraph provides that the enumerated services in connection with "materials * * * produced on the farm" are exempt only if they are "carried on as an incident to ordinary farming operations." The second paragraph contains the additional proviso that the services "hereinabove set forth" must be performed "by an employee of the owner or tenant of the farm on which the materials * * * were produced." Placed together in a separate subdivision designated (2), each paragraph of that subdivision refers to materials as completed things, and to the farms on which they were *produced*; and both relate to the same matter—the handling and treatment of materials which have already been produced. The most reasonable interpretation of the language and arrangement of rule 7.1 is that the second paragraph of subdivision (2) relates only to the same kind of activities described in the first paragraph of that subdivision—the handling of agricultural commodities which have already been produced or harvested. This is especially true since subdivision (1) had already clearly and definitely covered all services on a farm up to and including the harvesting of crops.

This analysis coincides with the application of said rule 7.1 in its 1937 form as discussed in the recent case of California Employment Comm. v. Butte County Rice Growers Ass'n, 25 Cal.2d 624, 154 P.2d 892. There the problem of construction arose in connection with the classification of employees of a farmers' co-operative association operating a warehouse located near a railroad siding for the storage of rice and grain for shipment to market—services falling wholly within subdivision (2) of the rule as being performed off the farm following the harvesting of the crops. It is there said at page 636 of 25 Cal.2d, at page 897 of 154 P.2d: "Concededly, the services performed by the defendant's employees are *not* 'on a farm' and so do not meet the specification of subdivision (1) of said rule. Equally exclusive is the plain language of subdivision (2), for it requires that services rendered 'in connection with the drying, processing, packing, packaging, transportation, and marketing of materials which are produced on the farm' be '*incident to ordinary farming operations as distinguished from manufacturing or commercial operations*' and be '*performed by an employee of the owner or tenant of the*

farm.' (Italics ours.) Thus, to come within the 'agricultural labor' exemption, *off the farm* services must be an integral part of farming operation performed for the farmer as such—not for a third person separate and apart from such fundamental concept."

The significance of the quoted language is its emphasis of the rule's division of services into two categories: [1] services mentioned in subdivision (1), which are essentially agricultural under all circumstances because the services are performed "on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops"; and [2] services mentioned in subdivision (2), which are not essentially agricultural under all circumstances because such services are performed after the harvesting of the crops, and such services may or may not be performed on the farm, may or may not be performed by employees of the owner or tenant of the farm, and may or may not be performed "as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations." As we interpret the rule, the services mentioned in subdivision (1) constitute "agricultural labor" regardless of who may be the employer of the person performing such services, while the services mentioned in subdivision (2) constitute "agricultural labor" only in the event that such services are performed by employees of the "owner or tenant of the farm" and as an "incident to ordinary farming operations." In other words, the limitations of the second paragraph of subdivision (2) of the rule should not be interpreted, as the commission contends, to relate to subdivision (1) of the rule, so as to exclude from the classification of "agricultural labor" the services there mentioned when not performed by the employees of the owner or tenant of the farm. In the Butte County Rice Growers case, *supra*, it was deemed entirely reasonable for the commission to enact a rule providing that services following the harvest should be excluded from the classification of "agricultural labor" when not performed by an employee of the owner or tenant of the farm; and it was only upon this basis that this identical rule 7.1 was approved as a valid exercise of the power of the commission to "fill up the details" by adopting "a practical, workable definition in amplification of the unexpanded statutory exemption" covering "agricul-

tural labor." California Employment Comm. v. Butte County Rice Growers Ass'n, 25 Cal.2d 624, 632, 154 P.2d 892.

[4, 5] Under any other interpretation this rule would amount to unauthorized legislation by the commission, in that it would purport to restrict the meaning of the expression "agricultural labor" used by the Legislature in the act itself. Sutherland, *Statutory Construction*, 3d Ed. [Horack], vol. 2, § 4002, p. 276; Hodge v. McCall, 185 Cal. 330, 334, 197 P. 86. "Agriculture," says Webster's New International Dictionary, 2d Ed., is "the art or science of cultivating the ground, and raising and harvesting crops. * * *" Such statement of the common understanding of the term manifestly does not envisage consideration of whether or not the services are performed by employees of the owner or tenant of a farm in determining whether or not such ordinary field activities, up to and including the harvest, constitute, "agricultural labor." An administrative agency may not, under the guise of its rule-making power, exceed the scope of its authority and act contrary to the statute which is the source of its power. California Drive-In Restaurant Association v. Clark, 22 Cal.2d 287, 302, 303, 140 P.2d 657, 147 A.L.R. 1028.

[6] Moreover, our act was adopted as a part of a national plan of social welfare and was designed to work closely with similar federal legislation. California Employment Comm. v. Butte County Rice Growers Ass'n, 25 Cal.2d 624, 630, 154 P.2d 892. It is even provided, in section 2 of our act, that a change in the national legislation or in the interpretation placed thereon shall, under some circumstances, affect the requirement for contributions under our act. In 1939 the Federal Social Security Act was amended by Congress so as to define as agricultural labor "all service performed on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural * * * commodity * * *," 26 U.S.C.A. Int.Rev.Code, § 1607(c) (1), (l). Before that amendment the federal act, like ours, merely contained the unexpanded statutory exemption of "agricultural labor" and the term was defined by Treasury Regulation 90, Article 206, February, 1936, in substantially the same language as that found in our rule 7.1 as above quoted—subdivisions (1) and (2) of our rule par-

alleling subdivisions (a) and (b) of the federal regulation, the only difference being that the limitation stated in the second paragraph of our subdivision (2) with respect to the qualifying requirement that the services be "performed by an employee of the owner or tenant of the farm" appears as the second sentence of subdivision (b) of the federal regulation.

A number of federal cases, in applying the federal regulation, have recognized that there was a line of demarcation to be drawn after the crops had been harvested, and that services performed prior to the completion of the harvest in producing and harvesting all crops were essentially agricultural. In *Stuart v. Kleck*, 10 Cir., 129 F.2d 400, 403, employees of an independent contractor performed for various farmers such services as preparing the soil for the planting of agricultural crops and seeding the land—essentially farming operations. The argument was advanced that "the statute was restricted by the Regulations so that these employees" did "not come within the exemption because they were not in the employ of the owner or tenant of the land on which the services were performed." In rejecting such claim the court said at page 403 of 129 F.2d: "This sentence [the owner-tenant employment requirement] is no part of (a) in its text, but is a part of the next paragraph (b), where the connection makes sense. From the language it unmistakably appears that it was not intended to apply to paragraph (a), which is not concerned with the processing of articles from materials which were produced on a farm. These activities are covered exclusively in (b), which deals with the products of the farm after they have been gathered."

In line with these observations is *Latimer v. United States*, D.C., 52 F.Supp. 228, 234, where the court considered such services as "plowing, discing, planting, cultivating, irrigating, root cutting, spraying, pruning, dusting, fumigating, and other cultural and maintenance labor." The court there said at page 234 of 52 F.Supp.: "All of such specified services directly and inherently pertain to the farm or orchard. These activities connote true 'agricultural labor.' They are inseparably attached to and associated with the cultivation of products of the soil. The fact that the services are rendered by employees of an entity other than the owner or tenant of the orchard is of no consequence, as the controlling

part of the regulations is paragraph (a) thereof, which contains no requirement as to the status of the employer of the one doing the work specified. It is the kind of work done and the locale of it which controls under the Regulations." And continuing at page 235 of 52 F.Supp.: "It is all done in the grower's orchard, in other words, on the farm, and it all precedes delivery of the fruit for processing or marketing purposes. Thus the stage of operations at which such services cease to be an incident to ordinary farming and become incidental to the commercial operations of the packing house is reached after the fruit has been picked and upon actual delivery of the fruit to the employees of the association for transmission to the packing house."

And in *Lake Region Packing Ass'n v. United States*, 5 Cir., 146 F.2d 157, 158, the federal statutory exemption was considered in relation to a co-operative marketing association "which, through its employees, performed for its members the labor required to cultivate, pick, haul to market, package, process, and market their fruit." The court commented on the distinctive features of this situation as follows, 146 F.2d at pages 159, 160: "The statute exempts agricultural labor. To hold that the cultivation of the fruit was, and its picking, assembling and hauling was not, agricultural labor will not do. The statute contains no such limitation. Neither does the regulation relied on to impose one contain it. It expressly declares that agricultural labor includes both the cultivating and the harvesting of the crops * * * it is quite clear that here is a case not of packing, processing and marketing as incidental to ordinary farming operations, but one, the essence of which was a commercial operation. Because this is so, those acts which were not performed in the field or in connection with getting the product from the field to the place of processing and were therefore not per se agricultural, are deprived of their agricultural character by the dominance in the operation of their commercial character."

These federal cases clearly demonstrate that the owner-tenant concept of employment has no bearing upon the definition of "agricultural labor" contained in subdivision (a) of the federal regulation. The point is again made in *Chester C. Fosgate Co. v. United States*, 5 Cir., 125 F.2d 775,

at page 778, where the court concluded "that the services which Fosgate Company rendered in cultivating crops of fruit for others were rendered on a farm in connection with the cultivation of the soil, and were under Art. 206(a) agricultural labor, although the owner of the crops did not directly hire the laborers, but dealt with the Company, which in turn put the laborers to work. The labor was done in cultivating the soil, the literal etymological meaning of agriculture." It is true that the court, in speaking of businesses which have arisen in recent years that are more nearly mercantile and manufacturing than agricultural, continued at page 778 of 125 F.2d: "Such businesses have increasingly tended to buy crops in the field or on the trees, thus cutting short the agricultural operations and transferring the harvest to the new business field." But in the orthodox sense agricultural operations, the act of producing agricultural commodities, cannot be cut short prior to harvest, and such last-quoted statement confuses the kind of service with the status of the employer, a consideration of no importance with respect to essentially agricultural activities.

This distinction is emphasized in the following federal cases where the meaning of "agricultural labor" was considered in relation to other statutes involving a similar employment exemption. Thus in *Ellis v. Continental Cas. Co.*, 5 Cir., 115 F.2d 1006, in holding that the picking of oranges was "agricultural labor" within the meaning of the Workmen's Compensation Act, the court said at page 1007 of 115 F.2d: "Gathering fruit by hand is manual labor. The operation of an orchard is an agricultural pursuit. The performance of manual labor in an orchard upon the produce of the soil is farm work." And in *North Whittier Heights Citrus Ass'n v. National Labor Relations Board*, 9 Cir., 109 F.2d 76, a case presenting the question of whether employees working in a packing house and engaged in the processing, packing and shipping of citrus fruits were "agricultural laborers" under the Wagner Act, 29 U.S.C.A. § 151 et seq., it is said at page 80 of 109 F.2d: "Industrial activity commonly means the treatment or processing of raw products in factories. When the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of 'industry.'" The court

then quoted at page 81 of 109 F.2d from *Pinnacle Packing Co. v. State Unemployment Commission*, an unreported Oregon case, as follows: "The fruit growers who are engaged in the care, cultivation, picking, and delivery of the products of the orchard to be processed, graded, packed and marketed are engaged in agricultural labor and are exempt from the provisions of the statute. As soon as the fruit is delivered by the growers to the plaintiff for processing, grading, packing, and marketing, then the exemption ceases." These last two quotations were cited with approval in the recent case of *California Employment Comm. v. Butte County Rice Growers Ass'n*, 25 Cal.2d 624, 633, 634, 154 P.2d 892.

Since our rule 7.1 was patently based on the federal regulation, the latter's interpretation has considerable force here in establishing that the owner-tenant employment limitation of the second paragraph of our subdivision (2) should be construed as applicable only to the situations described in the first paragraph of that subdivision immediately preceding the limitation, and not to the definition of "agricultural labor" contained in our subdivision (1), which is the analogue of subdivision (a) of the federal regulation. *H. Duys & Co. v. Tone*, 125 Conn. 300, 5 A.2d 23, 26; *Woods Bros. Const. Co. v. Iowa Unemployment Compensation Comm.*, 229 Iowa 1171, 296 N.W. 345, 348, 349; *Unemployment Compensation Comm. v. Wachovia Bank & Trust Co.*, 215 N.C. 491, 2 S.E.2d 592, 597; *Industrial Commission v. Woodlawn Cemetery Ass'n*, 232 Wis. 527, 287 N.W. 750, 753. In most of the other states where the federal statutory exemption has been "paralleled" by state legislation and the designated administrative agency has defined the term "agricultural labor," the form of such definition has followed exactly the paragraphing of the federal regulation as a basis for a like interpretation. *Park Floral Co. v. Industrial Commission*, 104 Colo. 350, 91 P.2d 492; *H. Duys & Co. v. Tone*, 125 Conn. 300, 5 A.2d 23; *Christgau v. Woodlawn Cemetery Ass'n*, Winona, 208 Minn. 263, 293 N.W. 619. So far as research reveals, the only state which has an administrative regulation which conforms precisely in language and arrangement to our own rule 7.1 in defining the statutory exception in its Unemployment Compensation Law is Arizona. *Wayland v. Kleck*, 57 Ariz. 135, 112 P.2d

207. And in that instance, too, the same reasoning was applied in the interpretation of the state regulation. Thus, it is said in the cited case at page 208 of 112 P.2d: "Our regulations, subdivisions (1) and (2) correspond, in the subject treated, to subdivisions (a) and (b) in the federal regulation and the regulations of other states. *The first subdivision* refers to one kind of labor, which is *always agricultural*, and the *second subdivision* refers to another kind of labor, which *may or may not be so classed*. In this subdivision the labor is used in processing things grown on a farm, also the packing, packaging, transportation or marketing the things grown or articles made therefrom. These services, *if done for the owner or tenant of the farm* on which the materials in their raw or natural state are produced and as an incident to the farming operation, as distinguished from manufacturing or commercial operations, are agricultural." (Italics ours.)

This same Arizona rule was involved in the later case of Employment Security Commission v. Arizona Citrus Growers, 61 Ariz. 96, 144 P.2d 682, wherein the court upheld the right of certain claimants to receive unemployment benefits. There were twelve claimants, eleven of whom worked in the association's packing house and one of whom was engaged in picking fruit from trees belonging to members of the association. The court at page 686 of 144 P.2d expressly approved the construction of the administrative rule defining "agricultural labor" as stated in Wayland v. Kleck, supra. But then, apparently losing sight of the labor of the *single* claimant engaged in the work of picking fruit, the court at page 686 of 144 P.2d placed *all* claimants under subdivision (2) of the rule as engaged in the packing and processing of fruit. Thus, limiting its language to a discussion of such services and premising its opinion in the main on the rationale of North Whittier Heights Citrus Ass'n v. National Labor Relations Board, supra, 109 F.2d 76, the court expressed its full conclusion as follows at page 687 of 144 P.2d: "We conclude that the claimants who worked in the Association's packing house are not agricultural laborers, * * *." Consistent with such analysis, it reasonably follows that the narrowed point of decision in the later Arizona case does not affect its approval in the forepart of the opinion as to the propriety of the early in-

terpretation of the Arizona rule as stated in Wayland v. Kleck, supra, so as to be in harmony with "all other regulatory bodies, both federal and state, that adopted this type of regulation."

Apparently out of line with such uniform construction is certain language in the recent opinion of California Employment Commission v. Rose, 67 Cal.App.2d 864, 155 P.2d 702 (hearing not requested before this court), purporting to follow the case of California Employment Comm. v. Butte County Rice Growers Ass'n, supra, 25 Cal.2d 624, 154 P.2d 892, in stating at page 868 of 67 Cal.App.2d, at page 704 of 155 P.2d, that "the services performed, regardless of their nature, * * * do not constitute 'agricultural labor' * * * unless the workmen are employees of the owner or tenant of the farm * * *." While, as aforesaid, the Butte County Rice Growers case is concerned wholly with a warehouse enterprise and services in connection therewith falling wholly within subdivision (2) of rule 7.1, it is plain from the import of the quotation from the Butte County Rice Growers case, hereinbefore set forth, that "on the farm" services in "the cultivation of the soil, the raising and harvesting of crops," as stated in subdivision (1) of the rule, always constitute "agricultural labor" irrespective of the status of the employer, and that the latter factor incident to the owner-tenant limitation enters only into the classification of the services specified in subdivision (2). Accordingly, to the extent that language of the Rose case may carry implications contrary to the import of the Butte County Rice Growers opinion, or of the opinion herein, it is hereby disapproved. However, the actual decision in the Rose case is entirely in line with the views herein expressed. There the employer was engaged in the business of baling hay on contract for various farmers. Sometimes the hay was baled on the farms where it was produced, but usually it was hauled to a central location nearby to save the cost and inconvenience of moving the hay-baling equipment. As so conducted, such independent enterprise was distinct from the farmers' "cultivation of the soil, the raising and harvesting of crops," and the hay-baling labor would properly come within subdivision (2) of our rule as services "in connection with the drying, processing, packing, packaging, * * * of materials which are produced

on the farm." Labor so identified would not be agricultural unless "performed by an employee of the owner or tenant of the farm on which the materials * * * were produced."

[7,8] From these observations it is clear that hay baling is an admirable example of "the nature of the work, modified by the custom of doing it," affecting the category into which the work falls—agricultural or industrial. See *H. Duys & Co. v. Tone*, 125 Conn. 300, 5 A.2d 23, 28. But no change in the custom or method of doing work in the actual production of agricultural crops can make such labor anything other than agricultural, even though the work be done by employees of a person or corporation whose business is industrial or commercial rather than agricultural in nature. So it is in the present case with regard to the field services in "girdling, thinning and harvesting" the crops—the girdling process requires the cutting of the grapevine bark so that the fruit will become larger and sweeter; thinning relates to the removal of leaves from around the grape bunches in order that the grapes may be properly colored by the sun; and harvesting concerns the picking of the fruit. While men are engaged in such "on the farm" work, their activities are essentially agricultural and cannot be otherwise regarded.

It therefore follows from reason and authority that the second paragraph of subdivision (2) of rule 7.1 does not relate or apply to subdivision (1) of that rule, and that all services here in question in connection with raising and producing these crops, up to and including the harvesting thereof, constituted "agricultural labor" within the meaning of our Unemployment Insurance Act.

[9] A different situation is presented with respect to that part of the services in question which was embraced within the classifications "office help" and "packing house labor," as made by respondent. Those services were performed off the farm following the harvest, either in the packing house or in the office, and as an integral part of respondent's general business. Such services come within subdivision (2) of rule 7.1 and constitute "agricultural labor" only if done "by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced" and "as an

incident to ordinary farming operations as distinguished from manufacturing or commercial operations." It therefore becomes important, as to this branch of the case, to determine whether or not the contracts under which respondent purchased this fruit made him a tenant with respect to the various properties.

[10] The agreements were in substantially the same language in each instance, providing that "the seller [the farmer] has sold" and "the buyer [respondent] has bought" a certain designated crop for a particular season at a stated price payable in installments, the last installment being due about harvest time. The usual arrangements specified that "buyer" would do "all girdling, thinning and harvesting at his own expense," and "seller" would "cultivate, irrigate and do general farming in a farm like manner at his own expense"; though in one or two cases the "buyer" agreed to do some of the "cultivating" and "irrigating." Considering the transactions as a whole, the general terminology would indicate contracts for the sale of specific crops rather than demises of land. The determinative points are stated in 15 California Jurisprudence 610 as follows: "In distinguishing between a lease and a cropping agreement, transfer of possession, special reservation of a right of re-entry for limited purposes only, covenants by the tenant to repair at his own expense, the creation of a definite term especially for several years, and an arrangement to deliver the owner's share of the crops to him off the premises, are all indicative of a lease. On the other hand, retention of possession by the owner indicates a cropping agreement." *Harrelson v. Miller & Lux, Inc.*, 182 Cal. 408, 410, 188 P. 800. Here there was no transfer of possession and consequently there was no need for a "special reservation of a right of re-entry" for any purpose. There is no evidence in the record that respondent agreed to make any repairs on the premises or, in fact, did so; the arrangements only related to a period of time required for the maturity of the designated crops; and in no case was the owner to receive any share of the crop, but only a stated sum representing the purchase price. In line with these considerations respondent was never given the right to plant any crop that he desired, but was limited to the grape or plum crop then being grown on the particular property.

[11, 12] Growing crops, as well as other personal property, are subject to contract for and absolute sale. *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 215, 18 P. 248, 9 Am.St.Rep. 199; *Vulicevich v. Skinner*, 77 Cal. 239, 240, 19 P. 424; *Jones v. California Growers & Shippers*, 182 Cal. 777, 778, 190 P. 172; *Tillis v. Western Fruit Growers, Inc.*, 44 Cal.App.2d 826, 830, 113 P.2d 267. Not only the language of the contracts but all the surrounding features likewise establish the respective transactions as agreements of sale. Thus, it further appears from the record that it was customary for commercial packers in the area where respondent operated, to buy crops prior to maturity—"The man who ships the fruit usually produces it to his own liking"—and thus be assured some certainty in sales. So the situation concerns not a farmer reaching for a market and preparing his fruit therefor, but a shipper—a man in the marketing business—reaching for a product to sell. He has contacted a market requiring a particular kind of product and to satisfy such demand, he undertakes, through a purchase agreement with the owner of the land where the crop is growing, to control its development to the extent of performing certain "field labor" in connection therewith so as to add "buyer appeal." Such arrangements do not envisage the transfer of any leasehold interest in land but simply the right to control and hasten the maturity of growing crops incident to the purchase of such crops.

As so analyzed, it is manifest that the "packing house labor" and "office help"—services in connection with the handling of crops off the farm and following the harvest, which may or may not be classed as "agricultural labor," depending upon satisfaction of the limitations specified in subdivision (2) of rule 7.1—were performed for respondent not as the tenant of land so as to tie those activities to the farm, but as an independent entrepreneur operating a fruit shipping business. Under the principles governing the decision in the cases of *North Whittier Heights Citrus Ass'n v. National Labor Relations Board*, supra, 109 F.2d 76, and *California Employment Comm. v. Butte County Rice Growers Ass'n*, supra, 25 Cal.2d 624, 154 P.2d 892, it follows that those services were not "agricultural labor" within the meaning of our Unemployment Insurance Act.

The judgment is reversed with directions to the trial court to take such evidence as may be necessary in order to determine the amount of contributions assessed with respect to that part of the services in question classified as "packing house labor" and "office help," and to enter judgment for appellant accordingly.

GIBSON, C. J., SHENK and TRAYNOR, JJ., concurred.

EDMONDS, Justice.

I concur in the judgment.

CARTER, Justice.

I concur in that portion of the majority opinion holding that labor performed in the "girdling, thinning and harvesting" are not subject to the Unemployment Insurance Act (Stats.1935, p. 1226, as amended, *Deering's Gen.Laws 1937*, *Gen.Laws Supp.1939*, Act 8780d). But I do not agree with that portion of said opinion holding the packing house labor activity of defendant to be not agricultural and therefore subject to the act.

Defendant is engaged in contracting with producers in which he agrees to purchase their products, and perform certain agricultural duties with regard to producing, harvesting and packing the produce. The majority opinion proceeds upon the theory that, under subdivision a of rule 7 adopted by the commission, packing activities are excluded from the definition of agricultural labor because traditionally, such activities are not concerned with tilling the soil or other on the farm activities, and that under subdivision b, such activities are not agricultural labor, because the employees are not employed by the owner or tenant of a farm. There is no realistic basis for the use of the owner-tenant employer test as the yardstick for measuring the scope of the definition of agricultural labor. It is conceded that if the packing was done by the farmer on the farm it would be such labor. And there can be no doubt about it. The packing of the produce is just as much an essential step in the farmer's business as any other factor. His aim is to make a living, first by growing the produce and then preparing it for sale. That preparation inescapably includes packing. Hence it follows that packing of agricultural products is a farming pursuit. Indeed it must be so characterized in order to fall within the

definition of agricultural labor where the employer is an owner or tenant. How then may it be said that the criterion is the status of the employer—that he must be an owner or tenant of a farm? On the one hand it would not be said that a person was employing agricultural labor if his employees were manufacturing locomotives, *even though he was the owner or tenant of a farm*, and the enterprise was conducted on the farm. On the other hand, if the services performed are the tilling of the soil it is agricultural labor *regardless of whether the employer is an owner or tenant of a farm*. That proposition is conceded by the majority opinion. I can see no other possible conclusion than that the requirement of a tenant-owned employer relationship is not a valid test for solving the problem. The basic principle must be that the vital turning point is the *nature of the services performed*. Are they agricultural in character as that term is used and understood throughout the nation?

In the instant case, packing as we have seen, by its very nature, is a part of the farmer's business, otherwise we leave him with his enterprise half completed. He has produced his crops but ceases to have farmer services performed when he carries his project to its logical conclusion—to the end that he had in view when he launched it,—that is, the packing and disposal of the fruits of his toil. Moreover, there are additional factors in the instant case. Defendant probably is not a tenant of a farm nor are he and the owner of the farm strictly speaking joint adventurers. Yet they have some of the aspects of the latter legal conception. The enterprise as a whole consists of *producing and disposing of farm products*. The owner of the land carries it to a certain stage and defendant completes the process. That process is continuous and unbroken from the seed to the consumer. Merely because the land owner does not perform the final acts, does not make the various phases any the less a part of the course of the activity. In a sense the defendant is performing some of the attendant tasks for the land owner and the latter carries some of the burdens of the former, all to the achievement of a single goal and all an integral and inseparable part of the venture.

The proposition that the scope of the words "agricultural labor" does not turn

on the test of an owner-tenant employer relationship is brought out in *Stuart v. Kleck*, 9 Cir., 129 F.2d 400, 402: "Accordingly, the exemption attaches to the 'services performed', which refers to the *type of work that is being done, and is not dependent on the form of the contract or whether the employee is employed by the owner or tenant of the farm or an independent contractor*. * * * The important question, then, is: *What is the nature of the services furnished and were these performed upon a farm?*" [Emphasis added.]

A case closely in point is *Batt v. Unemployment Compensation Division*, 63 Idaho 572, 123 P.2d 1004, 1005, 139 A.L.R. 1157, where it is said:

"The only controversy before us is as to whether the appellant, Batt, is liable for contributions under the Unemployment Compensation Law, * * * upon wages for (a) labor of individuals performed upon farm products purchased by him from farmers; and, (b) for the same kind of labor performed on farm products handled on so-called 'consignment'.

"The opinion of the Chief Justice seems to recognize a difference between the work done on (a) purchased farm products and (b) consigned farm products. I am unable to distinguish any material or legal difference between the two.

"The stipulation of facts covering this phase of the question is as follows:

"That aside from the produce raised by the applicant the balance for such produce which are processed as hereinafter set forth are secured in the following ways:

"The applicant purchases from the farmer grower the portion of his crop which is marketable when sorted and graded. To enable applicant to determine the part purchased and to prepare the same for market the farmer delivers such produce at the applicant's shed or warehouse, contained in half bags as taken by the farmer directly from the field as harvested.

"The applicant also handles a comparatively small part of potatoes on consignment, in which case the farmer delivers the potatoes from the field as harvested, and after the applicant has processed the same as hereinafter stated and sold the same there is deducted from the sale price the expenses, including a charge for processing and a brokerage charge, and the balance is paid to the farmer. * * *

"It appears, from the stipulation of facts, and is admitted, that this so-called processing merely consists of sorting, washing and grading these several farm products and packing or crating them for shipment and market. It is further stipulated and found as a fact, that the same laborers do the work on both the purchased and the consigned products; and that the work is identical on both.

*"It is clear that the appellant does, for hire, just such work as the farmer would have to do himself or hire someone else to do, on the farm or elsewhere, in preparation of his products for market. For this labor, the appellant received and deducted from the sale price 'the expenses including a charge for processing and a brokerage-charge', and paid the balance to the farmer. * * **

"I fail to see wherein the work done upon consigned products is any less 'agricultural labor' than that done upon the same kind of products purchased by appellant, or grown by him on his own farm. It was all agricultural labor." [Emphasis added.]

In *Cache Valley T. Growers Ass'n v. Industrial Comm.*, 106 Utah 1, 144 P.2d 537, the employer was not a farmer but bought turkeys from farmers and processed them for market. The labor was held to be agricultural. See, also, *In re Batt*, Idaho, 157 P.2d 547.

The decision of the majority in this case is out of harmony with the principles stated in the companion case of *Irvine Company v. California Employment Commission*, 165 P.2d 908. First, it is there stated in regard to the scope of the words here involved: "'agricultural labor'—a term 'intended * * * to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, * * * that in modern usage this is a wide and comprehensive term and that statutes using it without qualification, must be given an equally comprehensive meaning.'" [Emphasis added.] If we give that broad meaning to the term, the services here performed undoubtedly bear the characteristics of agricultural pursuits. Second, in the *Irvine* case the point is stressed that the courts should not "pick out some particular phase of the operation as determinative of whether it was agricultural, industrial, or commercial." They should view the enterprise as a whole. So analyzed

in the instant case, it is apparent that the labor supplied by the defendant under his contracts with the landowners was a part of the larger enterprise in which both participated in producing crops and conditioning them for sale to the consumers. Third, the *Irvine* case points to the 1939 amendment to the federal social security act (26 U.S.C.A.Int.Rev.Code, § 1607) as of persuasive significance in determining the scope of agricultural labor and the necessity for harmony between the state and federal acts. Applying that principle to the instant case we search in vain for any requirement in the 1939 congressional amendment for any restriction in the operation of the exemption on packing house employees to cases where the employer is a land owner or tenant. It reads:

"The term 'agricultural labor' includes all service performed—

"(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

"(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

"(3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 1141j (g) of Title 12, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

"(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary

farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption." [Emphasis added.]

In my dissenting opinion in California Employment Comm. v. Butte County Rice Growers Ass'n, 25 Cal.2d 624, 640, 154 P.2d 892, I discussed the rationale of the federal and state definitions of agricultural labor and the discussion there is pertinent here.

In my opinion the trial court was correct in holding that none of the services here performed were subject to the Unemployment Insurance Act, and the judgment should therefore be affirmed.

SCHAUER, J., concurred.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.



27 Cal.2d 568

**ANDREWS et al. v. CALIFORNIA
EMPLOYMENT COMMISSION.**

L. A. 19265.

Supreme Court of California, in Bank.

Jan. 29, 1946.

Rehearing Denied Feb. 25, 1946.

Taxation ☞219

Services in girdling, thinning and picking grapes, performed by fruit packers in pursuance of seasonal crop purchase agreements on the respective farms on which fruit was produced, constituted "agricultural labor" exempt from contributions under Unemployment Insurance Act. Gen.Laws, Act 8780d, §§ 7(a), 45.10.

See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural Labor".

165 P.2d—59

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action by Norris Andrews and others, doing business as a general copartnership under the firm name of Natomas Fruit Company, and another against the California Employment Commission, formerly the Unemployment Reserve Commission, to recover unemployment insurance assessments paid under protest. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Prior opinion, 158 P.2d 45.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Kimble & Thomas, Joseph C. Kimble, and Howard B. Thomas, all of Fresno, T. Newton Russell, of Palo Alto, and Maddox & Abercrombie, Dickson F. Maddox, and James K. Abercrombie, all of Visalia, for respondents.

SPENCE, Justice.

This is an action involving a claim for the refund of contributions assessed under the Unemployment Insurance Act. Stats. 1935, p. 1226, as amended; Deering's Gen. Laws 1937, Gen.Laws Supp.1939, Act 8780d.

The contributions under consideration here were levied on account of services performed by certain employees of the Natomas Fruit Company in pursuance of seasonal crop purchase agreements made with various farmers in this state during the years 1939 and 1940, for girdling, thinning, picking and hauling grapes to a packing house operated by Diamond K. Vineyards, a corporation. The assessments were paid under protest and this action was brought to secure a refund thereof, pursuant to the provisions of section 45.10 of the act. The trial court held that all these services constitute "agricultural labor" and were exempt from such contributions under section 7(a) of the act. Accordingly, judgment was entered in favor of plaintiffs and defendant appeals.

The only question presented on this appeal is whether services in girdling, thinning, and picking the fruit—all of which services were performed on the respective farms on which the fruit was grown—constituted "agricultural labor" within the meaning of the act. Appellant concedes, under the record and for the purpose of

this case, that the services performed in hauling the fruit were of the same nature as the other services just mentioned, and should be considered agricultural or not in accordance with the decision with respect to such other services. As so presented for consideration, the services to be classified and the surrounding circumstances are practically identical with, and the applicable principles of law are exactly identical with, those involved in the case of California Employment Comm. v. Kovacevich, Cal.Sup., 165 P.2d 917. On the authority of that case and for the reasons there stated, the judgment is affirmed.

GIBSON, C. J., and SHENK, ED-MONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



73 Cal.App.2d 6

KEELAN v. BELMONT CO. et al.

Civ. 14945.

District Court of Appeal, Second District,
Division 1, California.

Feb. 8, 1946.

Rehearing Denied March 4, 1946.

Hearing Denied April 8, 1946.

1. Vendor and purchaser ⇨335

Where contract for sale of realty provides that time is of the essence and that failure of purchaser to perform shall operate as a forfeiture, leaving the part payment made in possession of vendor, such forfeiture may take place automatically without notice or other affirmative acts on part of vendor.

2. Vendor and purchaser ⇨335

One in default cannot maintain an action for recovery from the other of sums previously paid on the contract for the sale of real property.

3. Damages ⇨85

Statute respecting invalidity of contract fixing damages for anticipated breach was inapplicable to contract for sale of realty making time of payment of the

essence and providing for forfeiture of deposit upon default. Civ.Code, §§ 1670, 1671.

4. Vendor and purchaser ⇨21

Where a deposit receipt, complete with respect to terms and conditions of sale of real property, was signed by both parties who agreed to buy and sell upon the conditions therein expressed, the fact that it was made subject to the buyer's approval of designated items of personalty did not detract from the binding effect of the agreement as making it a mere offer, particularly where court found that buyer by his conduct had approved such items.

5. Escrows ⇨5

Escrow instructions, which are a customary and necessary means of consummating real estate transactions, do not take the place of the agreement of sale but merely carry it into effect.

6. Vendor and purchaser ⇨341(3)

In action for return of down payment made on purchase of realty, under contract which provided that time was of the essence and provided for forfeiture of down payment upon plaintiff's default and that the contract was subject to plaintiff's approval of certain items of personalty, evidence sustained finding that, prior to plaintiff's default in paying purchase price, plaintiff by his conduct had approved the items of personalty in question, and that the contract was binding so as to prevent recovery.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by F. B. Keelan against Belmont Company, a corporation, and others, seeking return of money held in escrow as a partial payment of purchase price on an uncompleted purchase of real and personal property, wherein the defendant named filed a cross-complaint and defendant Donald C. Armour, as trustee, filed a counterclaim. From an adverse judgment, plaintiff appeals.

Affirmed.

LeRoy B. Lorenz, of Los Angeles, for appellant.

Macfarlane, Schaefer & Haun, and Dexter D. Jones, all of Los Angeles, for respondent Belmont Co.

Grady & Hotchkiss, of Los Angeles (David E. Field and Denis H. Grady, both of Los Angeles, of counsel), for respondent Armour.

YORK, Presiding Justice.

Plaintiff seeks the return to him of \$10,000 held in escrow by the defendant title company as a partial payment of purchase price on an uncompleted purchase of real and personal property. The defendant Armour, as trustee, was the owner of an occupied, 90-unit apartment hotel, together with certain furniture, fixtures and equipment therein contained. Defendant Belmont Company was a realty broker, acting as selling agent for the owner. On April 27, 1944, an agreement was executed in the form of a "Deposit Receipt," in which said Belmont Company acknowledged receipt from plaintiff Keelan of a cashier's check for \$10,000 made payable to Title Insurance & Trust Company. The stated purchase price of the apartment-hotel was \$336,000, said \$10,000 being a deposit on account thereof, the balance payable within 30 days from date of the agreement, which provided (among other things) as follows:

"This offer is subject to: Approval of rent statement; O.P.A. statements to conform to reported rent statement; satisfactory termite report; inspection of building by purchaser and associates; approval of inventory and equipment. * * *

"In connection therewith it is hereby agreed:

"(1st) That should the purchaser fail to pay the balance of the purchase price, or fail to complete the purchase, as herein provided, the amounts paid hereon may, at the option of the seller, be retained as the consideration for the execution of this agreement by the seller.

"(2nd) * * * That should the title of said property prove defective or unmerchantable and should the seller be unable to perfect the same within a reasonable time from date hereof all amounts paid hereon shall be returned to the purchaser unless the purchaser elects to accept the title in said condition.

"(3rd) That should the improvements on said premises be destroyed or materially damaged prior to delivery of Deed or Agreement of Sale to supersede this Deposit Receipt, all amounts then paid hereon shall be returned to the purchaser unless

the purchaser elects to complete the purchase regardless of the then condition of the improvements. * * *

"(5th) That the deposit and all other payments called for herein, if made with other than lawful money of the United States of America, may be converted into cash immediately, unless otherwise provided for herein, and held subject to the terms of this Deposit Receipt.

"(6th) That the essence of this Agreement is time and the undersigned real estate agent may, without notice, extend the time for an additional period of thirty days should said agent deem the extension advisable."

Plaintiff Keelan signed the agreement to purchase the property on the terms and conditions therein stated; defendant Armour, as trustee, signed the agreement to sell on the terms and conditions stated and in addition agreed to pay the Belmont Company a broker's commission in the sum of \$8,650, "or one-Half of the deposit should same be forfeited by purchaser, provided said amount shall not exceed the full amount of said commission."

On the following day, i.e., April 28, 1944, the buyer and seller opened an escrow with the Title Insurance & Trust Company, when the usual escrow instructions were executed. No mention was made therein with respect to the retention by the seller or the forfeiture by the buyer of the \$10,000 deposit, but consummation of the transaction was made "contingent upon buyer's approval of rent statement, OPA statements termite report, approval of inventory and equipment."

Plaintiff failed to deposit the remainder of the purchase price within the time provided and defendant Armour, as seller, cancelled the escrow and subsequently entered into a contract for the sale of said property to another party. Plaintiff having made a demand for the return of the deposit, instituted the instant action to recover the same, "on the theory that he is entitled to its return because he got nothing for it."

Defendant Armour by way of counterclaim alleged the failure of plaintiff to pay the balance of the purchase price and claimed the deposit "as consideration for the execution of said agreement" for the sale of the apartment-hotel, as provided by the deposit receipt.

The trial court found:

"That the defendant and cross-defendant, Donald C. Armour, as Trustee, fulfilled all of the terms and conditions of the agreement of sale attached to plaintiff's complaint and marked Exhibit 'A,' and fulfilled the escrow instructions on his part to be performed. That the plaintiff and cross-defendant at no time objected to any of the furniture, furnishings or equipment or the items on the inventory submitted, but made every effort to sell the said property at a profit to himself, and that he did approve, by his actions and conduct, all of said items on said inventory and the equipment, furniture and furnishings, and that he failed to perform his part of the escrow instructions within the time provided and as extended, to-wit, July 1st, 1944. * * *

"Wherefore, * * * the Court makes the following Conclusions of Law: I. That the plaintiff failed to pay the balance of the purchase price and failed to complete the purchase of the said property within the time limits of the escrow, and that under the terms of the agreement * * * the defendant, Donald C. Armour, as Trustee, is entitled to retain the said sum of \$10,000.00 as a consideration for the execution of said agreement. II. That by reason of the agreement * * * one-half of said deposit belongs to the said Donald C. Armour, as Trustee, and that the defendant and cross-defendant Title Insurance & Trust Company is directed to pay one-half of the said escrow deposit to the defendant and cross-defendant Donald C. Armour, as Trustee, and one-half thereof to the defendant and cross-complainant, Belmont Company * * *."

From the judgment which followed, plaintiff prosecutes this appeal urging as grounds for a reversal thereof, the following:

"I. The provision in the printed portion of the deposit-receipt, upon which the forfeiture was adjudged, assumes 'to fix the amount of damages for an anticipated breach of contract' and is therefore 'void', under section 1670 of the Civil Code.

"II. The 'deposit-receipt' constituted a mere offer.

"III. The 'deposit-receipt' was superseded.

"IV. No support for the finding that Keelan approved the inventory and equipment 'by his actions and conduct.'"

[1] "Executory contracts for the sale of land frequently contain a provision to the effect that in case of breach by the purchaser his interest or rights under the contract shall be forfeited. Such forfeiture may take place automatically without notice or other affirmative act on the part of the vendor, if it is expressly provided that time is of the essence of the agreement and that failure of the purchaser to perform shall operate as a forfeiture of all his rights, leaving installments of the price previously paid in the possession of the vendor. Where time is made essential and payment by the purchaser is to be made not later than a specified date, the forfeiture resulting from not making such payment is complete on that date and may not be undone by any subsequent act of the purchaser." 25 Cal.Jur. 607, sec. 113, and cases therein cited.

[2] As stated in *Ross v. Southern California Junior College*, 15 Cal.App.2d 541, 543, 59 P.2d 1038, 1039: "One in default cannot maintain an action for recovery from the other of sums previously paid on the contract for the sale of real property. *Rosenthal v. Silveira*, 42 Cal. App. 637, 184 P. 58; *Little v. Kennedy*, 86 Cal.App. 324, 260 P. 890; *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St. Rep. 17; *Los Angeles Gas & Electric Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 P. 55; *Cross v. Mayo*, 167 Cal. 594, 140 P. 283."

[3] In *Rea v. Security Trust & Savings Bank*, 129 Cal.App. 663, 666, 19 P.2d 267, 268, which involved agreements for the sale of real property, it was urged, as it is here, that "the provisions in each of the contracts, providing for the forfeiture of the buyers' rights, are in violation of sections 1670 and 1671 of the Civil Code." In that case it was held by this court as follows: "The point is not applicable to this appeal. We have here, in each instance, a contract for payments to be made by the purchaser; a provision that 'time is of the essence of the agreement'; and failure of the buyers to make payments which had become due. Whether there was a forfeiture or not, in either event it remains true that the facts found do not entitle the plaintiffs to judgment as for damages, or for return of the money which they had paid as part of the purchase price. * * * The case made by the record comes within the rule stated in

Glock v. Howard & Wilson Colony Co., 123 Cal. 1, at page 10, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17, where it is said that after the vendee's breach of the covenant to pay, the vendor, still resting upon the contract, may remain inactive, yet retain to his own use the moneys paid by the vendee. See, also, Winter v. Kitto, 100 Cal.App. 302, 309, 279 P. 1024."

In Kelso v. Ulrich, 67 Cal.App.2d 698, 701, 155 P.2d 407, 409, appellant cited many decisions for the purpose of establishing that the contract there under consideration was void under section 1670, Civil Code, and that its provisions for forfeiture of the contract and of all moneys paid thereunder was not justified by section 1671. The court in that case stated: "None of the cited authorities arises out of a contract for the purchase and sale of real property with time of deferred payments of its essence. Those cases have to do with attempts to enforce the forfeitures which are condemned under the general equity rule which abhors a forfeiture. See Ballard v. MacCallum, 15 Cal. 2d 439, 444, 101 P.2d 692, where the Chief Justice distinguishes the cited cases from those arising out of contracts such as that now before us."

See, also, Culligan v. Leider, 65 Cal. App.2d 51, 58, 59, 149 P.2d 894, which involved an option designated as a deposit receipt containing a clause fixing the amount of liquidated damages and a provision that if the property was not marketable the purchaser should have the option of "receiving back" the deposit and should be "released from all obligations." It was there held, that in case of the seller's inability or refusal to tender a marketable title, the purchaser was entitled to a return of the deposit, in accordance with the clause contained in the deposit receipt.

In view of the authorities above cited, appellant's proposition that the forfeiture clause in the agreement here under consideration is void, cannot be sustained.

[4] Appellant urges that when the clause requiring the approval of the buyer to the inventory and equipment was added to the deposit-receipt, it became merely an offer and not a binding agreement. An examination of the document reveals that it is complete with respect to terms and conditions of the sale; and that it is signed

by both parties, who agreed to buy and to sell upon the conditions therein expressed. The fact that it was made subject to the buyer's approval of the designated items, does not detract from its binding effect, especially in view of the court's finding that buyer by his actions and conduct approved the inventory and equipment.

[5] Appellant next argues that the deposit-receipt was superseded by the escrow instructions. Escrow instructions are a customary and necessary means of consummating real estate transactions, they do not take the place of the agreement for sale but merely carry it into effect.

[6] Appellant finally contends that there is no support in the record for the court's finding that he approved the inventory and equipment by his actions and conduct.

The finding complained of is to the effect that "the plaintiff and cross-defendant, at no time objected to any of the furniture, furnishings or equipment or the items on the inventory submitted, but made every effort to sell the said property at a profit to himself, and that he did approve, by his actions and conduct, all of said items on said inventory and the equipment, furniture and furnishings * * *."

Evidence was introduced showing that appellant through a real estate agent advertised the apartment for sale and definitely offered it for sale at a price of \$390,000. Appellant testified that he was informed at the time he "signed the original purchase agreement, that there was a party willing, able and ready to buy it at \$375,000."

Mr. Chester F. Ericson, who described himself as "operator of Marsden Hotel Apartments for the account of Donald C. Armour, trustee," testified that he "met Mr. Keelan at the Title Insurance and Trust Company the latter part of April, after Mr. Perren representing the Belmont Company, who had the exclusive agency for the sale of the property, had made an agreement, drawn an agreement which Mr. Keelan had signed, for the purchase of the property. We met to draw the formal escrow agreement with the Title Insurance and Trust Company. I met Mr. Keelan and also met Mr. LaFond there, Mr. Keelan's representative. The papers were drawn. I took them back for Mr. Armour

to sign, and then presently provided the Title Insurance and Trust Company with all the necessary papers which the escrow agreement called for. I then met Mr. Keelan at the Title Insurance later, sometime in June when he was inspecting the rent statement, inventory, and so forth. * * * The next time I saw Mr. Keelan was at his request I met him at the apartment, a week prior to the termination of the escrow—the date of the escrow termination. Met him with Mr. LaFond, and Mr. Keelan requested of me an extension of the escrow period. I had, prior to that, agreed to a two-weeks extension * * * I had no intention of creating any impression that we had all the time in the world to close the deal. At that time, however, I did not know that Mr. Keelan had been advertising the property and been attempting to sell it. * * * At the last meeting I had with Mr. Keelan and Mr. LaFond, Mr. Keelan said he was perfectly satisfied with the building. He wanted to purchase it. I had the loan for \$265,000, which he could not consummate, and he required another thirty days to complete the purchase. I said, 'Mr. Keelan, I am interested only in selling this property, and if you put up \$25,000 additional money as a further down payment on the purchase price, we will give you an extension.' But I did not propose to give an extension when I knew he was out trying to sell the property while he had it in escrow." This witness further testified that this conversation took place within a week prior to June 30, 1944.

Mr. LaFond, the real estate broker, who advertised the apartment for sale on behalf of appellant, testified that he and appellant made their final inspection of the equipment in the latter part of June a day or two before the close of escrow; that at that time the "carpets were terrible; all moth eaten with moths and holes * * * 15 or 20 dogs we saw in the building * * * there were spots all over the carpets. Nobody home; people working. Dogs there all day." On cross-examination he testified that he first inspected ten or

twelve of the apartments in the building prior to April 27, and saw only one dog, at which time the condition of the carpets in those apartments was fair. That he undertook to advertise the place for sale for \$390,000 and on June 11 and 18, he ran an ad in the Los Angeles Times reading: "Seven story, Class A-90 units, just like new. * * * Income about \$80,000 a year. Price right. Call LaFond." In reply to the following question: "You would not knowingly and maliciously advertise a thing that was not up to that standard that you put in the paper, as a licensed realty broker, would you?" the witness stated: "I would, yes. They don't show you all the apartments. They only show you 4 or 5; the nicest ones. * * *

"The Court: Just a minute. Do you advertise an apartment like this when it was in the condition you described here, Mr. LaFond? A. Well, Judge, Your Honor—

"Q. Just answer the question. * * * A. Yes, sir.

"Q. Is that the way you conduct your business? A. Well, we are out to make commissions, Judge, your Honor.

"Q. Anyway you can? A. I make my final—what I saw looked nice when I first saw it."

On redirect examination, this witness testified that he ran his advertisements for sale before he inspected the property and found it in bad condition; and that he considered the condition of the property up to the buyer rather than the broker.

Appellant testified that he made his last inspection of the premises, the latter part of June. "It was after Mr. Ericson refused to give me a further extension. I had my plans made and completed to close the transaction, but after a fairly thorough inspection of the building, I could not see my way clear."

The foregoing amply supports the finding of the trial court complained of.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

PRUNTY v. ALLRED et al.

Civ. 3185.

District Court of Appeal, Fourth District,
California.

Feb. 14, 1946.

Rehearing Denied March 13, 1946.

Hearing Denied April 11, 1946.

1. Appeal and error ⇨931(1)

A reviewing court must view the evidence in its most favorable light in support of the judgment.

2. Carriers ⇨280(1), 316(1)

Although a bus carrier is held to a high standard of care, not every injury to a passenger is presumed to arise from negligence on part of carrier, but it must first be shown that the injury came from the movement of the bus by those in charge of it or from something in connection therewith, or from something in the control of the carrier. Civ.Code, § 2100.

3. Negligence ⇨121(2)

The "res ipsa loquitur" doctrine is applicable where a thing which causes injury is shown to be under exclusive management and control of defendant and the accident is such as in ordinary course of things does not happen if those who have the management use proper care, and in such cases an inference arises that the accident resulted from the want of proper care.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

4. Carriers ⇨321(21)

The fact that the evidence is conflicting or leaves it doubtful whether the ultimate cause of an injury to a passenger was the negligence of the common carrier does not render it improper to instruct the jury on the doctrine of res ipsa loquitur.

5. Carriers ⇨321(21)

In action against bus company and driver for injuries sustained when seated passenger was struck by suitcase falling from overhead baggage rack, instruction on res ipsa loquitur doctrine was proper, where inference of negligence was permissible from failure of driver to discharge his duty of inspecting baggage, and from operation of bus in such a manner that the falling of the suitcase was coincidental with sudden movement of bus.

6. Carriers ⇨316(1)

A passenger who was injured by movement or operation of carrier need not show that such movement or operation was unusual before the rule of res ipsa loquitur can be applied.

7. Appeal and error ⇨1064(1)**Carriers ⇨321(21)**

In action against bus company and driver for injuries sustained when seated passenger was struck by suitcase falling from overhead baggage rack, giving of res ipsa loquitur instruction in the form that from the mere happening of the accident as established by the evidence an inference arose that proximate cause of the occurrence was some negligent conduct of bus company, was not prejudicially erroneous, where the falling of the suitcase happened when the bus was in motion and was due to movement of bus.

8. Carriers ⇨347(6)

A passenger suing bus company and driver for injuries sustained when seated passenger was struck by suitcase falling from overhead baggage rack was not as a matter of law contributorily negligent, where passenger did not place suitcase in the rack and was not charged with and did not assume the duty of inspecting the baggage and had no notice requiring her to be on the lookout to protect herself against such danger.

9. Carriers ⇨280(1)

A bus company and driver are charged with the duty of exercising the utmost care and diligence for the safe carriage of a passenger. Civ.Code, § 2100.

10. Trial ⇨145

In action against bus company and driver for injuries sustained when seated passenger was struck by suitcase falling from overhead baggage rack, withdrawal of issue of passenger's contributory negligence from jury's consideration was proper, where there was no evidence in support of the claim that passenger was contributorily negligent.

11. Damages ⇨132(3)

\$10,000 to teacher who suffered concussion, disruption of the nervous system, and a remarkable loss of field of vision, as result of injuries sustained when she was struck by suitcase falling from overhead baggage rack in bus, and whose loss of

salary and medical bills aggregated over \$2,700, was not excessive.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Mary Gladys Prunty against Cleet Allred and the Pacific Greyhound Lines, Inc., a corporation, for injuries allegedly sustained while riding on a bus. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Borton, Petrini, Conron & Borton, of Bakersfield, and Cooley, Crowley & Supple, of San Francisco (Paul Dana, of San Francisco, of counsel), for appellants.

Rae B. Carter and John D. Chinello, both of Fresno, and Dorsey & Campbell, of Bakersfield, for respondent.

GRIFFIN, Justice.

On May 1, 1943, plaintiff became a passenger, at Tulare, on one of the busses owned by defendant Pacific Greyhound Lines, Inc., a corporation, a common carrier of persons for hire, which bus was driven by defendant Allred. Plaintiff was a teacher in high school and her duties were taking her to a meeting at Bakersfield. 41 seats in the bus were arranged along both of its sides, with an aisle down the center. About 4 ft. 8 inches from the floor and about 10 inches from the top of the head of a person of ordinary height seated in the seat, two metal racks for hand baggage of passengers were provided, one on each side of the bus over the seats. These racks had an outside vertical rail about 4 inches high. Plaintiff entered the bus and occupied the aisle seat immediately behind the driver on the left-hand side of the bus. She had no baggage.

The driver of the bus testified that it was his duty, and that at frequent intervals he did inspect the baggage in the racks to see that it was properly stowed and safely placed. He was provided with a rear view mirror. After passengers entered the bus he would look down the racks and if the baggage looked all right he would go ahead. Between Tulare and Delano a fur coat fell from the rack immediately above plaintiff and descended upon her. The owner of the coat, seated in a seat immediately back of her, folded it and replaced it in the rack. The driver of the bus did not notice the coat nor the incident. At Delano a Miss Grimes boarded the bus

as a passenger and occupied the window seat alongside of plaintiff. After entering, she placed her paper suitcase or overnight bag in the rack above the seat in which plaintiff was sitting. The bag was about 18 inches long, 14 to 16 inches wide, and about 7 inches deep. It contained overnight wearing apparel and weighed in all about five pounds. It was put together with metal bands or "claws" on the corners. She testified that there were other articles and a fur coat on the rack "close by the place" where she put the bag. There is no direct evidence that the bag was placed on top of the fur coat, although each counsel in his argument to the jury stated that it was his opinion that the bag was placed on top of the fur coat. Miss Grimes further testified that the bag, as placed by her, was in a level position, not on any incline and not projecting over the edge of the rack.

The bus driver testified that before leaving Delano he "glanced over and looked over" the baggage generally and did that every time he stopped; that so far as he could see "it was all right".

About 25 miles south of Delano the suitcase or overnight bag fell from the rack above plaintiff and one of the corners thereof struck her on the right front temple of her head "as though a hammer had hit me". According to plaintiff it fell at a time when the bus, while traveling about 45 miles per hour, had passed a truck which they had overtaken, at the time when the bus came back into its own lane "rather suddenly * * * because there was oncoming traffic". The bus driver brought the bus to a stop. The bag was rescued from the floor. Plaintiff immediately complained of a headache, a severe neck pain, and nausea. The driver assisted her from the bus at Bakersfield. She attended a meeting and was driven back to Tulare by another teacher. She said she experienced difficulty in walking and unsteadiness on her feet.

On May 2nd, she was examined by her family physician, who prescribed rest and sedatives. She remained in bed under doctor's orders, until the end of July, 1943. She was then taken to a sanitarium where she remained until September 11, 1943, after which she came home and remained there until January 24, 1944.

Her doctor's report to the State Compensation Insurance Commission diagnosing plaintiff's symptoms and condition was to the effect that there was concussion,

probable traumatic arthritis of the cervical area, inflammation of the nerve, radical, leading to the spinal column into cervical area (radiculitis). Within a few days after the accident, plaintiff said she began experiencing a disturbance or blurring of vision at intervals.

The Commission's doctors examined plaintiff on several occasions. They testified generally that her field of vision was only five degrees instead of the normal of 90 degrees; that her condition was diagnosed as hysteria, over which she had no control. On November 26, 1944, they found her field of vision about 20 degrees. They testified that her condition could not be simulated; that it was a permanent unstable condition due to shock resulting from the injury.

Intimate friends testified as to her changed condition since the accident. She testified that her loss of wages during the period mentioned was \$2,083.14. She received an annual salary of \$2,725, but employed a substitute teacher in her stead. Her medical and hospital expenses amounted to \$686.46. The jury returned a verdict in her favor for \$10,000.

The first contention of defendants on appeal from the judgment is that the evidence is insufficient to sustain the judgment. It is argued that since there is no evidence that the baggage rack gave way or was faulty in construction, that there was no evidence of negligent operation of the bus, and that since there was nothing visible to the driver of the bus indicating that the bag was not secure, there was no liability on the part of the defendants.

At the request of plaintiff, the court gave an instruction on the *res ipsa loquitur* rule as follows: "From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. * * * That inference is a form of evidence and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff, * * *. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant * * * to rebut the inference by showing that it did, in fact, exercise the utmost care and diligence but that the accident occurred with-

out being proximately caused by any failure of duty on its part."

It is strongly contended that this doctrine was inapplicable to the case and that the jury was improperly instructed on the doctrine.

[1] Civil Code, section 2100 provides that a carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill. Viewing the evidence in its most favorable light, in support of the judgment, which we, as a reviewing court must do, an inference of negligence was permissible from the failure of the bus driver to discharge the duty of inspecting the baggage in the racks and seeing that it was properly stowed and securely placed. It is likewise obvious from the statement of facts, that an inference of negligence was permissible from the manner in which the bus was operated. The falling of the baggage was coincidental with the movement of the bus in suddenly coming back into its own lane of traffic to avoid on-coming traffic after passing the truck.

[2] The question whether the instruction on *res ipsa loquitur* was applicable to the facts as related is a close one. Although a carrier is held to a high standard of care, not every injury to a passenger is presumed to arise from negligence on its part. It must first be shown that the injury came from the movement of the bus by those in charge of it or from something in connection therewith, or from something in the control of the defendant.

Defendants cite *Wade v. North Coast Transportation Co.*, 165 Wash. 418, 5 P.2d 985, in which case a suitcase fell on plaintiff under similar circumstances when the bus made a sudden "lurch or jerk". In this decision *Diamond v. Weyerhaeuser*, 178 Cal. 540, 174 P. 38, and *Stevens v. Boston Elevated Ry. Co.*, 199 Mass. 471, 85 N.E. 571, are discussed. It was there held that the evidence was not sufficient to sustain a recovery. To the same effect is *Morris v. N. Y. Central & H. R. R. Co.*, 106 N.Y. 678, 13 N.E. 455; *Whiting v. N. Y. Central & H. R. R. Co.*, 97 App.Div. 11, 89 N.Y.S. 584; *Creahan v. Pennsylvania R. R. Co.*, 123 Pa.Super. 268, 187 A. 51; *Ginochio v. San Francisco*, 57 Cal.App. 150, 206 P. 763.

In *Stimson v. Milwaukee, L. S. & W. Ry. Co.*, 75 Wis. 381, 44 N.W. 748, it was stated that personal baggage of passengers is not a thing under the management of the defendant and it was necessary for plaintiff to show by other proofs that the company was guilty of some negligence or want of ordinary care in regard to the baggage.

[3] It is argued here that the overnight bag was never, at any time, under the exclusive control of defendants, one of the necessary elements before the doctrine applies, citing *Gerhart v. Southern Cal. Gas Co.*, 56 Cal.App.2d 425, 431, 132 P.2d 874. It has been repeatedly held that the doctrine may be relied upon where a thing which causes injury is shown to be under the exclusive management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. In such cases an inference arises that the accident resulted from the want of proper care. In this action the jury may have been justified in believing that it was the negligent operation or movement of the bus, which bus was admittedly under the exclusive control of defendant, that caused the accident and injury by "rather suddenly coming back into its own lane" and thereby causing the baggage to fall upon plaintiff; that the sudden and negligent operation of the bus was the proximate result or efficient cause of the accident and injury, i. e., that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury, and without which the injury would not have occurred, and that the falling of the suitcase was coincidental thereto, and had a causal connection with such operation.

In the decision of *Mudrick v. Market Street Ry. Co.*, 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533, many of the authorities cited by appellant are discussed and distinguished. It was there specifically held that when a passenger is injured by the movement or operation of a street car, he need not show that the movement or operation was unusual before the rule of *res ipsa loquitur* can be applied, so long as the injury results from such movement or operation. It likewise held that mere injury to the passenger does not place upon the carrier the duty of explanation, but the establishment of such injury, coupled with proof of coincident and causal colli-

sion, derailment, or other happening to the car, does cast upon the defendant the burden of exculpation.

This same question was considered in *Lynch v. Market Street Ry. Co.*, 130 Cal. App. 433, 438, 19 P.2d 1009, and many authorities are there cited, including some cited by appellants. The giving of an instruction on the doctrine of *res ipsa loquitur* was held to be proper.

[4] The fact that the evidence is conflicting or leaves it doubtful whether the ultimate cause of an injury to a passenger was the negligence of the common carrier does not render it improper to instruct the jury on the doctrine of *res ipsa loquitur*. *Lynch v. Market Street Ry. Co.*, supra.

[5] The complaint alleges negligence, both generally and specifically. It charges that defendants negligently managed and operated the bus and as a proximate result of that negligence, the baggage was thrown with great force against plaintiff's head, causing her great injury. Under the pleadings and the evidence, an instruction on the doctrine was proper. *Leet v. Union Pacific Railroad Co.*, 25 Cal.2d 605, 155 P.2d 42, 158 A.L.R. 1008. The case was tried and both sides argued to the jury upon the theory that the doctrine was applicable, depending upon the jury's interpretation of the evidence.

Complaint is made that the form of the instruction is deficient and not a correct exposition of the law. The instruction informed the jury that from the mere "happening of the accident", as established by the evidence, an inference arose that the proximate cause of the occurrence was some negligent conduct of defendant. This form of instruction has been held to be erroneous in certain cases.

In *Mudrick v. Market Street Ry. Co.*, supra, 11 Cal.2d page 731, 81 P.2d page 954, 118 A.L.R. 533, the court said: "It will be noted that in this instruction the jury was told that the mere proof of injury to plaintiff on defendant's car cast upon the defendant the burden of proving the absence of negligence on its part, or contributory negligence. In that instruction nothing was said as to the injury being caused by the movement or operation of the car. For such omission the instruction was erroneous. It differed materially from the three criticized instructions in the present case which expressly referred to the injury as, 'caused by the operation (or movement) of the car.' This difference in the wording of the in-

struction in that case and those in the instant case was pointed out in the opinion in the Steele case [Steele v. Pacific Elec. Ry. Co., 168 Cal. 375, 143 P. 718] in the following language: 'It is not the law, as the argument of the plaintiffs implies, that the mere fact that a passenger is injured while aboard a car, or while alighting therefrom, creates a presumption that the injury was caused by want of care on the part of the defendant operating such car. It must first be shown that the injury came from the movement of the car by those in charge of it, or from something connected therewith, or in control of the defendant. When this is done, the law then presumes prima facie that the particular thing thus shown to have caused the injury was due to the defendant's negligence, and the burden is thrown upon the defendant to disprove the prima facie case thus made.' See, also, Lynch v. Market Street Ry. Co., supra.

In the Steele case, supra, it was pointed out that there are certain cases in which an instruction, similar to the one here in dispute, has been approved. MacDougall v. Central R. Co., 63 Cal. 431; Bush v. Barnett, 96 Cal. 202, 31 P. 2; Boone v. Oakland Transit Co., 139 Cal. 490, 73 P. 243; Kline v. Santa Barbara, etc., Ry. Co., 150 Cal. 741, 90 P. 125; Housel v. Pacific Electric Ry. Co., 167 Cal. 245, 139 P. 73, 51 L.R.A.,N.S., 1105, Ann.Cas.1915C, 665. In each of those cases it was shown that there was no question but that the injury was caused by collision or derailment of the car in which the plaintiff was a passenger, or while he was alighting from it, and there was no issue as to how the injury occurred. It was held that under those circumstances, the giving of the instruction was proper.

[6,7] In the instant case, there is no doubt that the incident, resulting in the fall of the hand bag or suitcase from the rack, happened during the time the bus was in motion and was due to the movement of the bus. The evidence does not justify any other reasonable construction. Since it is not necessary to show that the movement was "unusual" before the rule can be applied, we must conclude that the giving of the instruction in the form submitted, under the facts of this case, was not prejudicially erroneous. Gerdes v. Pacific Gas & Electric Co., 219 Cal. 459, 27 P.2d 365, 90 A.L.R. 1071; Edwards v. Gullick, 213 Cal. 86, 1 P.2d 11; Gonzalez v. Nichols, 110 Cal.App. 738, 294 P. 758.

[8-10] The trial court instructed the jury that there was not sufficient evidence of contributory negligence on the part of the plaintiff and withdrew that issue from the jury. We are unable to discover any evidence supporting defendants' claim that plaintiff was guilty of contributory negligence. Nothing is mentioned in their argument to the jury indicating that she was guilty of contributory negligence. She did not place the baggage in the rack, she was not charged with the duty of inspecting the baggage, nor did she assume it. She had no notice requiring her to be on the lookout to protect herself against such danger. She was a passenger for whose safe carriage the defendants were charged with the duty of exercising the utmost care and diligence. Civ.Code, § 2100. Defendants have not pointed out wherein she could be so charged. It was therefore proper for the court to withdraw that issue from the jury's consideration. Blackwell v. American Film Co., 189 Cal. 689, 699, 209 P. 999.

[11] The last claim is that the award of \$10,000 was excessive. Defendants offered no medical testimony at the trial. The evidence shows that plaintiff suffered a concussion, disruption of the nervous system, and a remarkable loss of field of vision. Her injuries, according to the record, appear to be serious and permanent. They curtailed her activities as a school teacher for many months and threatened her future activities. Her special damages for loss of salary and medical bills aggregated over \$2,700. It cannot be said, as a matter of law, that a general verdict for the remaining \$7,300 is excessive. The trial court considered this matter on a motion for new trial. The issue was primarily factual in nature. The court and jury had the opportunity to observe plaintiff's affliction and the extent of her injuries. Suffering from the disruption of the nervous system of the human body may become, and often is, more intense and severe than most any other form of suffering. Its duration is problematical. Coleman v. Galvin, 66 Cal.App.2d 303, 152 P. 2d 39; Johnson v. Pearson, 100 Cal.App. 503, 280 P. 394; Sloan v. Original Stage Line, Inc., 124 Cal.App. 317, 12 P.2d 465. Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

73 Cal.App.2d 93

In re CRANE'S ESTATE.

**CRANE v. SECURITY-FIRST NAT. BANK
OF LOS ANGELES.**

Civ. 14814.

District Court of Appeal, Second District,
Division 1, California.

Feb. 18, 1946.

Rehearing Denied March 18, 1946.

Hearing Denied April 18, 1946.

1. Trusts ⇨331

Where investment by bank as testamentary trustee in participation certificates issued by bank had been regularly reported in annual accounts and had been approved by the probate court from 1927 to 1942 without objection, propriety of original investments and their retention for those years was res judicata and could not be successfully challenged by beneficiary on ground that certificates were void because issued without permit from the corporation commissioner. Gen.Laws Act 652, § 104; Probate Code, § 1123.

2. Trusts ⇨331

Where investments by bank as testamentary trustee in participation certificates issued by bank had been regularly reported in annual accounts and had been approved by the probate court from 1927 to 1942 without objection, trustee did not waive defense of res judicata as to such investments by inclusion in its accounts for 1942 and 1943 of the conventional statement that all investments made for the trust were in securities authorized by law or by the terms of the trust. Gen.Laws Act 652, § 104; Probate Code, § 1123.

3. Trusts ⇨331

Where investments by bank as testamentary trustee in participation certificates issued by bank had been regularly reported in annual accounts and had been approved by the probate court from 1927 to 1942 without objection, approving orders could be deemed res judicata as to such investments, as against contention that trust funds were invested in unauthorized securities and that therefore the orders settling the trustee's accounts were void as to those investments. Gen.Laws Act 652, § 104; Probate Code, § 1123.

4. Trusts ⇨331

Where investments by bank as testamentary trustee in participation certificates

issued by bank had been regularly reported in annual accounts and had been approved by the probate court from 1927 to 1942 without objection, approving orders were res judicata of objections to 1942 and 1943 accounts that trustee's purchase of the certificates violated testamentary requirement that trust funds be invested in good interest bearing securities. Gen.Laws Act 652, § 104; Probate Code, § 1123.

5. Constitutional law ⇨43(1)

Where investments by bank as testamentary trustee in participation certificates issued by bank had been regularly reported in annual accounts and had been approved by the probate court from 1927 to 1942 without objection, constitutionality of statute under which investments were originally made could not be successfully challenged for the first time on appeal from orders settling accounts for 1942 and 1943. Gen.Laws Act 652, § 104; Probate Code, § 1123.

Appeals from Superior Court, Los Angeles County; Ingell W. Bull, Judge.

Proceeding in the matter of the estate of Charlotte K. Crane, deceased, wherein Charlotte Jaquith Crane filed objections to accounts of the Security-First National Bank of Los Angeles, as testamentary trustee. From order settling the accounts as presented, the objector appeals.

Affirmed.

Goudge, Robinson & Hughes, Edgar F. Hughes, and Chas. M. Fueller, all of Los Angeles, for appellants.

Newlin & Ashburn, of Los Angeles (A. W. Ashburn, of Los Angeles, of counsel), for respondent.

DORAN, Justice.

The present controversy arose upon the settlement of the 21st and 22nd reports and accounts current of respondent bank as testamentary trustee under the will of Charlotte K. Crane, deceased. On November 23, 1920, the probate court distributed to the respondent's predecessor, Los Angeles Trust & Savings Bank, as trustee, property in the amount of \$364,138.90, of which one-third was to be administered for the benefit of appellant Charlotte Jaquith Crane. The will in question directed that the real and personal property should be disposed of and the proceeds invested in

"good interest bearing securities," with full power to sell such securities and purchase others. Since April 1, 1929 the respondent bank, acting as trustee, has filed the annual accounts current in the Crane Trust, which accounts have been settled and approved by the probate court after due notice.

In the year 1925 the legislature enacted Section 104 of the Bank Act, Gen.Laws Act 652, which authorized the issuance of participation certificates on trust deeds and mortgages owned by trust companies and departmental banks. Section 104 further provided that "the department owning and holding any such participation certificates *may sell and transfer the same to any department of the bank, or to any trust or trusts administered by it and be held therein.*" (Italics added.) In 1933, three additional paragraphs were enacted "to define and clarify the rights and obligations" previously created by section 104. The statute then remained intact until 1937 when it was amended so as to eliminate therefrom the power to sell and transfer such participation certificates to trusts administered by the bank. This amendment, however, contained no provision making unlawful the retention of such certificates in trusts administered by the bank where the same had been previously transferred to such trusts under the original provisions of section 104.

The first reference to participation certificates held by the Crane Trust occurs in the Sixth Account Current filed in 1927, and investments in such certificates are thereafter reported each year up to and including the 21st and 22nd accounts filed in 1942 and 1943. The record does not disclose any objection by appellant to any accounts other than the 21st and 22nd which are here under consideration. All of such accounts were duly approved.

The present controversy is particularly concerned with two participation certificates issued by the trustee bank in 1931. One of these, known as Trust Participation Series 6800/214, represented a \$3000 investment of Crane trust money and entitled the owner to a pro rata participation in a promissory note for \$275,000, secured by a trust deed covering certain business property located at 8th and Olive Streets in the City of Los Angeles. The loan had originally been made by the trustee bank to Helen Murray Swensen in 1926, at 6½% interest, and in 1933 at a foreclosure

sale, the bank bid in the property for \$275,000. In 1941 the bank sold this property for \$80,000, and the net loss to the Crane Estate resulting therefrom is alleged by appellant to be \$2554.97 plus interest.

Trust Participation Series 6800/215, in which the Crane Trust had an investment of \$1000, related to a \$130,000 loan made by the bank to the Wilshire Lodge Building Corporation, at 6% interest, secured by a trust deed or mortgage on property located on West Third Street in Los Angeles. In 1938 this loan was renewed at a reduced interest rate of 2½%, and on November 27, 1941, the bank accepted a deed to the property in lieu of foreclosure. At that time the indebtedness had been reduced to \$114,000 plus accrued interest, and the bank's "Trust Mortgage Loan Recommendation" (Objector's Exhibit C) recites that: "This loan has been in the workout class for many years * * *. On this basis (2½% interest) the loan has held its own for the past five years but no progress has been made in the way of either liquidating it or improving the income of the security." Under compromise arrangement recommended, the bank took title not only to the real estate but to the furniture and furnishings of the Wilshire Lodge Building, and leased the same for five years at a rental of \$175 per month.

Appellant's objections to the 21st and 22nd accounts current were predicated upon the proposition that the participation certificates just mentioned, issued under the provisions of Section 104 of the California Bank Act, were "not securities authorized by law or the terms of the trust." The objector alleged that such participation certificates were void for the reason that no permit for their issuance was ever obtained from the corporation commissioner; that the accounts were indefinite, ambiguous and unintelligible in respect to such certificates; that the probate court has no jurisdiction over the subject matter, which refers to acts of the bank "as trustee of the several participated trusts mentioned and not as trustee of the above entitled testamentary (Crane) trust." Objection was also made to the allowance of fees to the trustee bank and to its attorneys. The trustee's motion to strike every objection except those which referred to new matter first appearing in the 21st and 22nd accounts was granted in toto, and at the commencement of the hearing the trial court said: "I have held and do hold, that

the other accounts which were approved and allowed heretofore, are *res adjudicata*, and that the evidence that is being admitted now only pertains to the 21st and 22nd accounts current." The court settled the accounts as presented.

As pointed out in the respondent's brief, the appellant's contentions largely "revolve around the doctrine of *res adjudicata* and consist of attempts, direct and indirect, to escape its application at bar." The matter of participation certificates and the investment of trust funds therein by the Security-First National Bank as trustee, has been before the courts of this state upon several occasions. The question of *res adjudicata* in reference to participation certificates was directly presented in *Willson v. Security-First National Bank*, 21 Cal.2d 705, 713, 134 P.2d 800, 805, where the court said: "The purchase of the participation certificate herein was a trust transaction. We are of the view that the individual liability of the trustee by reason of that transaction, whether as purchaser or seller, was involved in and concluded by the accounting decree." The following language of the court at page 714, of 21 Cal. 2d, at page 805 of 134 P.2d, of the *Willson* case is particularly applicable: "The plaintiff further contends that the decree of the probate court in an accounting proceeding cannot determine the validity of securities, * * *. The question on the settlement of the trustee's account is whether the trustee shall be individually liable for the amount of trust funds expended for the certificate. For the purpose of determining this monetary liability the probate court can pass upon the validity of the security, even though such determination, binding as between the trustee and beneficiary, would not conclude a third party who had issued and sold the security."

Section 1123 of the Probate Code provides that a decree made on the settlement of a trustee's account, "When it becomes final, shall be conclusive upon all persons in interest." This section was referred to and followed in *McLaughlin v. Security-First National Bank of Los Angeles*, 20 Cal.App.2d 602, 604, 67 P.2d 726, 727, an equity action involving participation certificates, and the court held that "In the premises, the decrees confirming the accounts were conclusive on the plaintiff; the probate court could give him no relief whatever." There, as here, the objections were made that the certificates were void

because issued without a permit from the corporation commissioner. In *Re Estate of Pratt*, 119 Cal. 156, 51 P. 47, it was held that when a trustee's annual accounts have been settled and approved, items allowed in a previous account cannot be examined into upon the settlement of a succeeding annual account. In this connection, it is to be noted that, in the present case appellant did not file an action in equity asking relief on the ground of extrinsic fraud as was done in the *McLaughlin* and other cases, but merely attacked the investment by way of objections to the 21st and 22nd accounts current.

[1] Appellant's brief concedes that "There are several decisions * * * in which the doctrine of *res adjudicata* was held to apply to orders settling accounts covering trust participation certificates issued by this same trustee, but it is our fervent contention that those decisions are not controlling in view of the many new points of attack raised in the present case." Appellant's argument that "The participating trust certificates having been issued without a permit (from the Corporation Commissioner) are void" and that therefore the doctrine of *res adjudicata* is inapplicable, must be held untenable in view of the decision in *Ormerod v. Security-First National Bank of Los Angeles*, 21 Cal.App.2d 362, 367, 69 P.2d 469, 472 where the court said: "The question as to whether they were made in violation of said statute was addressed to the probate court when the defendant presented its account showing each particular purchase. In the absence of facts on the face of the probate record showing anything to the contrary, it must be presumed said court found the statutes had been fully complied with." The Supreme Court denied a hearing in the *Ormerod* case. The *res adjudicata* theory as developed in these and other cases, seems particularly apropos to the present situation where investments in participation certificates had been regularly reported to and approved by the probate court from 1927 to 1942 without objection.

[2] The appellant further affirms that "The trustee cannot rely upon the doctrine of *res adjudicata* to prevent a determination of the lawfulness of the investments because the trustee in both the twenty-first and twenty-second reports tendered the issue of the lawfulness of the trust participation investments and waived the benefit of any previous determination." This

contention appears to be based upon the conventional statement in the accounts that "all investments made for said trust are in securities authorized by law or by the terms of said trust," etc. However, as noted in respondent's brief, since these accounts specifically relate to trust activities during definite, annual account periods, the language used "obviously refers to investments made during the accounting period and presented for approval for the first time." The retention of such securities was submitted to the court from period to period, but not their original purchase. The record discloses no waiver of the *res adjudicata* defense, and no reopening of any adjudicated issues. Certainly, at the trial, this defense was presented and insisted upon at every opportunity.

[3] It is also claimed by the appellant that since it appears "that the trust funds were permitted to be invested in void, illegal and unauthorized securities, the order (settling the trustee's account) is void as to those investments." It is then argued that since a void order is a nullity, such order cannot be deemed *res adjudicata*. This argument is apparently based upon the dissenting opinion of Mr. Justice Carter in *Willson v. Security-First National Bank of Los Angeles*, 21 Cal.2d 705, 715, 134 P.2d 800, 806, wherein this justice, disagreeing with the other six justices who held that an order settling the trustee's account was *res adjudicata*, said: "A transaction falling within the terms of the Corporate Securities Act is declared * * * to be void if no permit therefor is obtained. Stats.1917, p. 673, * * * sec. 16. The order of the probate court approving that transaction, is also void, if the rule stated in *Hunter v. Superior Court*, 36 Cal.App. 2d 100, 97 P.2d 492, is followed. It is there declared that a judgment based upon a void contract is itself void." Whatever merit may exist in such dissenting opinion, obviously it cannot constitute authority in favor of appellant's claim. Moreover, the *Hunter* case cited in the dissenting opinion, and relied upon by appellant, bears no resemblance to the present controversy; it related neither to trustee's accounts nor to participation certificates. And to apply the quoted statement that "a judgment based upon a void contract is itself void," generally, or in respect to the present situation, would be demonstrably unsound. "Jurisdiction, being the power to hear and determine, implies power to decide a ques-

tion wrong as well as right" (15 Calif. Juris. 81), and, says the same work at page 82, "Mere error in the exercise of power does not invalidate the judgment." Judgments which were clearly erroneous in reference to trust matters, have nevertheless been held conclusive. *Manning v. Bank of California Nat. Ass'n*, 216 Cal. 629, 15 P.2d 746; *In re Estate of Pratt*, 119 Cal. 139, 51 P. 1099.

[4, 5] The claim that the trustee's purchase of participation certificate violated the testamentary requirement that trust funds be invested in "good interest-bearing securities" must likewise be disposed of under the *res adjudicata* doctrine. "It is manifest," as pointed out in respondent's brief, "that the Probate Court should not and would not approve any investment or reinvestment of trust funds without consulting the decree of distribution and determining whether same was consistent with its provisions." Doubtless, the beneficiary would have entered no complaint had the investment not depreciated in value, yet, as said in *Ormerod v. Security-First Nat. Bank of Los Angeles*, 21 Cal. App.2d 362, 368, 69 P.2d 469, 472, "such fact standing alone does not warrant * * * opening, surcharging, or falsifying the accounts under attack. 1 C.J. [Secundum, Accounting, § 47], page 690. Furthermore, if as trustee, the defendant acted 'strictly within the line of his duty, he will be responsible for no loss.' (II Perry on Trusts, § 847; 65 C.J. 819)" Appellant presents the point that "Section 104 of the Bank Act (enacted in 1925) in permitting a trust company as trustee to deal with itself is against common law and the statutory rules, and is class legislation which is in violation of Section 21 of Article 1 and/or Section 25(19) of Article IV of the State Constitution." It is also urged that Section 104 of the Bank Act, prior to its amendment in 1933, "was so incomplete and indefinite as to be inoperative and void." The constitutionality of Section 104 was raised in the case of *Willson v. Security First Nat. Bank of Los Angeles*, 21 Cal.2d 705, 134 P.2d 800, heretofore referred to, by way of a proposed amendment to the complaint, alleging that the participation certificate in question purported to be issued under Section 104. The court in that case refused to authorize the amendment, holding that the order of the probate court settling the trustee's account, was *res adjudicata*—the precise point

involved in the present controversy. In *Re Estate of Smith*, 112 Cal.App. 680, 297 P. 927, 930, upholding the constitutionality of Section 25 of the Bank Act as against a similar contention, the court said: "It has been heretofore decided that where legislation affects banking corporations doing business * * * as a class and such classification is not unreasonable, there is no valid constitutional objection to such legislation. In *re Estate of Barnett*, 97 Cal.App. 138, 275 P. 453. We find nothing unreasonable in such classification here and, in our opinion there is a natural and intrinsic difference between departmental bank trustees and other trustees. The various sections of the Bank Act relating to capital, surplus, reserves, securities, inspection and the like * * * surround every activity of departmental bank trustees with safeguards not required of trustees generally." In this case a hearing in the Supreme Court was denied.

"The right to question the constitutionality of a statute may be waived," observes the court in *Hershey v. Reclamation District No. 108*, 200 Cal. 550, 564, 254 P. 542, 547. "It is a general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived." 12 C.J. 785." (Italics added.) In the instant case it cannot be said that appellant has raised the constitutional question "at the earliest opportunity." In point of fact, the present attack on Section 104 did not come until some fifteen years after the issuance of the participation certificates in 1931. Yet the question of constitutionality, if any there was, must have been as fully apparent during this long period as it was when appellant for the first time objected to the trustee's 21st account current. Nor is any claim made that this matter could not have been discovered and presented at an earlier date. The record does not even disclose that remonstrance of any kind was previously registered or that the bank was requested to substitute other securities for the participation certificates.

In this connection it must also be noted that when appellant did finally take exception to the trustee's activities in 1943, the amended objections, upon which the matter was heard, contain no assertion that the section in question, was unconstitutional. On the contrary, the specific objection was that the participation certificates issued under Section 104 "are not securities au-

thorized by law or by the terms of the trust." In apparent explanation of such objection, the complaint is then made, not that the section was unconstitutional, but "that no permit was ever obtained * * * from the Corporation Commissioner"—obviously quite a different objection. If the appellant then had in mind the constitutional question so extensively argued in the briefs, it is indeed strange that such an important objection should not have been positively and concretely presented to the trial court. The briefs refer to no place in the record where any constitutional question was raised at the trial.

As said in 5 Cal.Jur. 613: "The courts do not determine constitutional questions unless a determination is absolutely necessary. * * * Where the record does not present a constitutional question, such question will not be considered. And where the court is not required to pass upon the constitutional question, it has been said that it is not justified in entering into a discussion of its merits." In view of the facts hereinbefore recited, it is deemed unnecessary and improper to further discuss the constitutionality of Section 104 of the Bank Act. And, as already noted, the alleged objectionable features of this section were eliminated by the legislature in 1937.

The language used in *McLaughlin v. Security First Nat. Bank*, 20 Cal.App.2d at page 605, 67 P.2d at page 727, is not inapplicable to the present case: "We are not passing upon the plaintiff's contention that the certificates in which the defendant invested its trust funds are void, for two reasons. In the first place they are seemingly authorized by Section 104 of the Bank Act * * *. The more significant reason * * * is that we do not find it an unanswered one, open to us, on this appeal. In approving the acts of the trustee in making the investments it had reported, the probate court necessarily had open before it the question of the legality of the investments and the matter of their economic merit as well." As in the *Willson* and other cases hereinbefore cited, the probate court's approval of the trustee's activities was deemed *res adjudicata*, as it must be in the instant controversy. All of the appellant's contentions have received due consideration, but no error is discernible in the orders of the trial court.

The orders appealed from are therefore affirmed.

YORK, P. J., concurs.

Mr. Justice WHITE, deeming himself disqualified, did not participate in the decision.

Hearing denied; CARTER, J., dissenting.



73 Cal.App.2d 58

PEOPLE v. WITHERS.
Cr. 3931.

District Court of Appeal, Second District,
Division 1, California.
Feb. 13, 1946.

Hearing Denied March 14, 1946.

1. Criminal law ⇨991

Trial judge need not give any reasons or explanation in connection with pronouncement of sentence and such reasons, if expressed, do not necessarily affect the validity of the judgment.

2. Criminal law ⇨1147

Whether sentences to be imposed upon conviction on three counts of grand theft should run concurrently or consecutively was a question addressed to the trial judge.

3. Criminal law ⇨1213

Where former prisoner in San Quentin was convicted on three counts of grand theft for obtaining from the father of a fellow prisoner various sums aggregating \$1,000 by false representations that accused could obtain son's release from prison, action of trial court in ordering sentences to run consecutively did not constitute prohibited, cruel and unusual punishment.

4. Criminal law ⇨824(14)

Failure to give cautionary instructions on circumstantial evidence and admissions of defendant, in absence of request therefor, was not error, where defendant's guilt was established mainly by direct evidence.

5. Criminal law ⇨706
Witnesses ⇨301

Trial court's rulings that defendant must answer proper questions put to him on cross-examination, though defendant contended they would tend to incriminate him, and prosecuting attorney's persistence in

asking such questions were not error, since defendant had waived privilege against self-incrimination by testifying.

6. Witnesses ⇨305(2)

Where defendant testifies in his own behalf, the right to urge constitutional protection against self-incrimination is waived as to all inquiries proper on cross-examination.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Irving Withers was convicted of grand theft, and he appeals.

Judgment affirmed.

Abbott C. Bernay, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty. of Los Angeles County, and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

DORAN, Justice.

Defendant was adjudged guilty by a jury of three counts of grand theft. A prior conviction of a felony (issuing worthless checks) was admitted. The appeal is from the judgment.

Six specifications of error are urged which, in substance, include alleged prejudicial cross-examination of the defendant, failure of the trial court to give cautionary instructions relating to circumstantial evidence and the admissions of defendant, insufficient evidence, and an alleged abuse of discretion on the part of the court in ordering the judgments to run consecutively.

The evidence reveals that the defendant had been a prisoner in San Quentin. While there as a prisoner, he became familiar with the duties and work of the Board of Prison Terms and Paroles. Upon his release, he worked for the Volunteers of America. While associated with this organization, he wrote a letter to the witness Roy Crowl, whose son was in San Quentin and whom the defendant knew in San Quentin. In substance, he represented in said letter and in later conversations with this witness that he was in a position to secure the release of Crowl's son. Upon these representations he obtained from Mr. Crowl a total of \$1,000 in several different payments. Defendant did not reveal to Mr. Crowl during the negotiations that he

had been a prisoner in San Quentin or that he was on parole. Mr. Crowl asked the defendant at one time who was getting the money, to which the defendant replied, "If you trust me, you know better than to ask any question". The letter above referred to was dated April 19, 1944. When the defendant failed to effect the release of Mr. Crowl's son, he gave Mr. Crowl a check dated June 8, 1944, for \$1,000, which was worthless.

[1-4] With regard to appellant's contention that the court abused its discretion by ordering the sentences to run consecutively, it is argued that "excessive, cruel and inhuman punishment" was thereby inflicted upon appellant and that the trial judge, at the time of pronouncing sentence, was "somewhat ruled by his strong personal feelings". The trial judge's remarks, which are the basis of this contention, were as follows: "I feel about this case as I very seldom feel in any case. I don't ordinarily take a personal feeling about any case, but I do in this case. I think Mr. Withers has done—besides stealing money in this case he has done three other mistakes. You have imposed on the natural love and sympathy and credulity of a hard working father, who put out his hard earned money in the hope of getting his son out of prison, and you have ruthlessly, without any compunction, dragged the name of an old established representative social service organization, the Volunteers of America, into the dirt by your use of your connection, and you have cast a cloud on the prison system of this State by your actions. While you were at San Quentin you had ability enough to ingratiate yourself sufficiently to be put in charge of a religious work in the prison, a place where you had no more right to be in than anybody else. I frankly state I have more respect for a man that goes out and gets money at the point of a gun than I have for you."

There is no legal requirement that reasons or explanations be given by the trial judge in connection with the pronouncement of sentence. Such reasons, if expressed, do not necessarily affect the valid-

ity of the judgment. How the sentences were to run was a question addressed to the judgment of the trial judge. What constitutes cruel and unusual punishment is largely a matter of opinion, and in the light of the record herein, the punishment administered to the defendant, described by appellant as cruel and unusual, could, on the other hand, be regarded as extremely mild. There was no error in ordering the sentences to run consecutively.

[4] With regard to the court's alleged failure to give "cautionary instructions on circumstantial evidence", it is sufficient to note, first, that no such instructions were requested by defendant and, second, that defendant's guilt was established, in the main, by direct and not circumstantial evidence. The rule imposing the duty to give certain pertinent instructions is not applicable here. And the same situation applies to other alleged errors in connection with the failure to give other instructions about which appellant complains. The jury was fully instructed.

[5,6] On cross-examination the defendant refused to answer certain questions for the reason, as stated by the witness, "It is my opinion it would tend to incriminate me". In the colloquy that followed, defendant's counsel advised the witness, "You have the right to refuse to answer"; the court directed the witness to answer the question and the defendant replied, "I am sorry, I will have to stand mute as to the question". Appellant complains about the court's ruling and the prosecuting attorney's persistence. There was no error in the conduct of either, nor in the court's rulings. It is well settled that when the defendant testifies, the right to urge the protection afforded by the Constitution is waived as to all inquiries proper on cross-examination. See *People v. Gallagher*, 100 Cal. 466, 35 P. 80. In the circumstances here presented, the cross-examination was proper and the record discloses no prejudicial errors. The judgment, therefore, is affirmed.

YORK, P. J., and WHITE, J., concur.

73 Cal.App.2d 170

CHERNABAEFF v. CHERNABAEFF et al.
Civ. 3184.

District Court of Appeal, Fourth District,
California.

Feb. 20, 1946.

I. Joint adventures ⇐8

Evidence supported finding that crop of potatoes was sold by plaintiff to his brother and defendant jointly, so that plaintiff could look to defendant for balance of purchase price, as against defendant's contention he merely financed plaintiff's brother in the deal and entered into a joint adventure with plaintiff's brother under which he was to handle selling of the crop.

2. Joint adventures ⇐8

Even if defendant did not know at time he and plaintiff's brother jointly entered into agreement to purchase plaintiff's crop of potatoes that one-fifth of the crop on 60 acres of the land belonged to owner of land for rent and was not included in purchase price, evidence established that defendant ratified the deal after he had been informed of the rental matter.

Appeal from Superior Court, of Kern County; Warren Stockton, Judge.

Action by John Chernabaeff against William Chernabaeff, Joseph Belson, doing business as United Produce Company, and others, to recover balance of purchase price for a crop of potatoes. From a judgment for plaintiff, the defendant Joseph Belson, doing business as United Produce Company, alone appeals.

Affirmed.

West & Vizzard, of Bakersfield, for appellant.

Harvey, Johnston, Baker & Palmer, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment covering the balance of the purchase price for a crop of potatoes. The plaintiff is a farmer and the defendant William Chernabaeff is his brother. The defendant Joseph Belson is a commission merchant in Chicago, operating under the name of United Produce Company. His brothers Robert Belson and Herman Belson were his agents

and employees. William operated a packing shed, and had had previous deals with Joseph.

The plaintiff had 70 acres of growing potatoes. Sixty acres were on land he had rented from the Kern County Land Company, that company to receive as rental one-fifth of the proceeds of the crop raised thereon. On or about May 5, 1944, William telephoned to Joseph at Chicago informing him that he could purchase the plaintiff's 70-acre crop of potatoes for \$300 an acre, a total of \$21,000, payable \$10,000 down and \$11,000 when digging began. After an investigation by his brother Herman, Joseph entered into some sort of a deal to purchase the potatoes, it being agreed that he would advance the \$21,000, that William would advance the cost of harvesting, that Joseph would have charge of selling and that they would split the profits. William was given a draft for \$10,000 payable to himself which had appended to it "Advance on seventy acres of bulk potatoes as bought from John Chernabaeff to handle jointly by William Chernabaeff and United Produce." This draft was indorsed by William and given to John. When John received word that it had been paid and on May 11, 1944, he entered into a written contract with William providing for the sale of the potatoes for \$21,000 but subject to and with the understanding that one-fifth of the crop on 60 acres belonged to the Kern County Land Company as rental.

Digging of the potatoes began on June 6, 1944. On that day William telephoned to Joseph at Chicago and during the conversation mentioned the crop rental feature. Joseph stated that he did not believe the existence of such a lien or claim and that he had not previously been told of it by anyone. Joseph immediately contacted his brother Herman in Idaho, who wired William demanding an explanation. On June 8, the plaintiff asked his brother William for the remaining \$11,000, saying he would stop the digging if it was not paid. William sent him to Robert Belson, who was then Joseph's agent at Bakersfield, and who was then sick in bed at a hotel. Being told that the digging would be stopped if the \$11,000 was not paid Robert, after being instructed to do so by William, gave the plaintiff a draft for \$11,000 marked "Balance of payment on seventy acres bought with Bill Chernabaeff." Joseph arrived in Bakers-

field on the morning of June 9th and was told of the delivery of this draft. He remained around Bakersfield seeing to the shipping of the potatoes and, as he says, investigating the validity of the rental claim of the Kern County Land Company. On June 11, Robert found out that William was diverting some cars of potatoes to other parties and informed Joseph. On June 13, Joseph stopped payment on the \$11,000 draft, but this fact was not discovered by the plaintiff until June 18. In the meantime, Joseph received and shipped some 16 cars of potatoes. On June 19, William started an action against Joseph, in which a receiver was appointed, who finished the harvesting of the potatoes. On June 23, John brought this action to recover the balance due him on the sale of the potatoes.

The court found that Robert and Herman Belson were agents and employees of Joseph Belson in the operation of the United Produce Company; that on or about May 5, 1944, William Chernabaeff and Joseph Belson entered into an agreement whereby they would purchase certain potatoes from the plaintiff for their joint use and benefit; that Joseph would advance \$21,000 for said potatoes to be purchased in the name of William; that in pursuance of this agreement, and on instruction of Joseph, Herman issued a draft for \$10,000 to William for the purpose of making the down payment to the plaintiff; that this draft had attached to it the statement "Advance on seventy acres of bulk potatoes as bought from John Chernabaeff to handle jointly by William Chernabaeff and United Produce"; that this draft was indorsed by William and given to the plaintiff and was paid by Joseph; and that on May 11, after the plaintiff found that this draft had been paid, he and William executed a contract between himself as seller and William as buyer, providing for the sale of 70 acres of potatoes, 60 acres of which was subject to a rental due to the Kern County Land Company of one-fifth of the returns from the crop thereon, that this purchase was subject to that lease, that the buyer was to pay \$21,000, \$10,000 of which had been paid and the balance to be paid when digging commenced, and the buyer was to dig the potatoes at his own cost. It was then found that on June 6, 1944, William commenced to dig the potatoes so sold by the plaintiff; that on June 8, the plaintiff demanded from William and from

Robert, as the agent of Joseph, that payment of the \$11,000 be made or that the defendants cease digging the potatoes; that on that day Joseph issued his draft for \$11,000, payable to the plaintiff, to which was attached the words "Balance of payment on seventy acres bought with Bill Chernabaeff"; that the plaintiff deposited this draft in his bank and on June 12, or 13, Joseph stopped payment thereon, which fact was ascertained by the plaintiff on June 16 or 18; that between June 8 and that time the plaintiff permitted the defendants to dig and remove the potatoes pursuant to the contract; and that prior to the time the \$11,000 draft was issued and prior to the time any potatoes were dug from the 60 acres of rented land Joseph had been advised and knew that one-fifth of the crop on said 60 acres belonged to the Kern County Land Company. Judgment was entered against all defendants for \$10,851.25, being the amount due on the contract less a small credit, about which there is no dispute. From this judgment Joseph Belson has appealed.

Briefly stated, appellant's position is that he had no dealings with the respondent; that the respondent sold this crop to his brother William; that the appellant merely financed William in this deal and entered into a joint adventure with William under which he was to handle the selling of the crop, William was to pay for the cost of harvesting and after the advances and costs were paid they were to divide the profits. In accordance with this theory the appellant contends that the respondent is not entitled to recover from him for three reasons: 1. That the respondent having contracted with one member of a joint adventure cannot hold the other undisclosed member since the contracting member exceeded his authority. 2. That since the respondent knew there were two members of the joint adventure and yet chose to enter into a contract with one of them individually he thereby elected to hold only the one he contracted with and not to obligate the other. 3. That the respondent, in selling the potatoes to his brother William, knew or suspected that William was intending thereby to work a fraud upon the appellant. This last contention is based on the assertion that William intended, by taking the contract in his own name, to be in a position to claim the potatoes for himself if the market went up or to claim that he and Joseph were

buying the potatoes if the market went down, as it did in this case. The difficulty with this contention is that there is no evidence in the record of such an intention on the part of William nor any knowledge of any such thing on the part of the respondent.

It is unnecessary to consider the cases cited in connection with the first two grounds of appeal relating to transactions by a third party with an individual member of a joint adventure. The distinction is pointed out in one of the cases relied on by appellants, *Hansen v. Burford*, 212 Cal. 100, 297 P. 908, 913, where the court said: "When, however, the rights of third parties are involved, the basis of the inquiry shifts materially, and the fundamental question is, What had those third parties the right to believe from the language of the contract and from the conduct of the parties to it as affecting them? and not as affecting each other." The essential and controlling question here is as to whether there is sufficient evidence to support the court's findings to the effect that the respondent agreed to sell this crop to his brother William and Joseph Belson jointly, and that before the \$11,000 draft was issued Joseph Belson knew that one-fifth of the crop on 60 acres of this land belonged to the Kern County Land Company, and was not included in the purchase price of \$21,000.

There is evidence which indicates that the appellant and William were buying this crop together and that the former was not merely advancing money in order to handle potatoes which William had purchased. William testified that he talked to John early in May; that "I told him if he would give me a chance I would buy them for Joe Belson in Chicago"; that John said he would give him to about May 5, in order to raise \$10,000; that he talked to Joseph on long distance and told him he had a chance to buy these potatoes for \$21,000, \$10,000 down and \$11,000 when digging commenced; that he told Belson that on 60 acres they were to get only four-fifths of the potatoes; that Joseph told him to see Herman, who was in Bakersfield; that a few minutes later Herman called him on the telephone and he took him out and showed him the potatoes and told him what Joseph had said; that Herman called Joseph in Chicago and after talking with him gave William a draft for \$10,000; and that in his conversation with Joseph they

agreed to divide the profit or losses 50-50. Herman Belson testified that William told him that he had talked to Joseph in Chicago; that he was buying 70 acres of potatoes to run through his shed that "Joe Belson and he was to handle in a joint venture"; and that Joseph wanted him to go and look at the potatoes. He then testified that he looked at the field; that "it looked to me like it might be a money-making deal"; that he asked William what he was paying for the potatoes and whether or not it would be a joint venture; that he heard William tell Joseph over the telephone that "I was to take the field of potatoes with him and he would like to handle these potatoes through his shed"; that nothing was said about a crop rental; that Joseph gave him some figures and "I tried to estimate what the potatoes were going to cost us"; and that after again talking with Joseph and telling him that he thought it would be all right he gave William a draft for \$10,000.

Robert Belson testified that he took over Herman's duties in Bakersfield in May; that he first saw the respondent on June 8; that he was in bed at the time; that John told him he wanted the \$11,000 that Bill owed him on the additional finance of the crop for \$21,000; that William got hold of him and told him to pay John the \$11,000 or John would "stop us from getting the crop"; that he gave John a draft for \$11,000; and that on June 11, he discovered that some of the potatoes were being sold to somebody else and told Joseph the same day.

The appellant himself testified that William called him up about May 5 and told him he had tied up or had an option with his brother for 70 acres of potatoes and that he could not go through with the deal unless he could get outside finance; that the deal required \$10,000 down and \$11,000 when harvesting started; that he replied "It sounds all right" and that he would have Herman look over the deal and if it looked all right "We would go through with it, we would advance him \$10,000 on potatoes he had contracted with his brother"; that it was agreed he was to advance \$21,000; that William would pay for the harvesting and packing, and "all sales were to be handled by me"; that he called Herman and told him to look into the matter; that Herman did so and called him back and he again also talked to William; that he told Herman to give the check for \$10,-

000 to William, which was done; that he knew nothing about the claim of the Kern County Land Company for rent until June 6; and that he then called Herman who was in Idaho. It appears that Herman sent William a telegram dated June 6, reading: "Seems you have difficulty getting full delivery on joint acreage we bought from your brother John. We were given to understand he owned crop no landlord mentioned. Wire me your side story before any drastic action is taken." Joseph also talked with Robert on the 6th about someone claiming rent but said, as Robert was sick, "I couldn't get much out of him." Joseph further testified that he got to Bakersfield on Friday morning and Robert told him the \$11,000 draft had been issued the previous day; that on Saturday he advanced to William's son \$1000 for harvesting in order to keep the picking crew working; that on Saturday "Everything was going along, I still refused to believe anyone owned a fifth of these potatoes and Tuesday was going along, Monday was going along, they still gave me cars"; that on Tuesday he discovered that some potatoes had been sold to two other firms; that he asked these firms not to pay the money to William; and that he stopped payment on the \$11,000 draft on Wednesday "when I found they were taking the potatoes and this crop rental."

[1] Not only does some of this testimony, with the reasonable inferences therefrom, justify the conclusion that these potatoes were sold to the appellant and William jointly, but the conduct of the parties strongly supports this conclusion. The respondent first gave his brother time in which to buy them for Belson. The fact that the written contract named only William as the purchaser is not inconsistent with that purpose. The respondent knew when he received the first payment that the money came from the appellant and the notation attached to the draft stated that it was an advance on potatoes bought and to be handled by them jointly. He refused to allow the digging to continue until the second payment was paid and then he permitted them to proceed. The draft he received stated that it was the balance due on 70 acres bought with William.

[2] The conduct of the appellant is even more significant. He admitted that he was told of the rent matter on June 6, and having come to Bakersfield was told on the

morning of June 9 that the final payment had been made to the respondent. He not only went on receiving the potatoes but advanced more money for harvesting them and he did not stop payment on the draft until the 13th, two days after he had learned that some of the potatoes had been diverted by William, and after the market had gone down. With full knowledge of the situation he continued to take the potatoes as fast as they were harvested until the respondent finally discovered that payment had been stopped on the draft. If there be any doubt as to his original intention and understanding, a complete case of affirmance and ratification appears on the part of the appellant after he had been informed of the rental matter, and when he knew that the respondent had accepted him as one of the buyers. The essential findings which are controlling are sufficiently sustained by the evidence.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



73 Cal.App.2d 49

CAPPELMANN v. YOUNG.

Civ. 12900.

District Court of Appeal, First District,
Division 1, California.

Feb. 13, 1946.

As Modified on Denial of Rehearing

March 15, 1946.

1. Landlord and tenant ☞24(1)

Where parties agreed in writing to essential terms of a lease, defendant could not object to covenant in lease submitted by plaintiff which was merely in compliance with city ordinance, since such covenant was already, in legal effect, a part of the contract.

2. Landlord and tenant ☞24(1)

Evidence supported finding that defendant was not justified in rejecting lease submitted by plaintiff pursuant to written agreement containing essential terms of lease but looking forward to execution of more formal lease either on ground of inclusion of improper covenants in proposed lease or on ground that plaintiff failed to

comply with covenant "to keep in repair" the roof of the building.

3. Landlord and tenant ⇨24(1)

Where parties have agreed in writing upon essential terms of the lease, there is a binding lease, though a formal instrument is to be prepared and signed later.

4. Landlord and tenant ⇨24(1)

Where written agreement entered into by parties contained essential terms of a lease but looked forward to execution of a more formal lease, written agreement would be regarded a binding lease upon defendant's refusal to execute formal lease.

5. Judgment ⇨256(1)

A judgment must conform to the findings of facts.

6. Judgment ⇨256(2)

Where findings that defendant damaged leased premises while in possession and that eight installments of unpaid rent under written agreement had accrued at time the findings were signed were fully sustained by evidence, entry of a judgment for plaintiff for an amount equal only to three installments of unpaid rent was erroneous as failing to conform to the findings.

7. Appeal and error ⇨1178(1)

Where plaintiff failed to direct trial court's attention to inconsistencies obtaining between its findings of fact and judgment at time when trial court was considering defendant's motion for new trial and when it had plenary power to correct both its findings and judgment, judgment was reversed, leaving open to trial court the right to retry any issue of fact or to modify its prior findings of fact. Code Civ.Proc. § 662.

8. Landlord and tenant ⇨193

The provision in written lease authorizing its cancellation at option of either lessor or lessee after one year from February 1, 1944, and payment of \$500 and 90 days' notice did not bar lessor's right to recover rent under lease, where lessee's recurring breaches of the lease upon which damages were to be awarded occurred prior to date upon which, under the lease, a cancellation could be effected, and especially where lessee never gave prescribed 90 days' notice of cancellation or tendered the sum of \$500 as provided.

Action by O. C. Cappellmann against W. E. Young for unpaid rent allegedly due under terms of written contract. From judgment entered, the defendant appeals and the plaintiff cross-appeals.

Judgment affirmed in part and in part reversed and remanded.

George H. Harlan and Harold Haley, both of San Rafael, for plaintiff-respondent-appellant.

Robert E. Hatch, of San Francisco, for defendant-appellee-respondent.

ATTERIDGE, Justice pro tem.

Defendant's appeal is from a judgment rendered against him for \$330 for unpaid rent which the trial court found to be due plaintiff under the terms of a written contract containing all the essentials of a valid lease. Plaintiff also filed a cross-appeal "from so much of that certain judgment * * * as fails to award plaintiff eight months' rent * * * found to have accrued in Finding IV, and so much thereof as fails to award to plaintiff the \$300 damages found to have been suffered by plaintiff in Finding VII." These interrelated appeals will be, to some extent, separately reviewed.

Defendant's Appeal.

On December 7, 1943, plaintiff was the owner of a vacant store building in Mill Valley, California. On that date he entered into the following written agreement with defendant and the latter's copartner Larry Reeder (who subsequently retired from the partnership after having conveyed his rights and obligations therein to defendant):

"Dec. 7, 1943

"Agreement on Property at 32 Miller Ave. to be in force until lease is drawn.

"Agreement between Mr. O. C. Cappellmann as Lessor and W. E. Young and Larry Reeder, Partners as Leasees.

"Rent to be One Hundred and Ten Dollars (\$110.00) per Month starting Feb. 1, 1944 for a period of 3 years.

"A two year option at end of three years with rent of One Hundred and twenty dollars (\$120.00) per month.

"Property to consist of building at 32 Miller Ave. and all ground behind same except space at rear for two garages approx. 20' by 20'. Leasees to improve property at their own cost to extent needed in their business. Lessor to keep in repair outside of building and roof.

"A proper lease shall be drawn within ten days.

"Lease can be cancelled at option of Leasor or Lessee after one year from Feb. 1, 1944 at payment of Five Hundred Dollars (\$500.00) and ninety days notice.

"O. C. Cappelmann

"Lessor

"W. E. Young

"Larry Reeder

} Partners."

[1] After executing the foregoing contract, defendant Young went into possession of the premises immediately after December 7, 1943, and remained in possession thereof until March 16, 1944, when the key thereto was surrendered to plaintiff by a subtenant of defendant. It is conceded by both parties that no rent was to be exacted for the months of December, 1943, or January, 1944. The only payment made by defendant was the sum of \$110 paid December 7, 1943. An issue having been tendered by the pleadings in this respect, the court found, upon sufficient evidence, independent of the contract, that said payment was the agreed prepayment of rental for the last month of the lease, to wit, January, 1947. Consequently, under such circumstances, defendant paid no rent whatsoever for the period during which he occupied the premises. The parties, however, failed to enter into the more formal lease contemplated by their initial contract, although plaintiff, a short time thereafter, submitted to defendant a form of lease which defendant rejected as unsatisfactory, allegedly because of his dissatisfaction with two of the covenants contained therein. The court found that one of these covenants was necessary and proper in order to comply with a certain ordinance of the city of Mill Valley, and that the other covenant was in the nature of a mere proposal, upon the retention of which in the lease plaintiff did not intend to insist and readily would have eliminated on request. These findings are supported by sufficient evidence. Manifestly defendant could not with justification object to a covenant which was merely in compliance with the city ordinance, since it was already, in legal effect, a part of the contract. *Equitable B. & L. Ass'n v. Wolfangle*, 111 Cal.App. 119, 123, 295 P. 388; *Keating v. Preston*, 42 Cal.App.2d 110, 116, 108 P.2d 479; 6 Cal.Jur. 311, sec. 186. Defendant on his part made no effort to submit any form of lease, other than to consult an attorney in respect thereto; and the rea-

sons advanced by him for his aforesaid breaches of the existing contract, and for his refusal to execute the more formal lease therein contemplated, are as follows:

First: The presence in the proposed form of contract of the two previously-referred-to covenants,—which, as has been pointed out, the trial court properly refused to accept as sufficient excuse for defendant's nonperformance of the contract.

Second: The plaintiff as lessor, by permitting rainwater to leak into the interior of the premises, failed to comply with his covenant "to keep in repair" the roof of the building. In respect to this defense the trial court found, upon sufficient evidence, that plaintiff had promptly and adequately repaired said roof, and that defendant, as a ground for the breach of his contract, was not justified in seizing upon the circumstance that during a heavy and unusual rain there had been some leakage.

Third: "The December 7th agreement was patently temporary and contemplative of a permanent agreement. No such permanent agreement was ever reached, wherefore no rights or obligations thereunder could have accrued."

[2, 3] As the first two contentions have been disposed of by our aforesaid approval of the trial court's findings in respect thereto, the third alone remains for consideration. The said contention is completely answered and shown to be without merit by the following controlling declaration of the Supreme Court in *Gavina v. Smith*, 25 Cal.2d 501, 504, 154 P.2d 681, 682, where it is said: "Where the parties, however, have agreed in writing upon the essential terms of the lease, there is a binding lease, even though a formal instrument is to be prepared and signed later. *Pacific Improvement Co. v. Jones*, supra [164 Cal. 260, 128 P. 404]; *Levin v. Saroff*, supra [54 Cal.App. 285, 201 P. 961]. The formal instrument may be more convenient for purposes of recordation and better designed to prevent misunderstanding than the other writings but it is not essential to the existence of the lease. 'The mere fact that a written lease was in contemplation does not relieve either of the contracting parties from the responsibility of a contract which was already expressed in writing. When one party refuses to execute the lease according to the contract thus made, the other has a right to fall back on the written propositions as originally

made, and the absence of the formal agreement contemplated is not material.' Levin v. Saroff, *supra*, 54 Cal.App. at page 290, 201 P. [961]; see, also, Pacific Improvement Co. v. Jones, *supra*, 164 Cal. at page 264, 128 P. [404]." The foregoing quotation is directly applicable to the present factual situation and is fatal to the merits of defendant's last-stated contention, which it so exactly describes.

[4] Defendant, however, contends that the authoritative effect of the decision just quoted, and of the supporting precedents cited therein, has been impaired and nullified as the result of a recent decision of the Second District Court of Appeal, Division Two, entitled Store Properties, Inc. v. Neal, 164 P.2d 38. This contention is untenable. In that case the reviewing court was concerned with a suit in equity for the specific performance of an alleged written agreement, and did not have before it, as we have here, an action at law for damages. It appears on the face of the decision that the appellate court exercised great care therein to observe the important distinction which obtains between actions at law and suits in equity, and which is so frequently the determinative factor in deciding whether a litigant is entitled to or should be denied equitable relief of a given character. It frequently occurs that a litigant may not be entitled to equitable relief where, under the same set of circumstances, were the action merely one at law there would be little or no doubt as to the right of the litigant to legal relief. Such a distinction is pointed out in the Store Properties case by the court's statement (164 P. 2d at page 40) that "a contract expressed in general terms might not be void and * * * might be the basis of an action for damages, yet * * * be entirely too loose and inexact to warrant a decree for specific performance." The court, therefore, based its decision in that case solely upon the fact that the agreement, the specific performance of which was therein sought, was too indefinite and uncertain to warrant the granting of said relief by a court of equity. Both the proposal and the acceptance, which were relied upon as constituting a contract in the Store Properties case, were made to and through an intermediary, and contemplated the further entry into a more definite contractual relationship by the parties themselves. In the present case the contract was made directly, by and between the

parties exclusively. The preliminary agreement in the Store Properties case remained wholly executory on the part of one of the parties thereto, and almost equally so on the part of the other, except that the latter, as the party seeking its specific enforcement had made a deposit with the intermediary as evidence of good faith, and alleged its agreement to deposit a large sum of money as a guarantee that it would improve the premises which were to be the subject of the lease. Unlike the present case, the would-be lessee in the Store Properties case never entered into possession, and the parties therefore did not, as they did herein, *act* "upon a mutual construction of their agreement,"—a factor pointed out by the court itself in distinguishing the case before it from Levin v. Saroff, *supra* (164 P.2d at page 41). It further should be noted that two of the three justices participating in the Store Properties decision expressly limited their concurrence on the ground that the documents involved were, when viewed as a contract, too indefinite and uncertain to warrant its specific enforcement,—while at the same time declining to "express any opinion as to whether either or both documents may form the basis of an action for damages" (164 P.2d at page 42). Under these circumstances, we conclude that the Store Properties case in no way impairs the force and effect of the authoritative declaration made by the Supreme Court in *Gavina v. Smith*, *supra*, as hereinbefore set forth.

It also should be mentioned that the defendant filed a cross-complaint, which was answered; but the defendant offered no testimony in its support, and expressly abandoned it in the court below. Defendant also contends that the judgment when compared with the findings of fact upon the issues is "one of hopeless conflict and uncertainty." This contention receives consideration in our review of plaintiff's cross-appeal which follows.

Plaintiff's Appeal.

The cross-appeal by plaintiff is based upon the ground that the conclusions of law and the judgment of the trial court fail to conform to its findings of fact and thereby operate to deprive him of an additional award of approximately \$850 (representing eight months' rent at \$110 per month, plus \$300 damages—less \$330, the amount of the judgment) to which the findings indicate he is entitled. His contentions as to nonconformity and as to incon-

sistency between the findings of fact and the judgment must be sustained for the following reasons:

First: As and for a separate and distinct cause of action plaintiff alleged in his complaint that defendant, while in possession of the demised premises, destroyed a large plate glass panel, and also caused certain other minor damage to the store front, to plaintiff's damage in the total sum of \$296. These allegations were denied in defendant's answer. The court, upon ample evidence, explicitly found that plaintiff's said allegations were true, and found that he had been damaged "in the sum of \$300.00." Nevertheless, in its conclusions of law and in its judgment the court made no reference to or any provision whatsoever for the award of the damage it thus found to have been sustained.

Second: In plaintiff's main cause of action for the recovery of the installments of rent due and unpaid under the contract, he further alleged that the installments of rent due under the contract "will continue to accrue at the rate of \$110.00 per month hereafter." At the time the findings were signed, eight of said installments, or \$880, had so accrued and were then unpaid. In its Finding IV the court found that "the said sum of \$110.00 will continue to accrue on the first day of each successive month thereafter [i. e., from the date of the filing of the complaint] to the date hereof [i. e., the date of the signing of the findings]." But the accruing sums so found to be due plaintiff under the contract were not awarded or referred to in the conclusions of law or in the judgment. It is upon these obvious failures of the judgment to conform to the aforesaid findings that plaintiff grounds his appeal.

[5,6] The situation thus presented is one where the findings are full and complete as to all issues and fully sustained by the evidence, but the conclusions of law are erroneous in that the true effect of the findings has not been applied or reflected by them, and as a consequence an erroneous judgment has been framed. In other words, the judgment is against law since "It is fundamental that a judgment * * * must * * * conform to the findings." *Nestor v. Burr*, 124 Cal.App. 369, at pages 371, 372, 12 P.2d 479, 480; *San Francisco C. C. House v. MacGowan*, 77 Cal.App. 308, 246 P. 347; *Leeper v. Ginsberg*, 29 Cal. App.2d 722, 726, 85 P.2d 548. Such a situation is analogous to one which would ob-

tain were a jury, upon sufficient evidence and in determination of the issues of fact made by the pleadings, to return a verdict for a stated sum of money, and thereupon for the trial judge (not in the exercise of his broad powers on motion for a new trial) to enter a judgment in a substantially lesser sum than that returned in the verdict. Under the circumstances thus assumed it repeatedly has been held to be error for a trial court to proceed as last described. 33 C.J. 1175, sec. 109, and succeeding annotations thereto; *Slater v. Mayzie*, 69 Cal.App. 87, 93, 230 P. 453.

[7] In making our determination of this appeal, consideration has been given to the alternative courses of (1) remanding the cause to the trial court with directions to vacate its judgment, reform its conclusions of law, and to enter a judgment in conformity with its findings, or of (2) reversing the judgment, thereby leaving open to the trial court the right to retry any issue of fact or to modify its prior findings of fact, if so advised. We adopt the last-stated course for the following reasons: The findings of fact, conclusions of law and judgment were prepared and submitted by plaintiff to the trial court. After the judgment had been entered, defendant made a timely motion for a new trial, which afforded plaintiff an adequate opportunity to direct the trial court's attention to the inconsistencies obtaining between the findings and the judgment, at the time when its power to correct both its findings and judgment was plenary. Code Civ.Proc. § 662. Plaintiff failed to do so, and shortly thereafter appealed from a judgment of his own procurement, after having himself prepared the findings with respect to which the judgment is inconsistent. No explanation has been offered as to how these inconsistencies were brought about, but in fairness to plaintiff's counsel it is proper to mention the fact that at the time of the oral argument on the appeal the court was advised of his protracted illness. Under these circumstances, a reversal of the judgment is indicated.

This was the action taken by the court in *Spindler v. Wittemann Co.*, 54 Cal.App. 207, 201 P. 604, where a similar inconsistency existed between the findings and the judgment, and the latter, under circumstances less persuasive than those last above stated, was reversed.

[8] The provision in the written agreement that the "Lease can be cancelled at

option of Leasor or Lessee after one year from Feb. 1, 1944 at payment of Five Hundred Dollars (\$500.00) and ninety days notice" never came into operation and had no effect upon the subject matter of the litigation in the trial court for the reasons, first; that defendant's recurring breaches of the contract for and upon which damages are to be awarded occurred prior to the date upon which, under the contract, a cancellation might be effected; and, second; defendant never gave the prescribed ninety day notice of cancellation or tendered said sum of \$500, as therein provided.

The judgment insofar as it bears upon and relates to all claims of error advanced by defendant is affirmed; on the appeal of plaintiff the judgment is reversed.

PETERS, P. J., and WARD, J., concur.



In re BUTLER'S ESTATE.*
BUTLER et al. v. COX.
Civ. 13010.

District Court of Appeal, First District,
Division 2, California.
Feb. 21, 1946.

Rehearing Denied March 23, 1946.
Hearing Granted April 18, 1946.

1. Executors and administrators ⇨314(12)

Order, denying motion of heirs to reopen proceedings in administration of decedent's estate after entry of decree of final distribution directing distribution of one-third of the interests in estate distributable to heirs, to their assignee, was not appealable. Probate Code, §§ 1020.1, 1240.

2. Descent and distribution ⇨86

Under assignment of an interest in heir's share in an estate under probate given in consideration of assisting heir in recovery of his interest in estate, the assignee becomes a party in interest with the same right to employ counsel as any other party. Probate Code, § 1020.1.

3. Attorney and client ⇨11

Assignments and powers of attorney to aid heirs in recovery of their interest in an estate under probate, being recognized by statute, were not invalid as being undertakings by a non-lawyer to "practice law" and therefore contrary to public morals,

though assignee was not an attorney. Probate Code, § 1020.1.

See Words and Phrases, Permanent Edition, for all other definitions of "Practice Law".

4. Attorney and client ⇨11

Assignments and powers of attorney to aid heirs in recovery of their interest in an estate under probate, being recognized by statute, were not invalid as being the result of an illegal solicitation of legal business, though assignee was not an attorney. Probate Code, § 1020.1.

5. Descent and distribution ⇨86

Where an assignment is made to aid an heir in recovery of his interest in estate under probate, the determination of assignee's interest in estate is committed to the discretion of the judge in probate, whose determination will not be disturbed on appeal unless an abuse of such discretion is shown. Probate Code, § 1020.1.

6. Descent and distribution ⇨86

Appellate court would not disturb determination by judge in probate that operator of probate and heir research business in Chicago, to whom heirs residing in Ireland assigned one-third of their interest in estate of decedent who died intestate in San Francisco, was entitled to one-third of the interests in estate, distributable to assignors, in absence of evidence as to what work was done by assignee prior to location of heirs or as to value of assignee's services, though heirs were readily found. Probate Code, § 1020.1.

7. Descent and distribution ⇨86

Executors and administrators ⇨314(13)

Where assignment by some heirs to aid in recovery of their interest in decedent's estate provided for reimbursement of assignee for all expenses, including attorneys' fees and court costs, while provision for reimbursement was deleted from assignment by other heirs to same assignee, under decree of final distribution directing payment to assignee of one-third of the interests in estate distributable to assignors, assignee was not entitled to reimbursement for expenses of litigation or attorney's fees but was entitled to costs on appeal by heirs from decree of distribution. Probate Code, § 1020.1.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

* Subsequent opinion 177 P.2d 16.

Proceeding in the matter of the estate of William Galvin Butler, deceased, wherein a decree of final distribution was entered directing distribution of one-third of the shares of Alice Galvin Butler and others, brothers and sisters of decedent, to Walter C. Cox, as assignee. From the decree of final distribution and an order denying their motion to reopen proceedings, Alice Galvin Butler and others appeal.

Appeal from order denying motion to reopen proceedings dismissed and decree of final distribution affirmed.

John B. Ehlen, of San Francisco, for appellants.

Elkins & Wright, of San Francisco, for respondent Cox.

Henry F. Boyen and A. E. Levinson, both of San Francisco, for Public Administrator Phil C. Katz.

NOURSE, Presiding Justice.

[1] This is an appeal by the heirs from an order of final distribution and from a denial of their motion to reopen proceedings under section 1020.1 of the Probate Code. The order denying the motion to reopen the proceedings is not an appealable order under section 1240 of the Probate Code and the appeal therefrom must be dismissed. The decree of final distribution disposed of all the matters contemplated by section 1020.1 of the Code. The determination of the rightful heirs was made in accordance with the agreements of all the parties and the only debatable issue raised by the appeal is whether the probate court should have rejected the interest of the first assignees in whole or in part.

The decedent died intestate in San Francisco on March 16, 1942, leaving an estate of \$8000. On March 20, 1942, the Public Administrator petitioned for letters of administration. On March 31, 1942, certain of appellants, brother and sister of decedent residing in Ireland, executed powers of attorney and assignments of one-third of their interests in the estate to respondent, who conducts a business of probate and heir research in Chicago. On April 21, 1942, the other appellants executed the same powers of attorney and somewhat similar assignments to respondent. In May all of the appellants executed powers of attorney to Mathew Murphy, Irish Consul in San Francisco, and specifically revoked the powers given to respondent. However, the respondent filed a notice of appearance in the

estate on behalf of appellants and employed counsel to represent him under his powers of attorney and assignments. In March, 1944, the final account showing the estate ready for distribution was filed, and in December, 1944, the probate court determined that appellants (and two minors who are not involved here) were the sole heirs and entitled to distribution. In January, 1945, appellants filed a motion under section 1020.1 of the Probate Code to distribute their entire interest to them in disregard of the assignments to respondent, and a supplementary motion asking the court to inquire into the reasonableness of the consideration for the assignments. The motions were denied. Appellants subsequently filed a motion to reopen the proceedings on the ground that the Public Administrator knew the names and addresses of decedent's brother and sister and hence appellants were not "lost or missing heirs." This motion was also denied and the decree of final distribution was made distributing one-third of appellants' shares in the estate to respondent.

Notation should be made that in the assignments to Walter C. Cox, executed March 31, 1942, by Alice Galvin Butler, Agnes Locke, and Theresa and Michael Butler the following language was deleted by drawing a pen and ink line through the words, "and receive repayment of any and all sums paid as expenses herein from such sum as may be awarded us or any of us of and from said estate, insurance or other assets; and further that for and in consideration of and." No initials are attached and no evidence was offered to show when the apparent deletion was made. The assignment of the other heirs to Cox executed April 21, 1942, are on a similar printed form without any deletion.

The controversy in the probate court and on this appeal is in fact a contest between the two groups of assignees over their share of the interests ordered distributed to the several heirs. Respondent Cox operates from his principal offices in the city of Chicago; Matthew Murphy operates from San Francisco where he holds the position of Consul of Eire. Both conduct their business in the same manner—by contacting the "lost or missing" heirs, securing their authorization to appear for them, and employing their own counsel to represent them either under powers of attorney or assignments. In this case respondent moved first and secured both powers of attorney and assignments from the

lost heirs within two weeks of the death of decedent. Murphy and his counsel thereafter persuaded the heirs to revoke their contracts with respondent and to execute powers of attorney to Murphy. Under this power of attorney he engaged legal counsel to represent himself and these heirs. The real controversy therefore is over the respective rights of these parties to compensation for finding the "lost or missing" heirs.

[2,3] The first point raised is that the respondent's powers of attorney and assignments constitute undertakings by a non-lawyer to practice law. The validity of an assignment or power of attorney to aid an heir in the recovery of his interest in an estate under probate is recognized in section 1020.1 of the Probate Code. By the assignment the assignee becomes a party in interest with the same right to employ counsel as any other party. No California case is found which rejects the inference in section 1020.1 that the practice is recognized as legal. In re Estate of Cohen, 66 Cal.App.2d 450, 152 P.2d 485, and In re Estate of Lund, 65 Cal.App.2d 151, 150 P.2d 211, both assume that the section is valid and appellants have not attacked its validity. The basis of their attack is that the practice is contrary to public morals, but this cannot be so if the legislature sanctions it. In view of the Code section, and the established practice under it, citations from other jurisdictions need not be reviewed.

[4] Appellants' second point is that respondent's powers of attorney and assignments are the result of an illegal solicitation of legal business. The argument might have had some weight before the practice was recognized by the code section cited and by Estate of Cohen, supra, but, since the legislature has recognized the practice as legal it is not the province of the courts to condemn it.

[5,6] Finally it is argued that the trial court erred in refusing to reduce the proportion of the estate to be distributed to respondent. The argument is based upon the fact that appellants were found readily through information in the possession of a local bank where the decedent had funds on deposit, and that respondent located some of

the heirs within two weeks after the death of decedent. No evidence was offered as to what, if any, work was done by respondent prior to the location of the heirs, and no evidence was offered as to the reasonable value of his services. On this appeal the argument is simply that the allowance to respondent was unreasonable and this is based on statements of counsel, not upon competent evidence. It is manifest that section 1020.1 of the Probate Code was designed to commit to the discretion of the judge in probate the determination of the assignee's interest, but such determination will not be disturbed on appeal unless an abuse of that discretion is shown. Unless the reviewing court is prepared to fix a stationary fee for such services, as the legislature has done in respect to executor's and attorney's fees (secs. 901 and 910, Probate Code), an appeal from an order of the court in probate made under section 1020.1 must show more than suspicion and conjecture that the fees awarded are excessive.

[7] We have heretofore referred to the confusion in the record relating to the form of the assignments. Counsel for both parties have added to the confusion by incorrectly stating the record. One of the assignments charges the assignors to reimburse respondent for all his expenses "including attorneys' fees and court costs." The other assignment shows a deletion of the portion obligating the assignors to reimburse the respondent for "all sums paid as expenses herein." Since the respondent stresses the deletion of this portion of the assignment we may assume that the same position was taken by him in the probate court and that the meaning of the decree of distribution is that respondent is entitled to a "twenty-one-seventy-seconds" interest in the entire estate (being one-third of the interests distributed to the heirs he represents) without reimbursement for his expenses of litigation or attorneys' fees. Nevertheless respondent must have his costs on this appeal.

The appeal from the decree is affirmed. The appeal from the order denying the motion to reopen the proceedings is dismissed.

GOODELL and DOOLING, JJ., concur.

GUE v. DENNIS.*

Civ. 3604.

District Court of Appeal, Fourth District,
California.

Feb. 14, 1946.

Hearing Granted April 11, 1946.

1. Appeal and error ⇐77(1)

A special proceeding by deputy labor commissioner for order directing a public works contractor to show cause why he should not obey subpoenas duces tecum issued by plaintiff was not a contempt proceeding, so that order requiring defendant to obey such subpoenas or be adjudged in contempt was appealable. Code Civ.Proc. § 1222.

2. Appeal and error ⇐80(1)

An order requiring payment of money or doing of act by or against party complaining thereof is final in effect as against such party and may be appealed from by him, though subsequent steps for enforcement of order may prevent it from being final. Code Civ.Proc. § 963.

3. Appeal and error ⇐76(1)

A judgment is "final" and hence appealable, where no issue is left for future consideration, except fact of compliance or noncompliance with terms thereof, but is "interlocutory," where anything further in nature of judicial action by court is essential to final determination of parties' rights. Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment" and "Interlocutory Judgment".

4. Appeal and error ⇐78(1)

Whether order or judgment is appealable must be determined, not by its form, but by its effect.

5. Appeal and error ⇐80(1)

A superior court order, requiring a public works contractor to obey subpoenas duces tecum issued by deputy state labor commissioner, was final determination of parties' rights respecting only matter then pending before court and hence was appealable, even if contempt proceedings might follow. Code Civ.Proc., § 963, subd. 2; § 1222.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Proceeding by Stanley M. Gue, as Deputy Labor Commissioner of the State of California, to require V. R. Dennis to appear and show cause why he should not be punished for contempt of plaintiff and subpoenas duces tecum issued by him. From an order requiring defendant to obey the subpoenas or be adjudged in contempt, defendant appeals. On plaintiff's motion to dismiss the appeal.

Motion denied.

Wright, Thomas, Dorman & Fox, of San Diego, for appellant.

Thomas Whelan, Dist. Atty., and Carroll H. Smith, Deputy Dist. Atty., both of San Diego, and Pauline Nightingale and William Kaplan, both of Los Angeles, for respondent Labor Commissioner.

BARNARD, Presiding Justice.

The respondent has moved to dismiss the appeal on the ground that it was taken from an order which was not appealable.

The respondent labor commissioner first filed in the superior court an affidavit concluding with a petition for an order requiring the appellant to appear and show cause why he should not be punished for contempt of the labor commissioner and certain subpoenas issued by him. The affidavit alleged that Dennis was a contractor on certain public works contracts with the United States Government, and also on certain public works contracts with the State Division of Highways; that under these contracts and certain statutes he was required to pay not less than the prevailing rate of wages applicable to the work performed, in accordance with schedules as set forth; that various statutes required him to keep records of wages paid in connection with these contracts and provided certain forfeitures as penalties; that he also had agreements with certain unions fixing the minimum wages to be paid to various classifications of labor; that the labor commissioner's office had received information, reports and complaints from several union organizations that Dennis was not paying the wage rates he was required to pay; that on receipt of said reports, complaints, and information the affiant, in his official capacity, had issued subpoenas requiring Dennis to appear at affiant's office in San Diego to testify in

* Subsequent opinion 170 P.2d 887.

an investigation of said complaints, and to bring with him for examination and investigation certain payroll sheets and records; that these subpoenas had been served upon Dennis but that he had wilfully refused to obey them; and that the testimony of Dennis and the examination of these records are essential for the proper performance of the duties imposed upon the labor commissioner by law.

The court issued an order requiring Dennis to appear and show cause why he should not be adjudged in contempt of court and punished for his failure to obey the subpoenas thus issued. A demurrer was filed and argued, and was sustained, apparently on the ground that it was not contempt of court to refuse to obey a subpoena which had not been issued under authority of the court. See, *People v. Latimer*, 160 Cal. 716, 117 P. 1051. In its order, the court sustained the demurrer to the affidavit in so far as its use as a basis for the order to show cause theretofore issued was concerned, and expressly found and determined that Dennis "has not hitherto been guilty of contempt of this court." The court's order further stated that by stipulation of the parties the affidavit theretofore filed might be used, without the necessity of refileing, as the basis for a new order directing Dennis to appear on a certain date and to show cause why he should not be required to obey the subpoenas referred to in the affidavit. The next day the court issued such a new order. Affidavits were filed by both parties and after a hearing the court entered its order requiring Dennis to obey the subpoenas duces tecum theretofore issued by the labor commissioner (with an exception not material here) not later than a certain date, "or be adjudged in contempt". This appeal was taken from that order.

[1] In support of his motion the respondent argues that judgments and orders in contempt proceedings are not appealable, since section 1222 of the Code of Civil Procedure makes them final and conclusive. His brief cites cases which support that proposition but no argument is presented to the effect that this was a contempt proceeding. On oral argument, however, it was contended that this proceeding might later become the basis for a contempt proceeding and that section 1222 of the Code of Civil Procedure is, therefore, applicable.

It seems clear that this special proceeding was not a contempt proceeding. While it was first attempted to make it such, a demurrer was sustained which effectively ended it as such a proceeding. By stipulation of the parties, the same affidavit was permitted to be used without refileing but for a different purpose, and a different order to show cause was issued. This presented a new and different proceeding as the only one before the trial court. The hearing was had on the sole issue as to whether Dennis should be required to obey these subpoenas. While acting on that single matter, in making the order here appealed from, the court went beyond a decision on the issue presented and added the additional clause "or be adjudged in contempt." This was not only surplusage but it involved a matter which might never occur or be raised and which, if subsequently raised, would require a new and different proceeding based upon an entirely different showing. It can hardly be held that a court may shut off a right of appeal in all cases where a party is ordered to do something, by merely adding to its order the further statement that he will be adjudged in contempt if he fails to comply. There was no contempt proceeding here and no judgment or order was entered to which section 1222, Code of Civil Procedure, is applicable.

The respondent next contends that, assuming section 1222, C.C.P., to be inapplicable the order here in question is not such a final order as is appealable under the provisions of section 963, C.C.P., and that it is not one of the orders specially enumerated in subdivision 2 of that section. In support of this contention *Union Oil Co. v. Reconstruction Oil Co.*, 4 Cal.2d 541, 51 P.2d 81, and *Frost v. Superior Court*, 41 Cal.App. 580, 183 P. 206, are cited. In the *Union Oil Co.* case, it was held that orders for an inspection and subsurvey of an oil well were not final because they were essential to the main issue in the case, which was with respect to a trespass by the defendant, and that these orders were but a necessary step in connection with the main issue. The questions involved in the orders were directly connected with the general subject of the litigation. In the *Frost* case, it was held that one of the steps in enforcing a judgment, an order requiring a judgment-debtor to appear before a referee and answer concerning his property,

was not final and could not be reviewed on certiorari. This was merely a step in enforcing a judgment already obtained and there is nothing to suggest that the judgment thus sought to be enforced was not final or appealable. Other cases are cited where it has been held that orders to appear and testify and orders to produce evidence of various kinds, when made as a part of and incidental to a cause then pending, are merely interlocutory and are not appealable. A different situation here appears as the order in question was the only thing sought in the proceeding in which it was made, and it was not merely a step in connection with other pending issues. The distinction is pointed out in *Ellis v. Interstate Commerce Commission*, 237 U.S. 434, 35 S.Ct. 645, 646, 59 L.Ed. 1036, involving an order made on the application of the Interstate Commerce Commission. It was there said: "The order directs the appellant to answer certain questions propounded and to produce certain documents called for by the appellee. There is no doubt that this appeal lies. The order is not like one made to a witness before an examiner or on the stand in the course of a proceeding inter alios in court. * * * It is the end of a proceeding begun against the witness."

[2] In the early case of *Adams v. Woods*, 18 Cal. 30, the court, on application, had ordered the books of the defendant turned over to a third party for use in another suit and then to be returned. In reversing this order on appeal it was held that this was an appealable order, the court saying: "We do not regard it, however, as an interlocutory order. It certainly partakes of an independent proceeding on the part of Pease, the plaintiff in the notice, as much as if he claimed the book as his property, and the court ordered it to be given up to him. Such an intervention, involving new and distinct rights, and being limited and spent by the final order, can scarcely be considered as merely interlocutory, and appurtenant to the main litigation." In *Fish v. Fish*, 216 Cal. 14, 13 P.2d 375, involving an order to sell certain property to pay the cost of a receivership, it was contended that the order was interlocutory and not final. In holding the order final, the court said: "Decisions recognizing the right of appeal from an order, where that right does not rest upon the express provisions of section 963 of the Code of Civil Procedure, are numerous and

proceed upon the theory that the order is in effect a final judgment against a party in a collateral proceeding growing out of the action; that is to say, is so far independent of the suit itself as to be substantially a final decree for the purpose of an appeal, although there has been no final decree in the action. *Anglo Californian Bank v. Superior Court*, 153 Cal. 753, 96 P. 803. Orders requiring the payment of money by the party complaining, or the doing of an act by or against him, are usually regarded as final as against such party and may be appealed from by him."

In *Title Ins. & Trust Co. v. California, etc., Co.*, 159 Cal. 484, 114 P. 838, 841, the court, after reviewing the decisions, stated the general rule as follows: "Where the order requires the payment of money by the party complaining (citing cases), or the doing of an act by or against him, the order is in effect final as against such party and may be appealed from by him." Nor will the fact that subsequent steps may be taken by way of enforcing the order or judgment prevent the same from being final. *Zappettini v. Buckles*, 167 Cal. 27, 138 P. 696.

[3,4] The rule is thus stated in *Bakewell v. Bakewell*, 21 Cal.2d 224, 130 P.2d 975, 978: "The general test for determining whether the judgment is final is 'that where no issue is left for future consideration except the fact of compliance or non-compliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.' *Lyon v. Goss*, 19 Cal.2d 659, 123 P.2d 11." In *Pignaz v. Burnett*, 119 Cal. 157, 51 P. 48, 50, the court said: "As to every order finally disposing of the rights of the parties as to any matter involved in the litigation,—orders, final in the sense that the question cannot be again considered in the case,—the parties affected have a right to be heard." The question as to whether or not an order or judgment is appealable is to be determined not by its form but by its effect. *Howe v. Key System Transit Co.*, 198 Cal. 525, 246 P. 39.

[5] It seems clear that the order here in question was a final determination in the trial court with respect to the rights of the parties in connection with the only matter then pending, and that it ordered

the appellant to do a certain act. No question was left for future consideration except possibly the fact of whether or not the order would be obeyed. There was no further judicial action for the court to take, and any further possible action would not only be in carrying the judgment into effect but, if it be assumed that contempt proceedings might follow, this would require an entirely new proceeding based on new and different allegations. There was here no main proceeding of which this was merely one of the steps, and there was no matter pending except the one which was covered by the order. This issue, whether or not he was required to obey the subpoenas issued by an agency other than the court, was fully and finally settled in so far as the trial court is concerned. Had the court decided this issue the other way, holding that this appellant was not required to obey the subpoenas, it would seem clear that this respondent would have had a right of appeal. Such a right can not be dependent upon which party happens to prevail. On reason and on authority, we conclude that this was an appealable order.

The motion to dismiss is denied.

MARKS and GRIFFIN, JJ., concur.



73 Cal.App.2d 82

PEOPLE v. YOUNG.

Cr. 3964.

District Court of Appeal, Second District,
Division 3, California.

Feb. 15, 1946.

Criminal law ⚖️531(3)

Evidence that defendant's confession of guilt was freely and voluntarily made without violence, threats, or inducements warranted admission of confession.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Edwin M. Young was convicted for violating section 286 of the Penal Code, and he

165 P.2d—61

appeals from the judgment of conviction and from an order denying a new trial.

Judgment and order affirmed.

Edwin M. Young, in pro. per.

Robert W. Kenny, Atty. Gen., and Robert S. Morris, Jr., Deputy Atty. Gen., for respondent.

DESMOND, Justice.

Defendant, charged with violating section 286 of the Penal Code, was found guilty by the court sitting without a jury. He appeals from the judgment of conviction and from the court's order denying a new trial. He contends in his brief, filed in propria persona, that the court erred in admitting in evidence his confession of guilt which he argues was not free and voluntary; further, that without the confession the corpus delicti was not established by the prosecution. He relies for this point upon section 1111 of the Penal Code, which provides that a conviction cannot be had in a criminal trial upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. Appellant cites us to *People v. Robbins*, 1915, 171 Cal. 466, 154 P. 317, as a case involving the same charge as the one upon which he was convicted and where the court considered the application of the statute and ordered a reversal. The People in their brief summarize the situation in the following language: "Appellant argues that without the confession of appellant, there was no corpus delicti, inasmuch as the only other evidence of the commission of the crime was the testimony of the accomplice. With this, respondent agrees. But appellant further argues that the confession was erroneously admitted as evidence in that it was not freely and voluntarily given. With this, respondent disagrees."

It appears from the transcript that on or about February 28, 1945, appellant, 31 years of age, took in as his roommate in a Los Angeles hotel, a 17 year old boy named Dave. On March 20th, shortly before midnight, after appellant and Dave had gone to bed in the double bed where they slept customarily, two police officers attached to the Juvenile Division entered their hotel room from an adjoining room, turned on the lights and arrested both men. Next day at approximately 11:30 a. m., another police officer named Simmons took Dave to the office of Dr. DeRiver "who talks to all peo-

ple placed in Central Jail on sex offenses," and who at that very time was talking to this appellant. Simmons, testifying that he then interrogated Dave in the presence of Dr. DeRiver and appellant, related in great detail, over the objection of appellant's counsel, the conversation which he had with Dave in that interview and which fixed the crime as having been committed upon Dave by this appellant on or about March 2d, the date charged in the information. The officer testified that he then turned to the defendant and asked him if he had heard what Dave had said and he replied that he had; further, that "what David had said was the truth." Additional questions propounded by Simmons directly to appellant and related to the court brought answers which definitely fastened guilt upon him.

All this evidence was received over the objection of the appellant that the confession was not free and voluntary. This objection was first made when officer Simmons undertook to relate what transpired in Dr. DeRiver's office. Appellant's counsel then interjected "May it please the court, I would like to make an offer of proof to negate any voluntary confession in this case, and I would like to put the defendant on for that purpose." The court ruled that the offer was in order and heard testimony not only from the defendant but from the boy David and officers Barrick and Suit, who made the arrest, and Probation Officer Bowman who accompanied them to the hotel. The testimony was to the effect that appellant was subjected to an inquiry conducted by the police officers immediately after being brought to the station. This inquiry lasted from forty minutes to an hour. According to appellant, upon his stating that he had not misconducted himself with Dave, one of the officers said, "I am going to knock a confession out of you; I am going to make you talk,"; that he then ordered appellant to take off his glasses and when he had done so hit him in the stomach and knocked him down; that the other officer helped him up and the first officer then hit him across the face several times; that he was knocked down and helped up repeatedly and finally "I thought I might just as well talk a little bit to make them stop hitting me"; that his nose was bleeding and his face swollen and "I said 'All right, I will talk.'" Both police officers denied that they mistreated the defendant in any way or ordered him to take off his glasses, saying that they had been seated most of the time inquiring into relations between appellant and the boy,

David; that appellant denied having had any improper relations. Mr. Bowman was seated at a desk across the room from the table where appellant was being examined. He testified that he was going over some of his papers and that the officers were questioning appellant in a rather loud tone; that appellant "refused to answer a question and they gave him a push, and I recall that he fell down to the floor. It seemed to me that he slipped or something and fell on the floor. * * * I believe that one officer reached down and assisted him to his feet. * * * They were standing there and there was some question asked * * * but the defendant said that this happened and the officer said, 'Oh, come on,' or something to that effect, and gave him a shove, and he seemed to slip and fall. * * * He said, 'Come on,' and he pushed him." This witness said that he saw no blood on appellant.

Under cross-examination appellant stated that when he was in Dr. DeRiver's office he did not tell him about the beating which he claimed he had received about 10 hours previously at the hands of the police officers; that Dr. DeRiver, whom he knew, did not threaten him in any way and he was not afraid of him. He stated also that he did not call Mr. Simmons' attention to any violence or beating; that he had talked to Simmons on two occasions in February; that Simmons never abused him in any way; that he talked to him in a normal tone of voice, but he was scared of "pretty near everybody"; that Simmons "was a policeman from Georgia Street and these other guys who beat me up were also from Georgia Street, so I didn't know whether he would do the same thing as they did or not.

"Q. Did Mr. Simmons make any motion as if to beat you? A. No.

"Q. Did he shout at you? A. No.

"Q. Did he threaten you in any manner? A. No, he didn't threaten me in any manner.

"Q. Did he make you any promise of any kind? A. No."

Upon the conflicting testimony of the various witnesses the trial judge held that "there was no force or violence used there whatsoever and that any statement given by the defendant was given freely and voluntarily."

Whatever may be said of the happenings in the Georgia Street jail where, so far as

the evidence shows, no admission of guilt was made by appellant, there was no showing of violence, threats or inducements at the interview in Dr. DeRiver's office. Appellant admitted his guilt at that interview and we cannot say under the circumstances of this case that the court erred in admitting the confession. At the trial David gave complete details of the offense charged against the appellant. Although the appellant took the witness stand concerning force and violence he did not deny his guilt.

Judgment and order affirmed.

SHINN and WOOD, JJ., concur.



72 Cal.App.2d 772

COLE OF CALIFORNIA, Inc., v. GRAYSON SHOPS, Inc.

Civ. 14998.

District Court of Appeal, Second District,
Division 2, California.

Jan. 30, 1946.

Rehearing Denied Feb. 19, 1946.

1. Trade-marks and trade-names and unfair competition ⇨3(4½)

The trade-mark "Swooner" for feminine wearing apparel is not invalid on ground that it relates to the character or quality of the merchandise. Business and Professions Code, § 14201(b).

2. Trade-marks and trade-names and unfair competition ⇨84

The trade-mark "Swooner" for feminine wearing apparel, including bobby socks, is not invalid as giving holder a practical monopoly in the sale of such merchandise.

3. Trade-marks and trade-names and unfair competition ⇨44, 45

Filing in office of Secretary of State of claim for trade-mark was in effect an application for registration of claimed word as a trade-mark, and certificate thereafter issued by Secretary of State constituted a registration of the trade-mark which registration was prima facie evidence of ownership of the mark. Busi-

ness and Professions Code, §§ 14230, 14237, 14271.

4. Trade-marks and trade-names and unfair competition ⇨93(3)

Trial court's finding that plaintiff appropriated the word "Swooner" as its trade-mark for feminine wearing apparel manufactured by plaintiff on March 17, 1944, when it sold and delivered to buyer outside the state wearing apparel to which trade-mark was affixed, had substantial evidentiary support. Business and Professions Code, §§ 14202, 14230, 14237, 14270, 14271.

5. Trade-marks and trade-names and unfair competition ⇨1

For manufacturer to appropriate a word as a trade-mark for its products, it was not necessary for trade-mark to be registered with Secretary of State, but application for registration and registration of mark lent support to finding that manufacturer had appropriated such word as a trade-mark. Business and Professions Code, §§ 14202, 14230, 14237, 14270, 14271.

6. Trade-marks and trade-names and unfair competition ⇨93(3)

Trial court's finding that operator of 26 stores acquired no property rights in the word "Swooner" by the use of such word on placard and price tickets displayed in window of one of its stores to advertise bobby socks to which no label or other matter bearing the word was affixed, had substantial evidentiary support.

7. Trade-marks and trade-names and unfair competition ⇨93(3)

Evidence of promotion sale of bobby socks under the designation "Swooner" in all of defendant's 26 chain stores and use of the designation in display windows containing other feminine wearing apparel justified finding that defendant's use of the word infringed state registered trade-mark "Swooner" for feminine wearing apparel manufactured by plaintiff and would cause irreparable damage to plaintiff and that plaintiff had no adequate remedy at law as basis for enjoining such use of the word by defendant. Business and Professions Code, §§ 14230, 14237.

8. Trade-marks and trade-names and unfair competition ⇨61

Manufacturer who first appropriated the word "Swooner" as trade-mark for feminine wearing apparel was entitled to

use it as trade-mark for the several items of such apparel including bobby socks, manufactured and sold by it and listed in its application for state registration of the trade-mark, to the exclusion of use of such designation by chain store operator in sale of bobby socks, though manufacturer had not used the trade-mark on bobby socks. Business and Professions Code, § 14231.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Cole of California, Inc., against Grayson Shops, Inc. (of California), to enjoin trade-mark infringement. From a judgment holding plaintiff's trade-mark to be valid and enjoining defendant from selling or offering for sale or advertising any articles of feminine wearing apparel under such trade-mark, defendant appeals.

Judgment affirmed.

Max Feingold and Theodore Rosenthal, both of Los Angeles, for plaintiff and respondent.

Philip Subkow, of Los Angeles, for defendant and appellant.

FOX, Justice pro tem.

This is an appeal by the defendant from a judgment determining that "the word Swooner is a valid and existing trade-mark for use on feminine wearing apparel owned by the plaintiff" and enjoining the defendant from selling or offering for sale or advertising any article of feminine wearing apparel under that name.

Plaintiff has been manufacturing women's and children's wearing apparel in the Los Angeles area since 1918. Early in December, 1943, the president of the plaintiff first thought of using the word "Swooner" as a trade-mark and soon thereafter discussed the matter with its advertising firm. In early January, 1944, the advertising firm started the preparation of full-page advertising material for such national magazines as Vogue, Harpers, Mademoiselle, Charm, Parents and Life. The first of this advertising appeared in the May, 1944, issue of Harper's Bazaar. Plaintiff has invested some \$15,000 in its national advertising campaign. Labels to be attached to the garments and bearing the word "Swooner" were printed prior to March 17, 1944. On this latter date plain-

tiff made its first shipment of garments so labeled to Nieman-Marcus in Dallas. On April 1, 1944, plaintiff filed in the office of the Secretary of State of the state of California a claim for trade-mark for the word "Swooner", used by it in connection with the sale of feminine wearing apparel, "including but not limited to dresses, bathing suits, swim suits, play suits, skirts, shirts, blouses, sweaters, hats, neckwear, turbans, lingerie, shoes made of fabric or fabric and leather, gloves, handkerchiefs, stockings and bobby sox." Thereafter on April 5, 1944, the Secretary of State issued to the plaintiff under the Great Seal of the State his certificate (No. 26494) of a claim for trade-mark for the word "Swooner" in accordance with plaintiff's application. During the months of March, April and May, 1944, plaintiff sold and delivered feminine wearing apparel under the trade-mark "Swooner" (and its related mark "Swoonsuit") to the value of \$22,486.50. This merchandise was sold in both intrastate and interstate commerce.

The defendant which operates twenty-six stores on the Pacific coast first used the word "Swooner" in connection with the sale of bobby socks on March 3, 1944, only in store No. 82 located at 737 South Broadway, Los Angeles. Upon that occasion there was placed in the window a cardboard sign approximately 12 inches by 24 inches stating "Swooner Anklet Sox, 4 pairs for \$1.00, 8 attractive colors"; also, six small cards approximately three by five inches bearing the words "Swooner Anklet Sox, 4 pair, \$1.00."

In a letter dated April 12, 1944, the store managers of defendant were advised that a chain-wide promotion sale of bobby socks would be had between April 17th and 29th, under the designations "Swooner" and "Swooner Sox."

Early in July, 1944, the show window of defendant's Crenshaw boulevard store in Los Angeles displayed a placard bearing the word "Swooner." In the window were not only bobby socks but also bathing suits, sun suits, shorts, sweaters and blouses. Defendant continued to use the word "Swooner", particularly in connection with the sale of bobby socks, until its use was restrained on July 13, 1944.

The court found, among other things, that the use of the placard and price tickets by the defendant was only a means of advertising the sale of bobby socks;

that defendant did not advertise the sale of bobby socks under the name "Swooner" in newspapers, magazines, on the radio, or in any other medium; that by the defendant's use of the word "Swooner" between March 3, and March 17, 1944, it acquired no property rights in said word; and that the use of the word "Swooner" by the defendant is an infringement of the valid and existing trade-mark "Swooner," adopted, used and owned by the plaintiff.

[1] Defendant's first contention is that plaintiff does not have a valid trade-mark in the word "Swooner" for the sale of bobby socks and other feminine wearing apparel. By the terms of section 14201, Business and Professions Code, "A trade-mark may not consist of a designation * * * that relates only to * * * (b) The quality of the thing marked." Defendant contends that under this code provision plaintiff does not have a valid trade-mark in the designation "Swooner" because such designation describes the class of trade for whom the goods are intended and therefore indicates the quality of the merchandise. There is no merit in this contention. The word "Swooner" does not relate to the character or quality of the merchandise. It certainly does not indicate the type or grade of material from which a garment is made, nor does it describe the weave, pattern, form, color, length or size of a bobby sock or other feminine wearing apparel. The designation is more suggestive of style than quality. A particular style of playsuit or bathing suit might be made of materials of different weights, weave, texture and durability. To describe a bobby sock as a "Swooner" sock does not indicate the quality of the material out of which it is made. To say, as defendant contends, that because bobby socks, sun suits, bathing suits, etc., which are sold under the designation "Swooner," are suitable for girls and women who are inclined to swoon when they hear the voice of a crooner indicates the quality of such wearing apparel is to confuse the quality of the merchandise with the quality or character of the persons wearing it. The fact that many ministers wear a cut-away coat in the pulpit does not indicate the quality of the coat but rather the style and the class of persons and occasions on which such a coat is worn. That "Swooner" is subject to trade-mark appropriation, finds support in *Hamilton Brown Shoe Company v. Wolf Company*, 240 U.S.

251, 36 S.Ct. 269, 60 L.Ed. 629, which holds that the words "American Girl" are properly appropriated as a trade-mark for women's shoes.

[2] Defendant argues that to allow plaintiff the exclusive use of the designation "Swooner" for bobby socks would practically give it a monopoly in the sale of such merchandise. This conclusion is without foundation. We may not assume that a sufficiently large percentage of the girls and women who wear bobby socks swoon when they hear the voice of a crooner so that if all of them purchased bobby socks of a particular brand a monopoly would thus be created in the firm selling such brand. Likewise, we may not assume that the potential wearers of bobby socks are going to purchase such merchandise merely because they are sold under a designation which is also descriptive of their emotional outbursts and without consideration of other factors such as price and quality. Finally, we may not assume that swooning has reached such an exacting technique that those who indulge in it must prepare themselves in advance by dressing in a particular style and wearing a particular brand of socks or other apparel. On the contrary, it would seem that the American public can still be relied upon to base their purchasing decisions essentially upon quality, style and price rather than upon a passing whimsical emotion which may lend itself to a shrieking outburst upon hearing the alluring tones of a crooner. It may well be that many girls and women will have their attention drawn to feminine wearing apparel advertised and sold under the designation "Swooner," since it is what might be termed a "catchy" word, and that a substantial trade will be developed under such label and trade-mark, but that is no reason for denying plaintiff the right to the exclusive use of such designation. Defendant still has full opportunity to sell its merchandise to that segment of femininity which swoons as well as to those who do not swoon.

[3-5] Defendant contends that it was the first user of the word "Swooner" and hence the court erred in determining that the plaintiff is the owner of the trade-mark. The findings, however, of the trial court in favor of the plaintiff on this issue have substantial evidentiary support. There can be no attack upon the findings that on March 17, 1944, plaintiff sold and delivered

feminine wearing apparel to Neiman-Marcus in Dallas "upon which was affixed the trade-mark 'Swooner,'" and that from and after that date plaintiff sold such apparel under that designation both within and without this state. It is of course obvious that the labels bearing the word "Swooner" which were affixed to the merchandise shipped to Neiman-Marcus were prepared some time prior to the date of such shipment. From the fact that advertising of plaintiff's merchandise under the designation "Swooner" appeared in a national magazine in May, 1944, it may be assumed that the arrangements therefor had been completed at some substantially earlier time. The direct evidence too in behalf of plaintiff supports this idea. The fact that plaintiff went into a national advertising campaign to make known this new brand of its merchandise and spent a sizeable amount in carrying it on is not without significance in showing that plaintiff had appropriated the word "Swooner" as a trade-mark. Of like significance is the fact that on April 1, 1944, plaintiff filed in the office of the Secretary of State a claim for trade-mark for the word "Swooner"—used by it in connection with the various articles of clothing for women that it manufactured and sold. This was in effect an application for registration of the word "Swooner" as a trade-mark. Sec. 14230, Business and Professions Code.¹ The certificate thereafter issued to the plaintiff by the Secretary of State constituted a registration of the trade-mark under section 14237² of the Business and Professions Code and such registration "is prima facie evidence of the ownership of the mark" by the express terms of section 14271³ of said Code. There is thus substantial support for the court's finding that "plaintiff adopted and used as its trade-mark on March 17, 1944, the word 'Swooner' in connection with the sale of feminine wearing apparel." In order for plaintiff to appropriate this word as a trade-mark it was not necessary for the same to be registered with the Secretary of State. Business and Professions Code, sec. 14202

and sec. 14270; Ward-Chandler Bldg. Co. v. Caldwell, 8 Cal.App.2d 375, 47 P.2d 758; 24 Cal.Jur. 623, sec. 10. But such application and registration lend support to the finding that plaintiff had appropriated said word as a trade-mark in connection with the merchandise it manufactured and sold. Ward-Chandler Bldg. Co. v. Caldwell, supra.

[6] Defendant bases its claim of prior use of the word "Swooner" on the display in its store window on Broadway in Los Angeles placed there on March 3, 1944. In connection with this display, however, the court found that "defendant did not affix or attach any sign, card, label or other matter to any of the bobby socks offered for sale by it"; that the cards in this display "were the only cards, signs, or other indicia to the public used by the defendant until April 17, 1944, of the word Swooner," and that "such use of the placard and price tickets by the defendant was only a means of advertising the sale of bobby socks." The evidence together with the inferences which the trial court could reasonably draw therefrom amply support these findings. When these facts are considered in connection with the character and arrangement of the display and the fact that it only appeared in the show window of a single store of defendant's Pacific coast chain it must be said that there is a substantial foundation for the trial court's further determination "That by the defendants' use of the word Swooner between March 3 and March 17, 1944, defendants acquired no property rights" therein.

[7] Defendant, however, argues that if its use of the word "Swooner" was not sufficient to give it a prior trade-mark right in said word then its use cannot constitute an infringement of any trade-mark property plaintiff may have acquired therein; hence it was improper to restrain the further use of said word by the defendant. This argument is unsound. The use made by the defendant of the designation "Swooner" was substantially greater after

¹ "14230. Persons entitled to register: Filing of claim. Any person may register any trade-mark used by him in this State by filing a claim to it with the Secretary of State. (Added by Stats. 1941, ch. 58, p. 704, § 1.)"

² "14237. Issuance of certificate of registration. At the time of filing, the Secretary of State shall issue to the claim-

ant a certificate of registration under the Great Seal of the State. (Added by Stats. 1941, ch. 58, p. 705, § 1.)"

³ "14271. Evidentiary effect of registration. Every trade-mark registration on the records of the Secretary of State is prima facie evidence of the ownership of the mark. (Added by Stats. 1941, ch. 58, p. 706, § 1.)"

March 17 than before that date. Up to that date its use had been limited to a single store in Los Angeles. But a month later a chain-wide promotion sale of bobby socks was undertaken by defendant under the said designation. Early in July a display window in the Crenshaw boulevard store of defendant in Los Angeles contained signs which reasonably could have led the purchasing public to believe that not only bobby socks but bathing suits, sweaters and play suits, which were also displayed in the window, were likewise being advertised for sale under the designation "Swooner." This, it will be noted, was after plaintiff's national advertising program had got well under way. Defendant did not discontinue the use of the word "Swooner" in advertising the sale of bobby socks until this action was filed and a temporary restraining order issued. There is therefore ample justification for the trial court's finding that "the use of the word Swooner by the defendant is an infringement" of plaintiff's trade-mark, and that "plaintiff will suffer irreparable injury and damage by defendant's use" of said word and that "plaintiff has no adequate remedy at law."

[8] Defendant also contends that since plaintiff had used the word "Swooner" on only certain of its line of feminine wearing apparel and had not used it on bobby socks the defendant could therefore not be prevented from using such designation on this particular item of clothing. This would unduly restrict plaintiff's use of its trade-mark. In its application to the Secretary of State for claim to trade-mark for the word "Swooner" plaintiff stated that it was engaged in the manufacture and sale of clothing and based its claim for trade-mark of said word on the use thereof in connection with the clothing it manufactured. Various items of women's wearing apparel were then enumerated including bobby socks. Under section 14231, the Secretary of State is authorized to establish classes of merchandise for purposes of trade-mark registration. Pursuant to this authority he has established class 39, consisting of clothing. To deprive plaintiff of the right to use its trade-mark upon the several items of clothing manufactured and sold by it and which were specifically listed in its said application and to allow a competitor to use the identical designation on a single item of such clothing would inevitably

lead to confusion on the part of the purchasing public and give one firm the advantage of the advertising by the other and the good-will built up by it. We are not unmindful that this case was not decided upon the theory of unfair competition but we mention this practical phase of the situation as a further reason for holding that plaintiff is entitled to use its trade-mark on the several items of women's wearing apparel manufactured and sold by it and listed in its application to the Secretary of State.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



73 Cal.App.2d 61

HEINZ v. HEINZ.
Civ. 14847.

District Court of Appeal, Second District,
Division 2, California.

Feb. 13, 1946.

Rehearing Denied March 5, 1946.

Hearing Denied April 11, 1946.

1. Parent and child ⇨2(4)

On appeal by defendant from judgment awarding to plaintiff the custody of the minor son of the parties, the evidence would be viewed in the light most favorable to the plaintiff.

2. Trial ⇨395(5)

Findings should be of ultimate facts, and findings of probative or evidentiary facts need not be made, for a finding of ultimate fact includes a finding of all the probative facts necessary to sustain it.

3. Parent and child ⇨2(4)

Where custody of a child is at issue, findings that one parent is a fit person to have custody and that other parent is not fit to have such custody constitute findings upon the ultimate issues of fact and include findings upon all probative facts necessary to sustain them.

4. Parent and child ⇨2(4)

In action by husband against wife for custody of minor son, where trial court found on the ultimate issues of fact that

husband was a fit person to have custody of son and that wife was not a fit person to have permanent custody of the child failure to find among other things whether a third party without wife's knowledge had been planted in her bathroom by husband and his agents or whether a certificate stating that child had certain bruises which might have been caused by blows or falls was false, was not error.

5. Appeal and error ⇐205

Where a question to which an objection is sustained does not in itself indicate that the answer will be favorable to the party seeking to introduce the testimony, the ruling will not be reviewed on appeal unless an offer of what it is proposed to prove has been made to the trial court so that the reviewing court can determine whether the proposed evidence would have been material and beneficial to the party offering it.

6. Evidence ⇐178(2)

A document which is beyond the territory of the state is a "lost document" in a sense permitting introduction of secondary evidence as to its contents.

See Words and Phrases, Permanent Edition, for all other definitions of "Lost Document".

7. Evidence ⇐178(14)

In action by husband against wife for custody of minor son, testimony that in a photographer's studio in New York witness saw negatives and prints of wife in the nude was properly admitted, it being conceded that the negatives and prints were outside jurisdiction of California.

Appeal from Superior Court, Los Angeles County; Charles E. Haas and Joseph W. Vickers, Judges.

Action by Clifford Stanton Heinz against Elizabeth Heinz to obtain custody of the minor son of the parties. From a judgment awarding custody of son to plaintiff, from an order modifying the judgment, and from an order denying defendant's motion for leave to renew an application to modify the judgment, defendant appeals. Affirmed.

Louis Bean, Jr. and A. E. Coppleman, both of Los Angeles, for respondent.

Maurice Rose, of Los Angeles, for appellant.

McCOMB, Justice.

From a judgment awarding the custody of the minor son of the parties hereto to plaintiff, defendant appeals.¹

There are also appeals from orders (a) modifying the foregoing judgment and (b) denying defendant's motion for leave to renew an application to modify the judgment.

[1] The evidence being viewed in the light most favorable to the plaintiff (respondent), and pursuant to the rules set forth in *Estate of Isenberg*, 63 Cal.App.2d 214, 216 et seq., 146 P.2d 424, the record discloses the following facts:

On June 27, 1938, plaintiff and defendant were married. In the latter part of March, 1939, defendant discovered that she was pregnant with the child here involved and which was subsequently born on December 28, 1939. Shortly after defendant discovered she was pregnant, she on several occasions stated that she wanted an abortion and solicited the aid of the plaintiff in procuring the same. This plaintiff refused to do. At about the time when plaintiff refused to permit defendant to have an abortion she told him he could have the custody of their child providing she could have full custody of a Cocker Spaniel dog which they owned. Plaintiff told defendant that he didn't believe her and that it shocked him that any prospective mother could make such a statement. Defendant replied that she meant it all right and if he would write the statement she would sign it. Thereafter defendant signed a statement in accordance with the tenor of her offer.

During the entire married life of the parties defendant possessed a violent and ungovernable temper and evidenced such temper on numerous occasions by such acts as the following:

a) Attempting to jump out of a hotel window when plaintiff refused to buy her a ring;

b) Attempting to jump out of a hotel window when they engaged in an argument relative to the purchase of furniture;

c) Smashing sterling silver dresser sets on two different occasions;

d) Throwing an alarm clock and heavy bookends at plaintiff;

¹ For a prior phase of this litigation between the same parties see *Heinz v. Heinz*, 68 Cal.App.2d 713, 157 P.2d 660.

e) Throwing a diamond wrist watch, a wedding gift from plaintiff, against a wall and smashing it when plaintiff refused to take her to Ciro's (a restaurant in Hollywood); and

f) Throwing dishes to the floor and breaking them in the presence of their minor son.

During the entire life of the parties' son defendant was abusive and intolerant of the child, frequently using profane and abusive language in his presence. This was evidenced by the conduct of defendant in:

a) Becoming abusive of the child if he would not eat quantities of food far in excess of the amount prescribed by the attending physician;

b) Refusing to follow a doctor's prescribed change in formula for the child but feeding the infant unripened bananas over the protest of a nurse who warned defendant that such feeding might kill the child;

c) Striking and beating the child on numerous occasions;

d) Permitting the child to fall to the floor; and

e) Using profane language in the presence of the child such as "God damning" the child, calling him a "darned brat", "darned kid", and saying to the child, "I wish I had never had you", "Wish you were dead", and "I will beat you to a bloody pulp."

On or about January 4, 1944, defendant exposed her semi-nude body to be photographed, at the time executing a receipt in release in favor of the photographer whereby she authorized the use of such photographic poses consisting of two front views naked to the waist line and one front view

full length in a standing position in which she wore only a transparent gown.

For more than a year prior to the entry of judgment in the present action defendant carried on relations unbecoming to a wife and mother with a skiing instructor named Walter Von Neudegg in that she maintained an extensive correspondence with him, couched in the most ardent and romantic terms and committed other improper acts with Mr. Von Neudegg. On one occasion plaintiff found defendant in a hotel room with Mr. Von Neudegg, he being nude at the time. Defendant, after the incident last mentioned, telephoned plaintiff and said, "You certainly got the goods on me this time, what do you intend to do about it?" Plaintiff replied, "I think you will have to come to me and discuss this infatuation for Walter, if that is what it is." Plaintiff said, "I would like to have it done quietly and without any scandal." Defendant remarked, "Well, I don't care, I love Walter. You should know that now, and I want to marry him." When asked regarding their son, defendant said, "I will worry about him later, but I want to marry Walter, and that is that."

Defendant does not question the sufficiency of the evidence to sustain the facts set forth above² but urges in support of reversal of the judgment three propositions which will be stated and answered hereunder seriatim:

First: *The trial court committed prejudicial error in not making findings upon material issues of ultimate facts since the trial court did not find, among other things, (1) whether or not Mr. Von Neudegg on January 23, 1944, without defendant's knowledge had been "planted" in her bath-*

² During the course of the oral argument counsel for appellant said:

"The present appeal is concerned with errors which the court committed in omitting to make various findings set out in detail in the briefs. * * * My purpose in appearing here is not to argue the facts. The primary purpose is to review the action of the trial court in failing to make findings which we claim were tendered by the issues in this case and which the importance of the case to the parties require to be definitely found. * * * We insist we have the right to have the trial judge who heard the witnesses, come to the conclusion upon some of the issues which are crucial and which go to the right of custody, and which if

found as we claimed were required to be found would destroy the fitness of the father to have the custody of this child.

* * * I shall not argue the facts in this record, but we are insisting in laying before this court this consideration, namely, that this appeal is based upon matters solely of law and is not a case in which there has been a controversy as to facts and the court has found one way and the appellant is asking this court to find another way. Our complaint is that under the statutory duty of the court there is an omission to make findings which we think are necessary for the purpose of projecting the proper issues in any appeal to the reviewing court."

room by plaintiff and his agents; (2) whether or not on August 30, 1943, Mr. Von Neudegg was in defendant's bedroom with defendant for a period of time, and whether or not plaintiff hired Mr. Rudd to be a false witness; (3) whether or not a certificate of Dr. Batell stating that the minor child of the parties had certain bruises which might have been caused by blows or falls was false; (4) whether or not Josephine Douglas was a fit person to act as a nurse for the child; and (5) whether or not plaintiff subjected defendant to cruel and inhuman conduct.

This proposition is untenable. The ultimate issues of facts in this action were:

First: Whether or not plaintiff was a fit and proper person to have the custody of the minor child;

Second: Whether or not the defendant was a fit and proper person to have the custody of said minor child.

The court found:

First: "That the plaintiff is a fit and proper person to have the care and custody of Clifford Stanton Heinz, the third, the minor son of the parties hereto."

Second: "That the defendant is not a fit and proper person to have the permanent custody of the said minor child, Clifford Stanton Heinz, the third."

[2] The law is established in this state that findings should be of ultimate facts and that it is unnecessary to make findings of probative or evidentiary facts, for a finding of ultimate fact includes a finding of all the probative facts necessary to sustain it. (24 Cal.Jur. (1926), p. 968, sec. 203; 10 Cal.Jur. 10 Yr. Suppl. (1936), p. 751, sec. 203.)

[3] The law is likewise established in this state, where the question of the custody of a child is at issue, that if there are findings that one parent is a fit and proper person to have the custody of the child and that the other parent is not a fit and proper person to have such custody, such findings constitute findings upon the ultimate issues of fact. These findings include findings upon all probative facts necessary to sustain them and it is not necessary for the court to make a finding relative to the probative facts. (Brown v. Brown, 92 Cal.App. 276, 283 et seq., 268 P. 401. See also Simmons v. Simmons, 22 Cal.App. 448, 455 et seq., 134 P. 791; Crater v. Crater, 135 Cal. 633, 635, 67 P. 1049; Kepfler v. Kepfler, 134

Cal. 205, 206, 66 P. 208; Stampfli v. Stampfli, 53 Cal.App. 126, 131, 199 P. 829.)

[4] Applying these rules of law to the finding of facts in the present case it is clear that the trial court made findings upon the issues of ultimate facts involved and that it was unnecessary to make findings upon probative and evidentiary facts as contended by defendant.

[5] Second: The trial court committed prejudicial error in sustaining objections to questions asked:

1) Plaintiff as to whether he went to Dr. Batell for the purpose of getting the doctor to approve of his sending for Josephine Douglas to act as a nurse for the minor child of the parties;

2) Mr. Deisler whether he had any reason for shadowing and following defendant and Mr. Von Neudegg in Spartanburg, South Carolina;

3) Mr. Deisler as to whether he had any reason for listening to voices in defendant's hotel room in January, 1944.

This proposition is without merit. We will not consider whether the trial court properly sustained objections to the questions set forth above, for the reason that the law is established in California that where a question to which an objection is sustained does not in itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony, before the ruling will be reviewed on appeal an offer of what is proposed to be proven must first be made to the trial court so that the reviewing court can determine whether the proposed evidence would have been material and beneficial to the party offering it. (Sumida v. Pacific Auto. Ins. Co., 51 Cal. App.2d 472, 478, 125 P.2d 87; Travelers Fire Ins. Co. v. Brock & Co., 30 Cal.App.2d 115, 117, 85 P.2d 904.) In the present case the questions to which objections were sustained did not indicate that the answers would be material or beneficial to defendant nor was any offer of proof made as to what answers the witnesses would give to the questions.

[6,7] Third: The trial court committed prejudicial error in permitting Mr. Ford to testify that he saw negatives and prints in a photographer's studio in New York which negatives and prints were pictures of defendant in the nude.

This proposition is without merit. The law is established in California that when

a document is beyond the territory of this state it is a lost document so as to permit the introduction of secondary evidence as to its content. *Zellerbach v. Allenberg*, 99 Cal. 57, 73, 33 P. 786; *Estate of Baker*, 176 Cal. 430, 438, 168 P. 881; *Mackroth v. Sladky*, 27 Cal.App. 112, 119, 148 P. 978.

In the present case it is conceded that the negatives and prints concerning which Mr. Ford testified were outside the jurisdiction of California; therefore under the rule of law stated, secondary evidence as to the contents of said prints and negatives was properly admitted.

For the reasons above stated, and in view of the fact that an examination of the record fails to disclose any error, the judgment and orders appealed from are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.



73 Cal.App.2d 86

PITZER v. WEDEL.
Civ. 3162.

District Court of Appeal, Fourth District,
California.
Feb. 15, 1946.

1. Contracts ⇨333(5)

Proper pleading required plaintiff suing on agreement to pay indebtedness to show when the indebtedness became due and payable.

2. Limitation of actions ⇨182(2)

The statute of limitations is an affirmative defense which must be pleaded.

3. Appeal and error ⇨1170(3)

In action on agreement to pay indebtedness, omission from plaintiff's pleading of allegation showing when indebtedness became due and payable did not prejudice defendant so as to warrant a reversal, where the pleadings did not show that the cause of action accrued prior to the statutory time, and the trial court specifically found on the issue. Code Civ.Proc. § 337, subd. 1; § 339, subd. 1; Const. art. 6, § 4½.

4. Limitation of actions ⇨46(2)

A son's agreement, when parents conveyed him their farm, to pay parents' indebtedness to another son from proceeds of the crops or otherwise, was a conditional agreement with no limitation of time of payment.

5. Appeal and error ⇨1008(3)

In action against executor of estate of deceased son who received title to parents' farm on his agreement to pay parents' indebtedness to the plaintiff, who was another son, from proceeds of the crops or otherwise, trial court's interpretation of the agreement would not be disturbed on appeal, where such interpretation was not unreasonable.

6. Limitation of actions ⇨46(2)

The obligation of son on his agreement, when his parents conveyed their farm to him, to pay parents' indebtedness to another son from proceeds of crops raised on the farm, matured when there was sufficient money in the grantee son's hands from the proceeds of the crops to pay the indebtedness, and the statute of limitations would not commence to run until such time. Code Civ.Proc. § 337, subd. 1; § 339, subd. 1.

7. Limitation of actions ⇨46(12)

An agreement to pay a third person's indebtedness to creditor, and not the indebtedness, constitutes the gist of creditor's action against the person making the agreement, insofar as the statute of limitations is concerned. Civ.Code, § 1559; Code Civ. Proc. § 337, subd. 1; § 339, subd. 1.

8. Contracts ⇨249

A contract to pay an indebtedness owing a third person by the promisee cannot be rescinded or revoked so long as the promisor continues to receive the consideration from the original promisee. Civ. Code, § 1559.

9. Contracts ⇨187(4)

A promise to pay promisee's indebtedness to third person, who was not cognizant of promise at time promise was made, is deemed to have been made to third person adopting the promise, and third person can sue upon such promise without a consideration passing from him to the promisor.

10. Contracts ⇨212(2)

Where contract to pay an indebtedness owing third person by promisee fixes no time for payment of indebtedness, contract

must be performed within reasonable time, which may be coincidental with the statute of limitations, or at least reasonable efforts to perform within a reasonable time should be made. Code Civ.Proc. § 337, subd. 1; § 339, subd. 1; Civ.Code, § 1657.

11. Contracts ⇨212(2)

Where contract to pay an indebtedness owing third person by promisee fixes no time for payment of indebtedness, reasonable diligence and good faith on part of promisee is required, and it is trial court's duty to hear evidence and therefrom fix a time for payment which would be fair.

12. Executors and administrators ⇨202(1)

An agreement of son to whom parents conveyed their farm to pay parents' indebtedness to another son from proceeds of the crops on the farm was enforceable against estate of grantee son who had died.

13. Limitation of actions ⇨46(12)

Where son to whom parents conveyed their farm agreed on June 20, 1936, to pay parents' indebtedness to another son from proceeds of crops raised on the farm, and agreement fixed no time for payment of indebtedness, reasonable time for payment of indebtedness was four-year period prescribed by statute of limitations, and hence statute of limitations did not begin to run until June 20, 1940, so that action filed by the other son on August 11, 1943, against estate of grantee son who had died, to recover the indebtedness, was not barred by four-year limitation statute. Code Civ. Proc. § 337, subd. 1.

14. Descent and distribution ⇨126

Where son's agreement to pay parents' indebtedness to another son out of proceeds of crops raised on farm was part of consideration for parents' conveyance of farm to grantee son, and the other son's cause of action on such agreement was not barred by statute of limitations, estate of grantee son who had died should not pass to heirs free of the obligation to pay the indebtedness. Code Civ.Proc. § 337, subd. 1.

15. Contracts ⇨187(1)

A third person can enforce a contract made for his benefit only to the extent to which it was intended he should be benefited thereby.

16. Interest ⇨5

Generally, the payment of interest must be the subject of an express or implied agreement.

17. Interest ⇨44

Where there is no contract to pay interest, in the absence of statutory provision to the contrary, the law awards interest upon money from the time it becomes due and payable, if such time is certain or can be made certain by calculation.

18. Executors and administrators ⇨267

In action against estate of deceased son to recover parents' indebtedness to the plaintiff, another son, which indebtedness the deceased son agreed to pay as part of the consideration for parents' conveyance of their farm to deceased son, the plaintiff was entitled to interest on the indebtedness only from the date of filing claim against estate of deceased son, and not from the date of the agreement, where nothing in agreement required that interest should be paid, and evidence disclosed that there was no intention of deceased son and parents that interest should be paid. Civ.Code, § 1914.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action on contract to pay indebtedness by Ray Pitzer against C. R. Wedel, administrator of the estate of Lewis Lee Pitzer, also known as L. E. Pitzer, deceased. From a part of the judgment, the plaintiff appeals, and, from the entire judgment, the defendant appeals.

Affirmed.

Alfred Siemon and Bennett Siemon, both of Bakersfield, for appellant and respondent Pitzer.

Henry E. Schmidt, of Bakersfield, for respondent and appellant Wedel.

GRIFFIN, Justice.

Lewis Lee Pitzer died August 4, 1940. Letters of administration were issued September 10, 1940. The claim upon which the complaint in this action was predicated was filed in the estate January 21, 1941, by which plaintiff makes claim of \$1,274.80, plus interest at 7 per cent per annum from June 20, 1936, to date of payment. The claim is based upon an agreement dated June 20, 1936, attached to it, reciting that L. E. Pitzer and Lydia Pitzer, husband and wife, parties of the first part, and Lewis Lee Pitzer, their son, party of the second part, agreed between themselves that parties of the first part will deed certain land in Kern County to Lewis, reserving a life estate

therein, and as part of the consideration Lewis agreed to "First," occupy a small house located thereon; "Second," allow his parents to occupy the main dwelling house, to farm the land at his expense, and "out of the proceeds from the sale of crops to be grown on said premises *and otherwise* provide the parties of the first part with all necessities of life"; "Third—Whereas, the parties of the first part are indebted to Ray Pitzer (another son) in the sum of \$1274.80 * * * the party of the second part hereby agrees to pay said indebtedness out of the proceeds from the sale of the crops to be raised on said premises *and otherwise*, and to save harmless the parties of the first part from being required to pay said indebtedness."

L. E. Pitzer died December 16, 1939, and Lydia Pitzer died subsequent to the death of Lewis.

The original obligation on which said claim is predicated is based upon claimed loans made by Ray Pitzer to his father and mother in the years 1924, 1925 and 1928. The statute of limitations was specifically pleaded as a defense, both in the demurrer and answer. The trial court allowed the claim in full but allowed interest thereon only from January 21, 1941, the date of filing the claim. Plaintiff takes the position that the claim and obligation was due and payable on June 20, 1936, the date of the agreement. Plaintiff therefore appealed from that part of the judgment disallowing interest from that date. Defendant appealed from the entire judgment.

The trial court found that the deceased, Lewis Lee Pitzer, contracted to pay the indebtedness due plaintiff by the written agreement "out of the proceeds from the sale of crops to be raised on the premises described and crops to be otherwise grown by decedent," after meeting prior specified obligations, i. e., maintenance and support of the mother and father, taxes, labor, interest on incumbrances, etc., which "were prior to the obligation to pay plaintiff"; that there were no proceeds from the sale of any such crops during the lifetime of deceased after meeting such prior obligations; that a reasonable time for the payment of plaintiff by deceased was four years from and after the date of the agreement; that the obligation of decedent to his parents to pay said indebtedness matured and fell due and payable on June 20, 1940, i. e. at the expiration of a reasonable time; that plaintiff had no knowledge of the existence

of said agreement until after the death of decedent, and that on January 21, 1941, plaintiff accepted the benefit of the agreement by filing and presenting his claim; that the claim was not barred by sec. 337, subd. 1, or by sec. 339, subd. 1 of the Code of Civil Procedure, as pleaded.

[1-3] It is first argued by defendant that plaintiff's complaint did not allege that the promise to pay the amount of the claim was a conditional promise to pay from a particular fund, and that the ultimate fact pleaded makes it appear that decedent's promise was an absolute and unconditional one as of the date of the agreement, citing *Van Buskirk v. Kuhns*, 164 Cal. 472, 475, 129 P. 587, 44 L.R.A., N.S., 710, Ann.Cas. 1914B, 932. The complaint refers to and incorporates as a part thereof a copy of the claim and written agreement sued upon and alleges that said sum is due and payable, under the terms of the agreement, and that the administrator rejected said claim. While proper pleading would require plaintiff to show when the indebtedness became due and payable (*Silvers v. Grossman*, 185 Cal. 696, 192 P. 534), the court specifically found that the deceased contracted to pay said sum out of proceeds from the sale of crops and that there were no proceeds from the crops out of which it could be paid during the lifetime of the deceased. The statute of limitations is an affirmative defense. The agreement was to pay from the proceeds of a particular fund. There is no showing in the pleadings that the cause of action accrued more than the statutory time before the filing of the claim and the complaint. The court specifically found on this issue. Any such omission in the pleading would not justify a reversal when defendant was not prejudiced thereby. Art. VI, sec. 4½, Constitution of Calif.

[4, 5] Defendant dwells at length upon the use of the words "and otherwise" above italicized, following the clause "out of the proceeds from the sale of the crops to be raised on said premises," and claims that the clause was not a requirement that the debt should be paid out of the proceeds from the sale of the crops, but requires that it be paid from other sources to be provided by the son if the crop proceeds were not sufficient. The wording of the agreement is susceptible of several translations. The most that defendant could contend is that the phrase, as used, meant that the indebtedness was to be paid out of the *proceeds* of the crops grown on the premises,

or out of the proceeds of the crops grown elsewhere, or crops otherwise grown by decedent, after meeting prior obligations. Under any interpretation, the fund from which the sum was to be paid made the agreement conditional, with no limitation of time. The construction given the contract by the trial court is not unreasonable. This interpretation will not be disturbed on appeal. *Tide Water Associated Oil Co. v. Curtin*, 41 Cal.App.2d 884, 107 P.2d 945.

[6] Ordinarily, under such circumstances, no cause of action would accrue thereon until the condition was performed. On that basis, the obligation would not ordinarily mature until there was sufficient money in his hands, for the specified purpose, from the proceeds of the sale of crops after payment of prior obligations specified in the contract. The statute of limitations would not commence to run until then. *Van Buskirk v. Kuhns*, supra.

[7-11] Section 1559 of the Civil Code provides that a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it. Such agreement, rather than the original indebtedness, constitutes the gist of the action by a creditor, insofar as the statute of limitations is concerned. *Sherwood & Sherwood v. Gill & Lutz*, 36 Cal.App. 707, 173 P. 171. Such a contract cannot be rescinded or revoked so long as the promisor continues to receive the consideration from the original promisee. *Malone v. Crescent City Mill & Transportation Co.*, 77 Cal. 38, 18 P. 858. Such a promise, although the party for whose benefit it was made was not cognizant of it when made, is, *if adopted by him*, deemed to have been made to him, and he may sue upon the promise thus made without a consideration passing from him to the promisor. *Sherwood & Sherwood v. Gill & Lutz*, supra, 36 Cal.App. at page 711, 173 P. 171. Where no time of payment is fixed, our courts have held that a reasonable time within which to pay is inferred and that such reasonable time may be coincidental with the statute of limitations. *Vickrey v. Maier*, 164 Cal. 384, 389, 129 P. 273; Civ. Code, sec. 1657. The law implies that the contract shall be performed within a reasonable time or at least reasonable efforts to perform within such time will be made. *Williston v. Perkins*, 51 Cal. 554. Reasonable diligence and good faith must be required in such instances and it is the duty of the court to hear evidence and therefrom

fix a time which would be fair. *Gazos Creek Mill, etc., Co. v. Coburn*, 8 Cal.App. 150, 96 P. 359.

[12] It is argued that the contract in question is purely personal in character and therefore the contract was discharged upon the death of the person who was to perform the act, citing 6 Cal.Jur. p. 448, sec. 267. This section also recites that the general rule does not apply where the services are of such a character that they may be as well performed by others; that if an instrument creates a debitum in praesenti, an obligation existing in the lifetime of the obligor, the fact that it is not to be discharged until after the latter's death renders it none the less enforceable as a demand against his estate, citing *Patterson v. Chapman*, 179 Cal. 203, 176 P. 37, 2 A.L.R. 1467.

This contract, as to the payment of plaintiff's indebtedness, would fall within the exception.

[13] The trial court has fixed four years from the date of the execution of the agreement as a reasonable time within which the contract could have and should have been performed. This period was reasonable under the circumstances. Under that finding, the obligation became due and payable at that time (June 20, 1940) and the statute of limitations began to run. The claim was filed on January 21, 1941, and this action was commenced on August 11, 1943, well within the four-year period prescribed by sec. 337, subd. 1 of the Code of Civil Procedure.

[14] From the record it appears that Lewis Lee Pitzer received title to the entire property with the understanding and agreement that this indebtedness would be paid to his brother from the proceeds of the crops and within a reasonable time. This assumption of debt was a part of the consideration for the agreement by which he acquired title to the property. His heirs now have the property. There appears to be no logical argument why the estate should now pass on to them, free from the obligation assumed by the deceased.

Interest was not allowed plaintiff from the date of the agreement. There was nothing in the written agreement requiring or even suggesting that interest should be paid on the obligation.

Plaintiff argues that, under sec. 1914 of the Civil Code, where a loan of money is

made, it is presumed to be made upon interest unless otherwise stipulated in writing, and therefore the allowance of interest from the date of the original agreement was mandatory. It is apparent from the record that it was not contemplated by any of the parties that interest would be paid on the indebtedness. Although plaintiff now claims the money was advanced to his parents to pay for an indebtedness on their home, counsel for the administrator disclaimed any knowledge of the nature of the indebtedness and there is no evidence that Lewis Lee Pitzer had knowledge thereof. It does not appear from the written agreement that the indebtedness contracted to be paid by Lewis was for a *loan*. As far as the written agreement is concerned, without extrinsic evidence, the indebtedness may have been for some other purpose. It might be plausibly argued that it was a means adopted by the father and mother to distribute a portion of their estate to plaintiff.

[15] A third person can enforce a contract made for his benefit only to the extent to which it was intended he should be benefited thereby. 6 Cal.Jur. p. 473, sec. 280. The finding that there was no inten-

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tion to pay interest in addition to the indebtedness assumed has evidentiary support.

[16] It is the general rule that the payment of interest must be the subject of an agreement, express or implied. *Slayden v. O'Dea*, 182 Cal. 500, 510, 189 P. 1066; *Adams v. Lambard*, 80 Cal. 426, 438, 22 P. 180; *Dugan v. Forster*, 104 Cal.App. 117, 121, 285 P. 384.

[17, 18] *Love v. Mabury*, 59 Cal. 484, was a case where the defendant agreed to pay a certain amount out of the proceeds of a mine, and he was entitled to a reasonable time within which to commence work. It was held that he was liable for interest from the expiration of such time. Where there is no contract to pay interest, in the absence of statutory provision to the contrary, the law awards interest upon money from the time it becomes due and payable, if such time is certain or can be made certain by calculation. The refusal of the trial court to allow interest from the date of the original agreement must be affirmed.

Judgment affirmed.

BARNARD, P. J., and MARKS, J. concur.

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SECOND SERIES

27 Cal.2d 631

BURNS et al. v. BROWN et al.
Sac. 5685.

Supreme Court of California, in Bank.
Feb. 8, 1946.

As Modified on Denial of Rehearing
Feb. 28, 1946.

1. Appeal and error ⇐559

The judgment roll, notice of appeal and notice of election to proceed under rule 7 are necessary parts of a settled statement, which either party has the right to have included in the record on appeal. Code Civ.Proc. § 652; Rules on Appeal, rule 7.

2. Appeal and error ⇐560

In excluding statements of the evidence from the settled statement on ground that it was not objective and truthful, but consisted of fragmentary and misleading partisan statements, a trial judge is not refusing to perform his duty in settling the statement, but is simply insisting that the proposed statement is incorrect and should be revised to present an accurate picture of the proceedings. Code Civ.Proc. § 652; Rules on Appeal, rule 7.

3. Appeal and error ⇐560

Where trial court rejects appellants' statement of the evidence as inaccurate, the appellate court will not endeavor to discover whether appellants' version of the statement is correct, since the object of the settled statement procedure, the furnishing of a short record in order to conserve the time and effort of the reviewing court, would be frustrated by such procedure. Code Civ.Proc. § 652; Rules on Appeal, rule 7.

4. Appeal and error ⇐607(1)

The statute dealing with the allowance of a bill of exceptions is not applicable to the preparation of a record under the new rules which eliminate the presenting of exceptions under former statute and provide

simply for a condensed statement of the procedure. Code Civ.Proc. § 652; Rules on Appeal, rules 6, 7.

5. Appeal and error ⇐607(1)

The statute dealing with the allowance of a bill of exceptions cannot be invoked to settle a dispute between a trial judge and a party as to what constitutes a correct statement of the oral evidence. Code Civ.Proc. § 652; Rules of Appeal, rules 6, 7.

6. Appeal and error ⇐659(1)

A conflict between the trial judge and a party with respect to the correctness of the proposed statement of the evidence cannot be solved by the exercise of an appellate court's authority under court rule to order the augmentation and correction of the record. Code Civ.Proc. § 652; Rules on Appeal, rule 12.

7. Appeal and error ⇐607(1)

Appellants who failed to make a motion for new trial within the period prescribed therefor cannot demand that their version of the evidence be incorporated in a settled statement as the authentic description of the proceedings, when the trial judge denies its authenticity. Code Civ. Proc. § 652; Rules on Appeal, rules 5(a), 7(b).

8. Appeal and error ⇐607(1)

Upon failure of proceedings to obtain a settled statement, appellant should be given additional time to bring up a reporter's transcript, but when appellant fails to avail himself of this method of preparing the record on appeal, and he fails to convince the trial judge that his statement accurately reflects the proceedings, the action of the trial judge must be regarded as final. Code Civ.Proc. § 652; Rules on Appeal, rules 6, 7, 12.

9. Appeal and error ⇐607(1)

Where the failure to include the judgment roll, notice of appeal, and notice of election to proceed under rule 7, in the

settled statement was due to the wording of appellant's notice, and under such circumstances that appellants could be released from default under rule 53b, trial court would be directed to include in the record on appeal the judgment roll, notice of appeal, and notice of election to proceed. Code Civ.Proc. § 652; Rules on Appeal, rules 5, 7, 53(b).

SCHAUER, J., dissenting on rehearing.

Action by Joseph J. Burns and Sidney M. Goodman against Eugene R. Brown and Beatrice Brown and others to quiet title to a mining claim. From a judgment quieting title in defendants, plaintiffs appeal. On plaintiffs' petition to prove the transcript.

Order in accordance with opinion.

Prior opinion, 66 Cal.App.2d 142, 151 P.2d 899.

Thomas Cotter, of Eureka, and Abraham Glicksberg, of San Francisco, for appellant.

W. T. Miller, of Grants Pass, Or., and Paul A. Brunk, of Crescent City, for respondent.

TRAYNOR, Justice.

This petition was originally filed in the District Court of Appeal, Third Appellate District, "to prove transcript under section 652 of the Code of Civil Procedure." The District Court of Appeal denied the petition, and this court granted a hearing to consider the import of section 652 and the new Rules on Appeal.

The petition alleges that petitioners, as plaintiffs, brought an action in the Superior Court of Del Norte County; that judgment was rendered against them and notice of appeal given; that they gave notice under rule 7 to bring up a settled statement as the record on appeal, and served and filed a proposed statement; that thereafter amendments were proposed by respondents, and the trial court entered an order "settling narrative statements," and signed an "Engrossed Statement on Appeal."

Petitioners contend that the record as settled is incomplete because the trial court failed to include certain matters required by rule 7, namely, the judgment roll, notice of election to proceed by settled statement, the points to be raised on appeal, and a narrative statement of the oral proceedings. Petitioners pray that "the set-

tled statement on appeal be proved before this court," certified as correct, and filed with the clerk of the trial court.

The objection relating to the omission of the points on appeal is unfounded, for they were included in the settled statement.

[1] The judgment roll, notice of appeal and notice of election to proceed under rule 7, however, are necessary parts of a settled statement, rule 7(b), which either party has the right to have included in the record on appeal.

The trial court excluded from appellants' proposed narrative statement all description of the evidence taken at the trial on the ground that, instead of giving a narrative summary of the proceedings, appellants "have attempted to set forth certain fragments of evidence produced at the trial, together with their interpretation of the meaning and effect of other evidence and argument thereon, which this court feels is material-not properly in a narrative statement." The trial court also excluded as "deliberate misstatement of facts" appellants' proposed statements with respect to an order made after the trial appointing a referee surveyor and with respect to the ensuing survey fixing the boundaries of an overlap of the mining claims recorded for the parties. The trial judge included in the settled statement the following description of the proceedings leading to his order: "At a hearing before the court it appeared that the overlap was not a right angle triangle as set out in paragraph 1 of the plaintiffs' proposed additional findings, but was more of a parallelogram. Whereupon it was orally stipulated by counsel for the parties that the property be surveyed under the direction of the court by a disinterested surveyor for the sole purpose of ascertaining the correct description of the overlap. It was also stipulated that, there being no disinterested surveyor in Del Norte County, Hal C. Acheson, a licensed surveyor from Humboldt County be appointed to survey the said overlap, and in accordance with said stipulation the following order was made." Appellants' proposed statement asserted that after trial and while holding the case under advisement, the trial court on its own motion appointed Hal C. Acheson as referee surveyor for the purpose of surveying the overlap, that no copy of the order was furnished to the surveyor or appellants, that the survey was made under

instructions of the trial judge and in his presence, and in the presence of respondents and their counsel but in the absence of appellants and their counsel, that under the instructions of the judge "no attempt was made by said referee to locate any of the alleged corners on the south side of defendants' alleged claim, or to retrace, or to find if possible, any location work as to the south side of defendants' claim." In support of these statements appellants submitted affidavits and requested their inclusion in the settled statement. It appears from the record that appellants moved for a new trial on the ground of the asserted impropriety of the survey and the order appointing the surveyor, but that their motion was denied without decision on its merits since it was made after the statutory period for filing notice of motion had expired.

[2,3] The trial judge rejected appellants' statement of the evidence taken at the trial and the events surrounding the survey on the ground that it was not objective and truthful, but consisted of fragmentary and misleading partisan statements. In excluding statements on that ground a trial judge is not refusing to perform his duty in settling the statement; he is simply insisting that the proposed statement is incorrect and should be revised to present an accurate picture of the proceedings. Appellants contend, however, that all statements proposed by them were accurate and proper and that this court under section 652 should determine their accuracy and propriety and include them in the settled statement. What appellants ask is that the appellate court endeavor to discover whether appellants' version of the statement is a fair condensation of the proceedings in the trial court. In effect, appellants, who have not been successful in obtaining settlement of their statement, ask the appellate court to settle a statement instead of the trial court. The object of the settled statement procedure, the furnishing of a short record in order to conserve the time and effort of the reviewing court, would be frustrated by such a procedure.

[4,5] Section 652, dealing with the allowance of a bill of exceptions, is not applicable to the preparation of a record under the new rules which eliminate the presenting of "exceptions" under former section 648 et seq. (repealed in 1945) and provide simply for a condensed statement of the proceedings. It is true as contend-

ed by appellants that in 1933 section 652 was amended to provide that: "If the judge in any case, in the superior court, refuses to allow a bill of exceptions or to certify a transcript in accordance with the facts, the party desiring the bill settled or the transcript certified may apply by petition to the Supreme Court * * * to prove the same." This section, however, cannot be invoked to settle a dispute between a trial judge and a litigant as to what constitutes a correct statement of the oral evidence at the trial. *Lane v. Pacific Greyhound Lines*, 55 Cal.App.2d 525, 131 P.2d 53. Even before the 1933 amendment it was held "that, when an exception to a particular ruling has been allowed, this court has no authority to strike out any evidence or other matters stated in connection with such ruling, upon the ground that such evidence was not given, or that such matters are untrue or incorrectly stated, from which it follows that we are equally without authority to add to the statement of the ruling and exception contained in the settled bill any evidence or other matters which may be alleged to have been improperly omitted therefrom. * * * If the judge has put in incorrect statements of evidence or other matters bearing upon his rulings, or has omitted evidence or other matters claimed to be material, the evil is not remediable here." *In re Estate of Dolbeer*, 147 Cal. 359, 361, 81 P. 1098; *Vance v. Superior Court*, 87 Cal. 390, 25 P. 500; *Hyde v. Boyle*, 86 Cal. 352, 24 P. 1059; *Landers v. Landers*, 82 Cal. 480, 482, 23 P. 126; *In re Gates*, 90 Cal. 257, 259, 27 P. 195. It follows that section 652 cannot be invoked to harmonize the views of the trial judge and a party with respect to the correctness of the proposed statement.

[6,7] Nor can such conflict be solved by the exercise of an appellate court's authority under rule 12 to order the augmentation and correction of the record. This rule does not authorize the reviewing court to take the place of the trial court and determine whether a proposed statement accurately and fairly reflects the proceedings in that court. Appellants' version of the proceedings surrounding the survey, and the affidavits supporting it would have constituted part of the record, had appellants made a timely motion for new trial. Rules 5(a), 7(b). Having failed to make such a motion within the period prescribed therefor, they cannot demand that their

version be incorporated in a settled statement as the authentic description of the proceedings, when the trial judge denies its authenticity.

[8] In many instances the answer to the deadlock ensuing from such conflicting views of the trial court and a party will be found in our decision in *Averill v. Lincoln*, 24 Cal.2d 761, 151 P.2d 119, where we held that upon failure of proceedings to obtain a settled statement, the appellant should be given additional time to bring up a reporter's transcript. When appellant cannot or does not want to avail himself of this method of preparing the record on appeal, either because a reporter was not present at the proceedings or for other reasons, and when he fails to convince the trial judge that his statement accurately reflects the proceedings in question, the action of the trial judge, who heard and tried the case, must be regarded as final. His familiarity with the trial and knowledge of what took place there make him uniquely qualified to determine what the evidence was and whether it has been correctly stated. In *re Gates*, 90 Cal. 257, 259, 27 P. 195; *Vance v. Superior Court*, 87 Cal. 390, 393, 25 P. 500.

[9] The trial judge excluded the judgment roll, notice of appeal, and notice of election to proceed under rule 7, from the settled statement on the ground that appellants' notice stated "that appellants desire in lieu of a reporter's transcript to pursue and perfect their appeal upon an agreed or settled statement as provided for in said Rule 6 and 7." This notice did not refer to either subdivision (a) or subdivision (b) of rule 7. By stating that they desired to perfect their appeal upon an agreed or settled statement "in lieu of a reporter's transcript" appellants invited the construction placed upon the notice by the trial judge that they intended to proceed under rule 7(a) and did not contemplate the inclusion in the settled statement of the parts of the record that would be included in the clerk's transcript. Appellants state, however, that they intended the settled statement to include such parts of the record and that they did not give notice for a clerk's transcript, rule 5(a), because of their belief that their general reference to rule 7 in their notice for settled statement included subdivision (b) of that rule. It is not necessary to determine whether or not the general reference to rule 7 was

adequate, for in any event it would be proper under the circumstances to relieve appellants under rule 53(b) from a default arising from the wording of their notice. The trial court is therefore directed to include in the record on appeal the judgment roll, notice of appeal, and notice of election to proceed under rule 7.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.

Rehearing denied; SCHAUER, J., dissenting.



27 Cal.2d 649

PEOPLE v. BARNETT.

Cr. 4681.

Supreme Court of California, in Bank.

Feb. 8, 1946.

1. Criminal law ☞ 1023(3)

An order in a prosecution for a sexual offense refusing to adjourn the proceedings or to suspend sentence for purpose of determining whether defendant was a sexual psychopath was not appealable but could be reviewed on appeal from the judgment of conviction. Pen.Code, § 288a; Welfare and Institutions Code, §§ 5500, 5501.

2. Criminal law ☞ 625

Where an unequivocal and uncontradicted showing is made by affidavit that defendant in a prosecution for sexual offenses falls within meaning of the term "sexual psychopath" as defined by Welfare Code, denial by court, both before, during and after the trial, of the fuller hearing upon the issue of whether he is a sexual psychopath, constitutes an abuse of discretion. Pen.Code, § 288a; Welfare and Institutions Code, §§ 5500-5503, 5511, 5512, 5512.5.

3. Criminal law ☞ 625

The Legislature, by deleting the words "against children" from the code section defining a sexual psychopath, disclosed that it did not intend that the word "children", as it had been used, was to be limited to chil-

dren under 14 years of age, but disclosed intent that code section is to have liberal construction and application. Welfare and Institutions Code, § 5500.

See Words and Phrases, Permanent Edition, for all other definitions of "Children".

4. Criminal law ☞625

Where trial court found defendant guilty of 12 separate sexual offenses, which offenses constituted defendant a menace to health and safety of boys against whom they were committed, and three physicians concurred in opinion that defendant was congenitally affected with a condition resulting in a psychopathic personality and was powerless to refrain from such offenses, denial to defendant of a full trial on issue of sexual psychopathy was an abuse of discretion. Pen.Code, § 288a; Welfare and Institutions Code, §§ 5500-5503, 5511, 5512, 5512.5.

5. Criminal law ☞511(7)

In prosecution upon a charge of sexual perversion where youth with whom act was accomplished was an accomplice, defendant's testimony before grand jury admitting the perpetration at the time charged with the boy named of the specific act charged was sufficient corroboration of boy's testimony to authorize a conviction. Pen.Code, §§ 288a, 1111.

6. Criminal law ☞1036(8)

Where defendant in prosecution for sexual perversion did not claim to have been prejudiced or misled by failure of prosecution to prove more definitely the exact date of particular offense and no objection was made on that ground, conviction would not be disturbed for such failure. Pen.Code, § 288a.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Earl Barnett was convicted on 12 counts of an indictment, each charging a separate offense under Penal Code, § 288a. From the judgment of conviction, an order denying a new trial, and an order refusing to adjourn the proceedings or suspend sentence to determine whether defendant was a sexual psychopath, he appeals.

Judgment of conviction reversed in part, order denying a new trial affirmed, appeal from order refusing to adjourn the pro-

ceedings dismissed, and cause remanded with directions.

Prior opinion 161 P.2d 571.

Robert A. Zarick, Wallace Shepard, and Thomas O'Hara, all of Sacramento, for appellant.

Robert W. Kenny, Atty. Gen., and Ward Sullivan, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

[1] Defendant was convicted by the court, without a jury, on twelve counts of an indictment, each of which charged him with a separate offense under section 288a of the Penal Code. Before, during, and following the trial defendant moved the court pursuant to the terms of section 5501 of the Welfare and Institutions Code to grant him a hearing to determine whether he is a sexual psychopath as defined by section 5500 of the same code. On each occasion the motion, based upon affidavits of a brother of defendant to which were appended written statements of three physicians that they considered defendant to be a sexual psychopath, was denied. Thereupon judgment was pronounced and defendant was sentenced to the state prison. He appeals from the judgment of conviction and from an order denying a new trial, and attempts to appeal "from the Court's order refusing to adjourn the proceedings and/or to suspend sentence for the purpose of hearing and determining whether or not the defendant * * * was and is a sexual psychopath." The latter order is, under the circumstances of this record, not appealable, but is reviewed on the appeal from the judgment.

Defendant's chief contention is that the court erred in denying his motion for a hearing to determine whether he is a sexual psychopath. Defendant argues also the sufficiency of the evidence to support his conviction on count three of the indictment. We have determined that upon the showing made defendant is entitled to the hearing he seeks, but that the conviction on count three is supported by the evidence.

The pertinent provisions of the Welfare and Institutions Code which relate to sexual psychopaths presently read as follows:

"Section 5500. As used in this chapter, 'sexual psychopath' means any person who is affected, in a form predisposing to the commission of sexual offenses [against children], and in a degree constituting him a

menace to the health or safety of others, with any of the following conditions:

"(a) Mental disease or disorder.

"(b) Psychopathic personality.

"(c) Marked departures from normal mentality."

(The words "against children" which appear in brackets in the above section were in effect at the time of the trial of this case but were deleted by amendment in 1945.)

"Section 5501. If, when any person is charged with a crime, either before or after adjudication of the charge, it appears by affidavit to the satisfaction of the court that such person is a sexual psychopath within the meaning of this chapter, the court may adjourn the proceeding or suspend the sentence, as the case may be, and thereupon proceed as provided by this chapter.

"The affidavit shall be substantially in the form specified for the affidavit of insanity in section 5051 [apparently reference to § 5049 is intended] and shall state fully the facts upon which the allegation that the person is a sexual psychopath is based. If the person is then before the court or is in custody, the court may order that the person be detained in a place of safety until the issue and service of a warrant of apprehension as provided by this chapter.

"The judge or justice presiding in such court shall issue and deliver to some peace officer for service, a warrant directing that the person be apprehended and taken before a judge of the superior court for a hearing and examination upon the allegation that the person is a sexual psychopath. * * *

"Section 5502. If, upon the hearing on the allegation of sexual psychopathy, the person before the court upon trial or under conviction, is found not to be a sexual psychopath, the court may proceed with the trial or impose sentence, as the case may be. If upon the hearing on the allegation of sexual psychopathy, the person is found to be a sexual psychopath, the court may suspend the proceedings and commitment to the Department of Institutions for placement in a State hospital shall proceed, according to the provisions of this chapter. * * *

"Section 5503. The person alleged to be a sexual psychopath shall be taken before a judge of the superior court * * *. The judge shall then inform him that he is alleged to be a sexual psychopath, and inform him of his rights to make a reply to

the allegation and to produce witnesses in relation thereto. * * *

"Section 5511. The alleged sexual psychopath shall be present at the hearing * * *.

"Section 5512. If, after examination and hearing, the judge believes that the person is a sexual psychopath, he shall make and sign an order that the person be committed to the Department of Institutions for placement in a State hospital for the care and treatment of the insane. * * *

"Section 5512.5 Persons found by the court to be sexual psychopaths under this chapter shall have the same rights to jury trial as provided in this code for persons mentally ill or insane."

Provision is also made for examination of the alleged sexual psychopath by psychiatrists, for attendance of witnesses, and for payment of the expense of commitment, delivery, and care of the person at the hospital. Other sections set forth the procedure to be followed in case of recovery of one who has been adjudged a sexual psychopath or in case the superintendent of the state hospital is of the opinion a sexual psychopath who has not recovered will not benefit from further treatment.

In support of his contention that the court erred in not granting a hearing to determine whether defendant is a sexual psychopath, defendant relies upon the proposition laid down in *People v. Haley* (1924), 46 Cal.App.2d 618, 622, 116 P.2d 498, to the effect that the provisions of the first paragraph of section 5501, quoted hereinabove, confer upon the court and, as a corollary, require the exercise of, a sound discretion to determine from the affidavit therein described whether defendant is a sexual psychopath and so entitled to a further hearing on the matter, and urges that in view of the uncontroverted allegations of the original affidavit of defendant's brother and of a supplement thereto and of the attached reports of physicians the court abused its discretion in denying to defendant the requested hearing.

The original affidavit states, among other things, that defendant is forty-five years of age, unmarried, and by occupation an architect; that affiant (who does not claim to be a medical expert) as a result of reading the transcript of the testimony taken before the grand jury upon which the indictment against defendant was returned and of reading the medical statements attached to

the affidavit believes that defendant "is affected with a predisposition and uncontrollable desire and impulse to commit sexual offenses against children upon any and all occasions when by chance or otherwise he comes in contact with such children and the opportunity for the commission of said acts is present; is affected in a form predisposing to sexual offenses against children, to wit: That he shows marked departures from normal physical development, normal physiological development which in turn has produced marked departures from normal mentality. That the departures from normal mentality include but are not limited to disorder of his ideation, reasoning and judgment and comprehension concerning all things sexual; disorder in the emotional sphere in relation to sex; and disorder in the very instinctive basis of sex and the desires and impulses that lead therefrom.

"That an innate organic inability to profit by experience, to fit into social patterns of behavior, or to respond to self discipline, together with the whole mental picture, indicate the presence of a psychopathic personality; that a review of the testimony taken before the Grand Jury, as aforesaid, indicates that the said Earl Barnett * * * for the past 30 or more years has been homosexual in the gratification of his sexual desires; that he has for more than five or six years last past persistently engaged in sexual offenses with and upon young boys ranging in age from 13 to 18 years old, such offenses including [various described lewd and unnatural practices] * * * but that the central core of his sexual aberration and variation consists of the fixation of attraction, ideation in both consciousness and in his dreams, of boys of 14 or of immature years."

One of the medical statements, in which two physicians joined, reads as follows: "[W]e are of the opinion that he [defendant] is a Sexual Psychopath within the meaning and intent of Section 5500 of the Welfare and Institutions Code. * * * [T]his individual * * * can be classified under well known and generally accepted medical rules with reference to his sex reactions and behavior. He suffers from a congenital condition technically known as inversion. He is an Invert, a type of individual in whom not only is there defective microscopic brain structure, but in addition to this brain defect a congenital variation in the structure of endocrine

glands which have a determining effect upon character. Such persons all have psychopathic personalities and when their sex life is considered, are Sexual Psychopaths.

"* * * [T]his condition is congenital. It is inborn and exists in the microscopic structure of his body. He is in sexual matters an Invert: i.e. one whose interest sexually has been turned congenitally by a power outside of him and apart from any consideration of free will from normal interest and satisfaction in the opposite sex to a condition where he is interested in, attracted by and obtains sexual satisfaction from his own sex. When this results in obvious and often unlawful, as well as shocking and indecent, anomalies in sexual behavior, such acts should be considered not as vicious manifestations of a perverted free will, but rather as the unfortunate and destructive results of a congenitally bad brain and glandular makeup under the influence of the bad habits of a corrupt environment.

"* * * [W]hile this inborn basis for inverted and anti-social sex conduct may possibly serve to extenuate the purely moral dereliction involved in his conduct, it renders the individual so afflicted an even greater menace to society, in general, and to the age group of children which he prefers, in particular, than are individuals who may indulge in similar practices for reasons other than an inborn urge, for congenitally afflicted individuals such as the defendant will not abstain, when opportunity affords, from the aberrant sex practices characteristic of their inverted nature, because they can not."

The other medical statement recites as the opinion of the physician making it that defendant "presents: 1. Certain elements of mental disorder. 2. A psychopathic personality. 3. A marked departure from normal mentality. There are readily apparent anatomic and physiological abnormalities which lie at the basis of the above. * * * [Such abnormalities are then enumerated.] These anatomical and physiological abnormalities are congenital and they have determined in toto the evolution of his sex psychology. He is as he is, for exactly the same reason that a normal man is as he is * * * in the matter of sex. * * *

"Just as nature has broadened his pelvis * * * so has nature made him associate words one with the other in a feminine rather than masculine way. Given him the

visual imagery of a woman, caused him to seek and retain knowledge that is feminine, caused him to respond to anger provocations more as a woman than a man. Given him likes and dislikes of a great number of sorts, which are common to the female rather than the male. Forced him to choose material for art work, writing, studying, travelling, in a female manner in the ratio of 10 to 2. Nature has so built him that authoritative scientific tests of the total masculinity or femininity in his nature given him a score 85 points away from the average masculine score. (Male average 52: female average 70: Barnett's score—feminine 33) Such a long list of abnormalities, variations or perversions of mind indicate 'certain elements of mental disorder' * * *

"On the basis of these abnormalities * * * this subject has found himself in opposition to established modes, customs and conventions of the society in which he lives. But, unable to change * * * he has not responded to self discipline: has been unable to profit by the experience of mental discomfort and anxiety; and has been unable to fit into social patterns. This status of mind establishes him as a 'psychopathic personality.'"

"Such things * * * mark the defendant as one with definite departures from normal mentality. The extent to which the abnormal mentality has expressed itself in untoward behavior moves us to state that the departures from normal mentality are marked.

"The analysis of his personality up to this point when coupled with perverted sexual behavior indicate that this man is a homosexual. * * *

The supplemental affidavit, also made by defendant's brother, added no material facts but merely incorporated a copy of the transcript of the grand jury testimony, referred to in the original affidavit.

It is not contended that the trial judge was an expert in such matters. Nevertheless, he determined, contrary to the positive and undisputed statements of the three physicians, that defendant was not affected, in a form predisposing to the commission of sexual offenses and in a degree constituting him a menace to the health or safety of others, with either (a) mental disease or disorder, (b) psychopathic personality, or (c) marked departures from normal mentality. (Welf. & Inst.Code, § 5500.)

[2] The People rely upon the declarations in *People v. Haley* (1941), supra, 46 Cal.App.2d 618, 622, 116 P.2d 498, 501, that it is "not mandatory that the court shall adjourn the criminal proceeding when the affidavit is filed. The word 'may,' as it is used in that section [5501] should not be construed as a mandatory direction to the court regardless of the sufficiency of the showing. It is merely discretionary. Unless there is an abuse of that discretion the ruling of the court in that regard may not be disturbed on appeal." However, we are of the opinion that where, as here, an unequivocal and uncontradicted showing is made by the affidavit that the accused falls within the meaning of section 5500, the denial by the court (both before, during and *after* the trial) of the fuller hearing upon the issue, which is provided for by subsequent sections of the Welfare and Institutions Code, constitutes an abuse of discretion. (We do not imply that postponement of such a hearing until after the trial and adjudication of guilt would be otherwise than proper.)

[3] Although there was some suggestion that the youths upon whom defendant committed the acts with which he was charged, all of whom were between 14 and 18 years of age at the time of such acts, were not "children" within the meaning of section 5500 as it read at the time of the trial, it does not appear that the trial court based its denial of defendant's motions upon that ground. Moreover, the argument that the word "children" as used in this statute should be narrowed to exclude children of 14 years of age or over, if ever persuasive, has lost all substantiality by reason of the deletion of the word from the act by the amendments of 1945. It is apparent that the Legislature intended that the statute shall have liberal construction and application.

[4] As stated hereinabove, the court, without a jury, found defendant guilty of the commission of twelve separate sexual offenses, and it cannot be seriously disputed that such offenses constituted him a menace to the health and safety of the boys against whom they were committed. The three physicians, experts in such matters, concurred in the opinion that defendant was congenitally affected with a condition resulting in a psychopathic personality and was therefore powerless to refrain from such offenses. One of the physicians was

of the further opinion that defendant was also affected with mental disease or disorder and with marked departures from normal mentality. The conclusion that the trial court, in view of the strong showing made by defendant, abused its discretion in denying to him a full trial on the issue of sexual psychopathy appears inescapable. As declared in *Gossman v. Gossman* (1942), 52 Cal.App.2d 184, 194, 126 P.2d 178, 184, "Even within its legal limits the power [of judicial discretion] is not unbridled. The mere fact that a court may have jurisdiction to make an order does not equip it to exercise *judicial discretion*. Its acts must not only be confined within the field of *discretion* but must also be of a character within the bounds of the limiting adjective 'judicial.' To exercise that power all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent, and just decision. On that basis then, and guided thereby, it gives latitude to the trial judge to express his own convictions in the declaration of rights and application of remedies." We are of the view that substantial justice, in a liberal interpretation and application of this remedial statute and in the light of the facts shown, requires that defendant be granted the hearing he requested.

[5] Defendant contends also that the judgment finding him guilty of the offense charged in count three of the indictment is not supported by the evidence because the testimony of the boy with whom such alleged offense was committed established that he was an accessory thereto and, asserts defendant, such testimony lacks corroboration. The prosecution concedes that the witness was an accomplice to the acts described by him and that therefore his testimony must be corroborated under section 1111 of the Penal Code. However, defendant's contention that such testimony is uncorroborated is without merit. The indictment charged defendant with thirteen separate offenses under section 288a of the Penal Code, performed with various boys. Each count alleged the date "on or about" which the particular offense was committed and the name of the boy involved. Count six was dismissed upon motion of the prosecution. As stated above, defendant was found guilty on each of the other twelve counts. Count three alleged an offense with

a named boy "on or about the 15th day of July, A.D. 1944." No other count alleged an offense committed in that month, or in any other summer month of 1944.

[6] The boy named in count three testified in detail as to his participation with defendant at the latter's home during the summer of 1944 in the act charged in such count. Three other boys, who were named in other counts of the indictment and who the witness testified accompanied him to defendant's home in the summer of 1944, also testified in detail as to the unnatural practices of defendant. In addition, defendant freely and voluntarily admitted in his sworn statement to the grand jury, which was received in evidence at the trial, the commission of "immoral activities" during 1943 and 1944 with each of the boys named in the indictment and in particular admitted the perpetration during the summer of 1944 with the boy named in count three of the specific act charged in that count. Thus defendant's own testimony furnishes adequate corroboration of the offense described in the challenged count. (See 8 Cal.Jur. 178, § 256.) Moreover, defendant does not claim to have been misled or prejudiced by failure to prove more definitely the exact date of the particular crime, and at the trial made no objection on that account. Under such circumstances the judgment of conviction as to count three cannot be disturbed.

The judgment of conviction is reversed only insofar as it commits defendant directly to imprisonment in a state prison and otherwise is affirmed as to all twelve counts. The order denying defendant's motion for a new trial is affirmed. The cause is remanded to the trial court with directions "to suspend sentence for the purpose of hearing and determining whether or not the defendant * * * is a sexual psychopath," to grant defendant the requested hearing, and after such hearing to commit the defendant to the Department of Institutions or to a state prison as may be determined according to law, and to make such other orders in the premises as may be meet. The purported appeal "from the Court's order refusing to adjourn, the proceedings * * *" is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

27 Cal.2d 678

PEOPLE v. MITCHELL**Cr. 4648.**

Supreme Court of California, in Bank.

Feb. 15, 1946.

1. Criminal law ⇨238

In a preliminary examination, defendant need not be proved guilty beyond a reasonable doubt, and "reasonable or probable cause" required to uphold the commitment of a defendant exists if there is sufficient proof to make it reasonable to believe that defendant is guilty of offense charged. Pen.Code, §§ 872, 995.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable or Probable Cause".

2. Automobiles ⇨344

A person commits an "unlawful act" within meaning of involuntary homicide statute, if he violates speed laws designed to prevent injury to person, and he is guilty of involuntary manslaughter if death is caused thereby. Pen.Code, § 192.

See Words and Phrases, Permanent Edition, for all other definitions of "Unlawful Act".

3. Criminal law ⇨238

Where evidence before committing magistrate, if accepted as true, would support conclusion that defendant drove his automobile not only in violation of speed laws but in reckless disregard for safety of others, dismissal of information because it was not sufficient to justify holding defendant for trial was error. Pen.Code, § 192, subd. 2, §§ 872, 995; Vehicle Code, §§ 510, 511.

4. Automobiles ⇨344

The provision in Vehicle Code relating to negligent homicide in operation of automobile, which specifically provided that provisions of Penal Code defining involuntary manslaughter should not apply to homicide caused by driving of any vehicle, prevented dual liability for same conduct. Vehicle Code, § 500; Pen.Code, § 192.

5. Statutes ⇨169

The statutory rule against revival of a statute by repeal of a repealing act relates to absolute repeals, and not to cases where a statute is left in force and all that is done in way of repeal is to except certain cases from its operation, and in such cases the

statute does not need to be revived for it remains in force, and the exception being taken away, the statute is afterwards to be applied without exception.

6. Automobiles ⇨316**Statutes** ⇨169

The 1941 amendment of Vehicle Code providing that definition of involuntary manslaughter as contained in Penal Code should not apply to homicide caused by driving of any vehicle does not repeal such definition, but merely created an exception to its application, and, hence, when amendment was repealed, definition again applied without exception. Vehicle Law, § 500; Pen.Code, §§ 192, 193; Government Code, § 9607.

7. Criminal law ⇨1048

The purpose of formal exception on appeal in criminal case was to cause the question of law, which was presented to and decided by trial court, to be made a matter of record, so that it could be re-examined by trial court on motion for new trial or be reviewed by appellate court, and the widespread use of reporter's transcript as record on appeal and modernization of bill of exceptions into a narrative statement of the proceeding have resulted in practical disappearance of formal exception in appellate procedure. Pen.Code, § 1259; Rules on Appeal, rule 7.

8. Criminal law ⇨1104(I)

In criminal cases, the record on appeal must be a reporter's transcript, unless it is unobtainable, thereby indicating that formal exception in criminal cases has become obsolete. Rules on Appeal, rules 7, 33, 36.

9. Criminal law ⇨1050

Appeal by people from order dismissing information would not be dismissed for failure to take an exception to order appealed from. Pen.Code, §§ 1238, 1259; Rules on Appeal, rules 7, 33, 36.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Prosecution by the People against Bart Mitchell for involuntary manslaughter. From an order dismissing the information, the people appeal.

Order reversed.

Prior opinion, 157 P.2d 862.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty. and Eugene R. Duket, Deputy Dist. Atty., both of San Diego, for appellant.

C. W. Bowers, of Los Angeles, Edgar B. Herve, of San Diego, and Henry F. Walker, of Los Angeles, for respondent.

TRAYNOR, Justice.

Defendant was charged by information with involuntary manslaughter alleged to have been committed in violation of subdivision 2 of section 192 of the Penal Code. The superior court on motion of defendant entered an order dismissing the information on the ground that the evidence before the committing magistrate was insufficient to justify holding the defendant for trial. The People appeal.

The record on appeal does not include the reporter's transcript of the evidence at the preliminary examination. The reporter's transcript of the proceedings in the superior court, however, includes a summary by counsel for defendant of the evidence taken at the preliminary examination, which counsel for the prosecution agreed was a fair and complete summary of all the evidence before the committing magistrate. This summary was given by counsel for defendant in presenting his motion to enable the court to pass on the sufficiency of the evidence at the preliminary examination. Defendant has no cause to complain if his counsel's summary is used by this court for the same purpose.

On October 30, 1944, at about 6 o'clock in the evening, defendant drove his car in a southerly direction on Park Boulevard and Twelfth Avenue in San Diego. An accident occurred on Twelfth Avenue near the intersection of Park Boulevard and Russ Street. The part of Park Boulevard involved herein runs in a general northerly and southerly direction across Balboa Park. As it approaches the main buildings of the United States Naval Hospital from the north it makes a broad curve to the west, returns into a slight curve to the east, and joins the north end of Twelfth Avenue at Russ Street. Commencing near the hospital the grade of Park Boulevard descends to the south. A street car track runs along the east side of the boulevard, crosses Russ Street, and proceeds south on Twelfth Avenue. Both Park Boulevard and Twelfth Avenue are main thoroughfares and at times carry considerable ve-

hicular traffic. There is a 25-mile an hour speed limit sign on the west side of Park Boulevard about 180 feet north of the north line of Russ Street.

The evidence as summarized by defendant's counsel shows that defendant drove his automobile downgrade on Park Boulevard at such a high rate of speed that when he came upon a street car that had stopped south of Russ Street to take on and discharge passengers, he could not stop his automobile behind the street car. He swerved to the left to avoid hitting passengers and collided with the left rear corner of the street car thereby losing control of his automobile. The automobile came to rest against a trolley-line-support pole, which was broken by the impact. A police officer who arrived at the scene after the accident gave a description of his findings, quoted by counsel as follows: "He says this: 'The rear of the street car at the point contact was made between the car and the street car, was approximately eighty-one feet south of the south line of Russ. Prior to this point running up to the end of the street car was approximately twenty-seven feet of centrifugal skid'—showing an application of the brakes about twenty-seven feet before the collision—leading from the point of impact to where the car was setting was approximately fifty-one feet of centrifugal skid.' In other words, there was a skid mark fifty-one feet after the contact with the street car and twenty-seven feet before. At the point where the car was resting, a support pole which supports the trolley lines for the street car, was broken off at the base. Also an ornamental light standard which was along side the support pole, was badly damaged." Two United States Navy Waves who were walking west on Russ Street observed the accident. One testified concerning the speed of the automobile: "We thought it was going very rapidly, and in my opinion about seventy." The other testified that it was travelling "very fast"; that when she first saw the automobile "it was going around a curve," and that "as it turned to its left coming around the curve * * * it was on two wheels * * * the right front and the right rear wheels, and * * * the other wheels were in the air." Harvey Anderson, who was riding with defendant, died of injuries received in the accident.

The question presented at the outset is whether the superior court was justified in holding that there was not sufficient cause

to believe the defendant guilty of the offense charged.

[1] In a preliminary examination it is not necessary that a defendant be proved guilty beyond a reasonable doubt. "Reasonable or probable cause," required to uphold the commitment of a defendant (Pen. Code, § 995), exists if there is sufficient proof to make it reasonable to believe that the defendant is guilty of the offense charged. Pen. Code, § 872; *People v. Tallman*, Cal. Sup., 163 P.2d 857; *People v. O'Brien*, 37 Cal.App.2d 708, 712, 100 P.2d 367; *People v. Fisk*, 32 Cal.App.2d 26, 30, 89 P.2d 142; *People v. Novell*, 54 Cal.App. 2d 621, 623, 129 P.2d 453.

Subdivision 2 of section 192 of the Penal Code as it read at the time of the alleged offense* defined involuntary manslaughter as "the unlawful killing of a human being, without malice * * in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

The accident occurred after defendant had passed a sign declaring the speed limit in that district to be 25 miles an hour. The evidence shows without conflict that his speed was not only in excess of this limit, which is prescribed for residential or business districts where signs are in place giving notice thereof, but in excess of the 55-mile an hour limit, which applies unless a different speed limit is established. Vehicle Code, § 511. It must therefore be determined whether there was reasonable cause

to believe that defendant was committing an unlawful act or was committing a lawful act in an unlawful manner within the meaning of section 192 of the Penal Code. Section 510 of the Vehicle Code, the violation of which is a misdemeanor under section 763 of that code (In re Johnson, 6 Cal.App.2d 654, 656, 45 P.2d 241; *People v. Banat*, 39 Cal.App.2d Supp. 765, 768, 100 P.2d 374; see *Knox v. Pryor*, 10 Cal.App.2d 76, 78, 51 P.2d 106), provides that "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." A prima facie case of violation of this section arises if the speed of a vehicle exceeds the limits prescribed in section 511 "unless the defendant establishes by competent evidence that any said speed in excess of said limits did not constitute a violation of the basic rule declared in Section 510 hereof at the time, place and under the conditions then existing." Defendant has shown no circumstances explaining why his speed did not constitute a violation of the basic rule declared in section 510.

[2,3] In some jurisdictions it has been held that the commission of a misdemeanor is not an unlawful act within the meaning of involuntary manslaughter statutes like section 192 of the Penal Code, if the punishable act is *malum prohibitum* rather than *malum in se*. See 40 C.J.S., Homicide, § 60, p. 923; 5 Am.Jur. 925. It is

* Section 192 was amended in 1945 to read as follows:

"Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds:

"1. Voluntary—upon a sudden quarrel or heat of passion.

"2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; provided that this subdivision shall not apply to acts committed in the driving of a vehicle.

"3. In the driving of a vehicle—

"(a) In the commission of an unlawful act, not amounting to felony, with gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

"(b) In the commission of an unlawful act, not amounting to felony, without gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.

"This section shall not be construed as making any homicide in the driving of a vehicle punishable which is not a proximate result of the commission of an unlawful act, not amounting to felony, or of the commission of a lawful act which might produce death in an unlawful manner."

Since the Legislature has not expressly declared that violations of the section as it formerly read shall not be prosecuted thereunder, the section as it read at the time of the commission of the offense is to be applied. Government Code, § 9608; *Sekt v. Justices Court*, 26 Cal.2d 297, 300, 159 P.2d 17; see 4 Cal.Jur. 10-Yr. Supp. 546.

generally recognized, however, that the violation of speed regulations is an unlawful act within the meaning of such statutes. Thus in *State v. McIver*, 175 N.C. 761, 766, 94 S.E. 682, 684, the court referred to the distinction between *malum in se* and *malum prohibitum*, stating: "It is, however, practically agreed, without regard to this distinction, that if the act is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous, and death ensues, that the person violating the statute is guilty of manslaughter at least * * *." *Commonwealth v. Samson*, 130 Pa.Super. 65, 196 A. 564; see 40 C.J.S., Homicide, § 60, p. 924; 29 C.J. 1153; 1 Wharton, Criminal Law, 12th Ed., § 157, note 10.

In this state it is settled that a person commits an unlawful act within the meaning of section 192 if he violates speed laws designed to prevent injury to the person, and that he is guilty of involuntary manslaughter if death is caused thereby. *People v. Wilson*, 193 Cal. 512, 516, 226 P. 5; *People v. Collins*, 195 Cal. 325, 348, 233 P. 97; *People v. Seiler*, 57 Cal.App. 195, 199, 207 P. 396; *People v. Cunningham*, 64 Cal.App. 12, 20, 220 P. 312; *People v. Kelly*, 70 Cal.App. 519, 523, 234 P. 110; *People v. Von Eckartsberg*, 133 Cal.App. 1, 5, 23 P.2d 819; see *People v. McIntyre*, 213 Cal. 50, 55, 56, 1 P.2d 443; 16 A.L.R. 914; 59 A.L.R. 695; 99 A.L.R. 756; 42 C. J. 1355. From the evidence before the committing magistrate in the present case it would be reasonable to conclude that defendant drove his automobile not only in violation of such laws but in reckless disregard for the safety of others. The committing magistrate was therefore fully justified in holding defendant to answer in the superior court.

[4] Defendant contends that at the time of the accident, the killing of a person by negligent operation of an automobile was not punishable as involuntary manslaughter. In 1941 section 500 of the Vehicle Code was amended to read as follows: "When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle with reckless disregard of, or wilful indifference to, the safety of others, the person so operating such vehicle shall be guilty of negligent homicide, a felony, and upon conviction thereof shall be punished by imprisonment in the county jail for not more than one year or in the State prison

for not more than three years. Hereafter, the provisions of the Penal Code, defining involuntary manslaughter, shall not apply to homicide caused by the driving of any vehicle." Stats.1941, p. 1414. The sentence last quoted prevented dual liability under section 500 of the Vehicle Code and section 192 of the Penal Code for the same conduct. See *People v. Amick*, 20 Cal.2d 247, 125 P.2d 25.

[5,6] In 1943 the Legislature adopted an "act to amend Section 193 of the Penal Code and to repeal Section 500 of the Vehicle Code, relating to crimes involving the operation of vehicles." Stats.1943, p. 1959. Defendant argues that the latter act, by repealing section 500 of the Vehicle Code, removed any criminal liability for causing the death of another by negligent operation of a motor vehicle. He contends that sections 192 and 193 of the Penal Code were repealed by the 1941 amendment to section 500 of the Vehicle Code in so far as they applied to homicide caused by the driving of a vehicle, and that it was necessary to provide expressly for their revival to make them again applicable to such homicide. Defendant relies on the provision in section 9607 of the Government Code that "No statute or part of a statute repealed by another statute, is revived by the repeal of the repealing statute without express words reviving such repealed statute or part of a statute." The 1941 amendment to section 500 of the Vehicle Code, however, did not repeal sections 192 and 193 of the Penal Code. It left those sections in force but excepted from their operation homicide caused by the driving of a vehicle. When the exception was taken away, these sections were then to be applied without the exception. *People v. Ely*, Cal.App., 163 P.2d 453. "The rule of law applicable to this situation is well stated as follows: 'The statutory rule against the revival of a statute by the repeal of a repealing act relates to absolute repeals, and not to cases where a statute is left in force and all that is done in the way of repeal is to except certain cases from its operation. In such cases the statute does not need to be revived, for it remains in force, and the exception being taken away, the statute is afterwards to be applied without the exception. * * *' 25 R.C.L. 934." *County of Ventura v. Barry*, 202 Cal. 550, 554, 262 P. 1081, 1083. Moreover, the statute repealing section 500 of the Vehicle Code showed clearly that the Legislature intended sec-

tions 192 and 193 to apply thereafter to homicide caused by the driving of a vehicle, for it provided that section 193 of the Penal Code be amended to read: "Manslaughter is punishable by imprisonment in the State Prison for not exceeding 10 years, except that a violation of subdivision 2 of Section 192 of this code resulting from the operation of a vehicle is punishable by imprisonment in the county jail for not more than one year or in the State Prison for not more than five years." The special limitation upon the punishment of one who commits involuntary manslaughter in the operation of a vehicle would be meaningless if the Legislature had not intended to make such a person punishable for involuntary manslaughter.

[7,8] Defendant contends that this appeal should be dismissed because of the failure of the People to take an exception to the trial court's order granting defendant's motion to dismiss the information. Defendant's theory is that section 1259 of the Penal Code provides that a defendant may have a ruling reviewed on appeal without taking an exception therefrom, but that no comparable provision gives such privilege to the People. He concludes, therefore, that the People cannot review any ruling on appeal unless a formal exception has been noted in the trial court. This argument is based upon a misconception of the function of the exception and the nature of appellate jurisdiction.

The exception is a formal protest against a ruling of the court, which was of considerable importance when the record consisted of a bill of exceptions. Its purpose was to "cause the question of law, which was presented to and decided by the Court, to be made a matter of record, so that it may be re-examined by the Court on motion for a new trial, or be reviewed by the appellate Court." *Smith v. Lawrence*, 38 Cal. 24, 27, 99 Am.Dec. 344; see 3 Am.Jur. 47. The widespread use of the reporter's transcript as the record on appeal and the modernization of the bill of exceptions into a narrative statement of the proceedings (see Rules on Appeal, rule 7), have resulted in the practical disappearance of the formal exception in appellate procedure in

this state. The fact that in criminal cases the record must be a reporter's transcript, unless it is unobtainable (rules 33, 36), is further evidence that the exception in criminal cases is obsolete.

[9] Irrespective of these considerations, however, there is no force to the contention that an appeal may be dismissed for failure to take an exception to the order or judgment appealed from. Exceptions, if required, are taken from intermediate rulings in the course of a proceeding to enable the aggrieved party to have such rulings reviewed on his appeal. The scope of review on appeal is entirely different from jurisdiction of the appeal. When a judgment or order is appealable, as is the order dismissing an information in this case (Pen.Code, § 1238), appellate jurisdiction attaches upon the proper and timely filing of a notice of appeal. Thereafter, if a record on appeal is filed, the appellate court must determine the matter on the merits. If any ruling in the court below was not the subject of a proper objection by the appellant, the appellate court may deem the error waived and decide against the appellant on the merits; but it cannot dismiss an appeal because the appellant has, by failure to make such proper objection, limited the scope of review.

Stated briefly, there is no more purpose in taking an exception to an appealable order than there is in taking an exception to a final judgment. The exception is only a formal type of objection, and there is no more formal type of objection known to the law than a notice of appeal from an appealable order or judgment. *Smith v. Lawrence*, 38 Cal. 24, 27, 99 Am.Dec. 344; *Board of Com'rs of City and County of Denver v. Home Savings Bank*, 236 U.S. 101, 104, 35 S.Ct. 265, 59 L.Ed. 485; *United States v. La Franca*, 282 U.S. 568, 570, 51 S.Ct. 278, 75 L.Ed. 551; see 3 Am.Jur. 47; 4 C.J.S., Appeal and Error, § 324, p. 662.

The order dismissing the information is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.

73 Cal.App.2d 166

DEAN v. DAVIS et al.
Civ. 14941.

District Court of Appeal, Second District,
Division 3, California.

Feb. 20, 1946.

Hearing Denied April 18, 1946.

1. Frauds, statute of $\S$ 139(1)

The statute of frauds has no application to an executed agreement. Civ.Code, $\S$ 1624.

2. Frauds, statute of $\S$ 129(2)

Where a contract has been so far performed that nothing remains to be done but payment of the consideration for the performance, the fact that contract does not require payment within a year furnishes no defense under the statute of frauds to an action for the price. Civ.Code, $\S$ 1624.

3. Frauds, statute of $\S$ 129(2)

When the parties to a contract which is not to be performed within a year have partly performed it, neither can avoid its obligation as to past transactions by objecting that it was oral and within the statute of frauds. Civ.Code, $\S$ 1624.

4. Frauds, statute of $\S$ 129(2)

Where plaintiff had performed his part of oral contract to secure employment for defendant in consideration of payment of percentage of defendant's earnings and defendant had rendered services required under the employment and made partial payment under pretense of making full payment of amount due under contract, the statute of frauds did not preclude recovery of balance allegedly due plaintiff, regardless of whether contract was to be performed within a year. Civ.Code, $\S$ 1624.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Duff L. Dean against Harold M. Davis and another to recover on an oral contract whereby defendants agreed to pay plaintiff a percentage of named defendant's earnings is a result of employment to be procured for him by plaintiff. Defendants' demurrer to the first amended complaint was sustained without leave to amend, and, from a judgment of dismissal, plaintiff appealed.

Judgment reversed.

Alan E. Gray and George Boshae, both of Los Angeles, for appellant.

Reynolds & Painter and Louis Miller, all of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff appeals from a judgment of dismissal entered after a demurrer to his first amended complaint had been sustained without leave to amend.

The first amended complaint alleged in substance that in January, 1939, plaintiff and defendants entered into an oral agreement whereby plaintiff agreed to "directly or indirectly secure for defendant Harold M. Davis employment" with companies acceptable to said defendant; that "in consideration for securing the employment mentioned * * * herein said defendants promised and agreed to pay said plaintiff ten per cent of all moneys, income * * * over and above \$3,250.00 annually earned and usual sales and traveling expenses annually expended by said defendant Harold M. Davis * * * as a result of the employment procured by plaintiff * * * and as accepted by defendant Harold M. Davis"; that the agreement was to continue in force "until cancelled by the mutual consent of the parties thereto"; that "pursuant to the agreement," plaintiff "procured and defendant Harold M. Davis accepted certain employment" on eight occasions during the years 1942 and 1943 with five different companies; that as a result of said employment defendants received as income during 1942 the sum of \$33,390.23; that in violation of said agreement the defendants "knowingly" and "wrongfully" reported in writing to plaintiff on May 7, 1943, that their income in 1942 from said employment was \$21,390.23 and paid to plaintiff as his share \$1139.35, whereas defendants actually received as the result of said employment during 1942 an income of \$33,390.23, from which plaintiff should have been paid \$2556.32; that as a result of said employment defendants received as income during 1943 the sum of \$57,070.22; that defendants "knowingly" and "wrongfully" reported in writing to plaintiff on May 8, 1944, that their income in 1943 from said employment was \$45,070.22 and paid to plaintiff as his share \$1404.76, whereas defendants actually received as the result of said employment during 1943 an income of \$57,070.22, from which plaintiff should have been paid \$4277.16; and that plaintiff had demanded

payment of the balance due him from defendants but defendants had failed and refused to pay the same.

Defendants demurred upon the grounds that the amended complaint did not state a cause of action, and that it was ambiguous, uncertain and unintelligible.

Defendants contend that the agreement is invalid and unenforceable under the statute of frauds. Section 1624 of the Civil Code provides in part: "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: 1. An agreement that by its terms is not to be performed within a year from the making thereof * * *." Defendants argue that the amount of defendant Harold M. Davis' income and the extent of his expenses could not be determined until after the passage of a year, and that the parties contemplated that a period of more than a year would elapse before there could be performance on the part of defendants. Appellant argues that the agreement was capable of being performed within a year and is not within the statute of frauds. Appellant further argues that, assuming it is an oral agreement which violated the provisions of the statute of frauds, it is a fully executed agreement and therefore is not invalid by reason of said statute.

[1-4] The statute of frauds has no application to an executed agreement. *McComsey v. Leaf*, 36 Cal.App.2d 132, 142, 97 P.2d 242. The amended complaint herein shows that plaintiff had performed his agreement to secure employment for defendant Harold M. Davis, and that said defendant had rendered the services required under the employment which he had accepted. "When a contract has been so far performed that nothing remains to be done but the payment of the consideration for the performance, the fact that the contract does not require the payment within a year furnishes no defense to an action for the price." *Hellings v. Wright*, 29 Cal.App. 649, 656, 156 P. 365, 368. In 49 American Jurisprudence 860, it is said: "To state the rule another way, where the employee has fully performed the contract on his part and there is nothing left for the other party to do but to pay the agreed compensation, the statute does not apply, and the contract may be enforced against the employer according to its terms. Such is the view of the American Law Institute." See

Restatement, Contracts, vol. 1, § 178. When the parties to a contract which is not to be performed within a year have partly performed it, neither can avoid its obligation as to past transactions by objecting that it was oral and within the statute. 12 Cal.Jur. 858; *Pico v. Cuyas*, 47 Cal. 174, 179. In the case of *Dutton v. Interstate Investment Corp.*, 19 Cal.2d 65, 119 P.2d 138, which was an action for an accounting upon an oral agreement whereby plaintiff was to share in profits from an oil lease, it was said at page 70 of 19 Cal.2d, at page 141 of 119 P.2d: "Assuming that the agreement in the present case falls within this provision of the statute of frauds [Civ.Code, sec. 1624(1)], the finding of the trial court that Dutton [plaintiff] had fully performed all of his obligations under the contract operates to remove the bar of the statute [citing cases]. * * * The case of *Dougherty v. California Kettleman Oil Royalties, Inc.*, supra [9 Cal.2d 58, 69 P.2d 155], is so factually similar to the instant case that it must be considered as controlling. It was there said * * *: 'The fact that the agreement between Dougherty and Ochsner rested in parole is of no legal significance in this case. This agreement was fully executed by Dougherty. Assuming the contract could not be performed within a year and therefore fell without the statute of frauds, the circumstances of this case, showing as they do complete performance by Dougherty, clearly create an estoppel to plead the statute.'" In the present case the agreement not only had been performed by plaintiff, and performed by defendants, except as to payment, but the defendants, in making a partial payment under the pretense of making full payment of the accurate amount due, had recognized their agreement and duty to render an accounting to plaintiff for the income and expenses resulting from the employment and to pay plaintiff ten per cent of said income after the agreed deductions had been made. The question here is not whether defendants were legally obligated to pay plaintiff, but whether the accounting was true and whether the payments which were made were the accurate amounts due to plaintiff. Defendants accepted the benefits of plaintiff's services, and acknowledged by their actions that plaintiff performed his obligations under the agreement. The statute of frauds is not applicable herein.

It is not necessary to discuss other points presented by the demurrer, since the de-

murrer was sustained without leave to amend, and it does not appear that plaintiff could not have made proper amendments if amendments were necessary.

The judgment is reversed.

DESMOND, P. J., and SHINN, J., concur.



73 Cal.App.2d 233

PEOPLE v. ROBINSON.

Cr. 2374.

District Court of Appeal, First District,
Division 1, California.

Feb. 25, 1946.

1. Criminal law ⚡742(1)

Credibility of witness is for jury.

2. Robbery ⚡24(1)

Evidence supported conviction of first degree robbery.

3. Criminal law ⚡656(1)

A trial judge is not required to comment on evidence in criminal prosecution, but, if he does so pursuant to constitutional amendment giving him the power he should be extremely careful to exercise the power with wisdom and restraint. Const. art. 6, § 19.

4. Criminal law ⚡656(1)

Under constitutional amendment giving court power to comment on evidence, the comment must be fair and temperate, and not argumentative or contentious to a degree that makes it characteristically an act of advocacy. Const. art. 6, § 19.

5. Criminal law ⚡656(1)

The true test in determining whether trial court's comment on evidence is proper is not the artificial one that all evidence on the issue must be summarized, but that the comment must avoid realm of advocacy. Const. art. 6, § 19.

6. Criminal law ⚡656(1)

Trial judge's comment on testimony of complaining witness on vital issue of identification of defendant and his reference to testimony of one who confessed

his participation in the crime also on issue of defendant's identification did not constitute improper comment depriving defendant of his right to fair trial, notwithstanding that no mention was made as to defendant's denial of guilt, his alibi, or his description of identification process. Const. art. 6, § 19.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Robert Robinson was convicted of first degree robbery, and he appeals.

Affirmed.

J. Maxwell Peyser, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., State of California, and Edmund G. Brown, Dist. Atty., and Edmund J. Dunning, Deputy Dist. Atty., City & County of San Francisco, both of San Francisco, for respondent.

PETERS, Presiding Justice.

Robinson was found guilty by a jury of first degree robbery. From the judgment of conviction he appeals, contending that the evidence is insufficient, and that the trial judge committed prejudicial error in his comment on the evidence.

The contention that the evidence is insufficient to support a conviction of first degree robbery is clearly without merit.

[1] On April 12, 1945, between 10 and 11 o'clock in the morning, two negro men entered the pawn and second-hand shop operated by the complaining witness Isadore Mintz on Third Street in San Francisco. Mintz positively identified appellant as one of the two men. He testified that appellant tried on several suits; that then the two men followed him to the back of the store; that they then grabbed him and threw him to the floor; that they took over \$90 from his person, and a box of watches from the safe; that he tried to get up from the floor and one of the men, whom he identified as appellant, hit him on the head with an acetylene torch; that he put up his hand to protect himself and was struck again. He identified the other man as Booker T. Harper, who was originally a co-defendant but who has since pleaded guilty to the offense charged. He

also testified that he had picked both appellant and Harper from a police line-up of fifteen to eighteen men. Mintz was very excited as he testified, from which fact appellant implies his testimony was not to be believed. Obviously, the credibility of this witness was for the jury.

The evidence also shows that, prior to the robbery, appellant and Harper had driven to San Francisco from Los Angeles in appellant's car, and were rooming together. When Harper was arrested he was wearing one of the stolen watches, and another was found under the mattress of the bed located in the room shared by the two men. The other watches were not recovered. Harper confessed to the crime and gave the police a statement implicating Robinson as the other participant. At the trial he admitted that this statement was given freely and voluntarily, but testified that one of the arresting officers, prior to the time the statement was taken, had threatened to throw him in the bay unless he told the truth. At the trial he testified that the police statement was untrue; that he had engineered the robbery; that he and another boy (whom he did not identify) committed the robbery; that Robinson was not a participant in the robbery, did not know anything about it and received none of the proceeds. He admitted that, after the robbery, he gave Robinson some money to get a suit from a pawn shop. Robinson admitted receiving from Harper \$10 in cash on the day of the robbery.

Robinson at all times has denied complicity in the offense charged. He took the stand in his own defense and testified that at the time the crime was committed he was working at a pool room. No corroborating testimony was produced. He also stated that, after his arrest when Mintz tried to pick him out of the police line-up, Mintz picked out Harper but failed to recognize him, and only picked him out after the police told Mintz the other man was in the line-up. This testimony was contradicted by Mintz and by Inspector O'Leary. Robinson also testified that he was beaten by the police. This testimony was contradicted by O'Leary.

[2] This summary demonstrates to a certainty that the evidence is sufficient to sustain the conviction. There is no doubt that a robbery occurred. Mintz positively identified appellant as one of the robbers. Harper implicated Robinson when arrest-

ed, but at the trial attempted to exonerate him. Robinson's and Harper's credibility on the one hand, and Mintz's on the other, were for the jury, and its finding on the issue cannot, and should not, be disturbed by this court.

It is next urged that the trial judge committed prejudicial error in his comments to the jury. It is contended that the trial judge assumed the role of an advocate and that his comment was unfair, argumentative, and prejudicial.

The instructions are relatively short, covering but seven pages of the transcript. At the very start of his instructions the trial judge told the jury that it was his duty to state the law and it was their duty "unaided by any suggestion by me to pass upon all questions of fact"; that the court expressed no opinion about the weight of the evidence or upon the truth or falsity of any witness' testimony; that "with all questions of fact, the weight of evidence, the credit that you should give to any witness sworn in the case, the Court has nothing to do. These are matters entirely within your province and which you, as jurors, under your oaths, must determine for yourselves."

At the close of the instructions the judge stated that he desired to comment on the evidence, and then made the following comment:

"The evidence is uncontradicted that a brutal robbery was committed here. It is likewise uncontradicted that this robbery was committed by two men. One of these men has already pleaded guilty.

"The evidence further shows a positive identification of the defendant in this case by the complaining witness. The complaining witness further testified that he picked both defendants out of the line, unaided by anybody else.

"We likewise have the testimony of Harper here, the other defendant who has pleaded guilty.

"It is for you to determine whether or not his testimony is worthy of any credence. It is for you to determine whether or not he has made contradictory statements."

It will be noted that after commenting on the testimony of the complaining witness on the vital issue of the identification of the appellant, the trial judge briefly referred to the testimony of Harper on that issue, and failed to mention appel-

lant's denial of guilt, his alibi, or his description of the identification process.

There have been many cases discussing the propriety of comments of various kinds made by trial judges under the power conferred by Art. VI, § 19, of the Constitution. That section authorizes trial judges to make "such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."

[3] The right thus conferred to comment on the evidence is a most potent one. Trial judges are not required to comment, but, if they do so, they should be extremely careful to exercise the power with wisdom and restraint. The point need not be labored that the members of the jury are apt to give great weight to any hint from the judge as to his opinion on the weight of the evidence or the credibility of the witnesses, and, for that reason, care should be taken not to affect unfairly the rights of the defendant.

[4] It will be noted that the constitutional provision above quoted by its terms imposes no restriction on the nature of the comment except that the jury must be instructed that it is the exclusive judge of fact and credibility. Nevertheless, the courts have properly held that the comment must be fair and temperate, and not argumentative or contentious to a degree that makes it characteristically an act of advocacy. See many cases collected and commented upon 25 Cal. L. Rev. 212; 10 Sou. Cal. L. Rev. 50.

[5] While appellant argues that this comment falls within the prohibited sphere above defined, the only real criticism of the comment is not that it is contentious, but that it failed to summarize all of the relevant evidence on the issue upon which comment was made. There is some indication in a few of the federal cases that if the judge undertakes a statement of the evidence on an issue, he must fairly summarize all of the evidence produced by both sides on that issue. *Hunter v. United States*, 5 Cir., 62 F.2d 217; *O'Shaughnessy v. United States*, 5 Cir., 17 F.2d 225; *Palno v. United States*, 8 Cir., 58 F.2d 111; see annotations 95 A.L.R.

785, 795; 113 A.L.R. 1308. In *People v. Talkington*, 8 Cal.App.2d 75, 47 P.2d 368, a reversal was ordered because of an improper comment. In discussing the comment there involved the court (page 95 of 8 Cal.App.2d, at page 378 of 47 P.2d) did emphasize that not a word of appellant's testimony was referred to in the comment, and the court did state that this indicated a lack of impartiality. However, where the point has been directly involved the Supreme Court has clearly indicated that the true test to be applied is not the artificial one that all the evidence on the issue must be summarized, but that the comment must avoid the realm of advocacy. Thus in *People v. Ottey*, 5 Cal.2d 714, 728, 56 P.2d 193, 200, it is stated: "There is no merit to the contention that the court, if it venture to comment on the evidence or the testimony of witnesses or of any witness, must sum up all the evidence and the testimony both favorable and unfavorable. There is no such injunction, express or implied, in the language of the Constitution, and none that would compel it under established rules in other jurisdictions. The provision in the Constitution expressly permits the court to 'make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case.' The court may therefore exercise its own discretion in respect to what comment it will make, so long as it does not withdraw any material evidence from the consideration of the jury * * * and does not attempt to control the verdict by a direction. *State v. Fuersten*, 103 N.J. L. 383, 135 A. 894, and cases hereinabove cited. * * * The trial court, under the operation of the section, is therefore the best judge of the extent of its comment and should thus be free to exercise the power in accordance with its own discretion as to how the end should best be accomplished, so long as it does not usurp the exclusive function of the jury to decide the facts and the credibility of the witnesses. [Citing ten cases.] The foregoing conclusion and the cases cited indicate that comments argumentative in form are not objectionable * * * so long as they are not calculated to and do not effect what the court may not do directly, viz., direct a verdict. The so-called 'argument' of the court in this case did not partake of the nature of partisan advocacy * * *."

In *People v. Dail*, 22 Cal.2d 642, 657, 140 P.2d 828, 836, the court, after referring to the argumentative and partisan comment there made by the trial court, stated: "While a trial court is not necessarily required to comment on all of the evidence, nevertheless its comment should be 'temperately and fairly made. * * * Trial courts should be cautious in the exercise of this power (of comment) with a view to protecting the rights of defendants.' *People v. DeMoss*, 4 Cal.2d 469, 477, 50 P.2d 1031, 1034. In the present case, however, the quoted comments standing alone would not require a reversal * * *."

In the instant case the comment is not comparable to the intemperate remarks of the trial judge in *People v. Patubo*, 9 Cal. 2d 537, 541, 71 P.2d 270, 272, 113 A.L.R. 1303, where the comment was held to be reversible error. In that case the trial judge, among other things, told the jury that in his judgment the evidence showed that it was the intention of the defendant to kill the deceased. That "I don't know why, but it was his intention to kill Big Boy in that pool hall that night"; that "you can see [from] this man's manner of testifying in the courtroom" that he "had that hangdog look of a guilty man. * * * If ever a man by his appearance and his manner of giving testimony has shown himself to be a willful, deliberate and outright perjurer as to material facts in a case, the defendant in this case has been it." After ridiculing the evidence on self-defense the court stated (page 542 of 9 Cal.2d, page 272 of 71 P.2d, 113 A.L.R. 1303): "In the opinion of the Court this man is guilty of first degree murder and the extent of the punishment he is to receive in this matter is a question for the jury."

Nor is the comment in the present case comparable with that in *People v. Talkington*, 8 Cal.App.2d 75, 47 P.2d 368. In that case the jury returned to the jury room and told the judge an agreement could not be reached. The court ascertained that the jury was divided 9 to 3. The court sent them back for further consideration. A short time later the jury returned and told the judge that no agreement had been reached. The judge then asked if the members of the jury had all agreed as to the guilt of the defendant and were merely in disagreement as to the degree. The foreman then told the judge that three were for not guilty. The judge

then stated (page 80 of 8 Cal.App.2d, page 376 of 47 P.2d): "I have tried a great many cases in this court, and now I have the right to say to you what I believe with reference to the evidence in this case * * * you heard the argument of the District Attorney. I believe I agree with him almost absolutely. * * * 'I cannot see how anyone can after hearing this evidence, can raise a very strong argument, or make an argument in defense, that is, to the extent that there is no crime committed here. * * * To me it appears impossible that these gunshot wounds could have been inflicted as the defendant contends. * * * Now all of these things lead very strongly that she deliberately committed this act. * * * this is as clear as any case tried in this courtroom.'" This, together with other independent errors, was held to be prejudicial.

Appellant places great stress on certain language in the dissenting opinion of Justice Edmonds in *People v. O'Donnell*, 11 Cal.2d 666, 671, 81 P.2d 939. In that case the trial judge engaged in a course of conduct throughout the trial that indicated his opinion that defendant was guilty. The dissent was directed to that conduct. No such conduct here appears.

[6] When the comment here involved is tested by these standards it cannot be held to have violated appellant's right to a fair trial. In the first sentence of the challenged comment the judge stated that it was uncontradicted that a "brutal robbery" had been committed. While the word "brutal" might be subject to criticism, it could not have prejudiced appellant, because the uncontradicted evidence did show that a robbery had been committed and that the complaining witness had been handled very roughly. The only issue in this case was whether appellant was one of the two robbers. The court commented on the fact that the complaining witness positively identified the accused and picked him out of a police lineup. The record so shows. The only criticism that can be made is that no reference was made to appellant's testimony on that issue. As already held, that alone cannot constitute prejudicial error.

The judgment appealed from is affirmed.

WARD, J., and SCHOTTKY, Justice pro tem., concur.

COWAN v. COWAN.
Civ. 15009.

District Court of Appeal, Second District,
Division 1, California.

Feb. 6, 1946.

Rehearing Denied Feb. 25, 1946.

Hearing Denied April 1, 1946.

1. Divorce ⇨156

An interlocutory judgment of divorce, although intermediate, for all intents and purposes has the effect and dignity of a formal judgment and at the end of one year becomes such upon the performance of a mere clerical act.

2. Judgment ⇨375, 443(1)

A final judgment is subject to direct attack on the ground of fraud by an action in equity or by motion

3. Judgment ⇨386(7)

Motion to vacate a judgment for extrinsic fraud must be made within a reasonable time.

4. Judgment ⇨390

Where it is sought to vacate a judgment on the ground of extrinsic fraud by motion supported by affidavits, such affidavits must make a strong showing.

5. Divorce ⇨165(4)

Wife's motion to vacate interlocutory judgment of divorce on the ground of fraud, made almost a year after entry of such judgment, supported by affidavits of wife and her physician, the wife's affidavit making merely a superficial showing and doctor's affidavit amounting to little more than a naked conclusion that wife until recently was in no mental condition to discuss personal problems or to consult an attorney, should have been denied for failure of affidavits to make a substantial showing and for want of timeliness.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by James Sydney Marshall Cowan against Theda Agnes Cowan for divorce. From an order granting defendant's motion to set aside the interlocutory judgment, plaintiff appeals.

Reversed.

George Penney and Claude F. Wein-gand, both of Los Angeles, for appellant.

Edward Feldman, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order granting defendant's motion, in a divorce action, to set aside the interlocutory judgment.

Briefly the record reveals the following: The action for divorce was filed by the husband on December 14, 1943; summons served December 21, 1943; default entered January 4, 1944; interlocutory decree entered January 24, 1944.

On January 10, 1945, one year, less two weeks, after the interlocutory judgment was entered, defendant made the motion referred to herein. Affidavits setting forth what was declared to be extrinsic fraud were the basis for the motion. In support thereof, two affidavits of merit were offered, one by defendant's physician and one by defendant. The physician's affidavit is as follows:

"Vernon Van Zandt, M. D., being first duly sworn, deposes and says that:

"He has been treating Theda Agnes Cowan for approximately three (3) years. That she was under my personal care and supervision from the period of December, 1943 to date. That it is my personal opinion and observation that Theda Agnes Cowan was in no condition mentally to discuss any personal problems or to consult an attorney from December 1943 until approximately three or four weeks ago.

"Vernon Van Zandt, M. D."

So far as the doctor's affidavit is concerned, it is of little, if any, value in support of the motion; it is scarcely more than a naked opinion. The expressions "treating Theda Agnes Cowan for approximately three years" and "under my personal care and supervision," reveal nothing in the nature of reasons for the opinion. Section 1872 of the Code of Civil Procedure provides:

"Whenever an expert witness gives his opinion, he may, upon direct examination, be asked to state the reasons for such opinion, and he may be fully cross-examined thereon by opposing counsel." And section 1870, paragraph 10, provides that evidence may be given upon a trial of "the opinion of an intimate acquaintance respecting the mental sanity of a person, *the reason for the opinion being given.*" (Italics added.) Although not a trial, the

court was charged with the responsibility of determining an important fact, by means of evidence presented in the form of affidavits. Such procedure does not dispense with the necessity of proof; and substantial evidence is required to produce such proof. There is nothing substantial about that which is merely perfunctory.

The pertinent part of the wife's affidavit is as follows:

"She is the defendant in the above entitled action. That on the 14th day of December 1943, she was served with the Summons and Complaint in the above entitled action. That the plaintiff, her husband, continued to see her before, during and after the service of the papers and during the entire month of December, 1943. That she asked him why he had started action, and asked him what he was going to do about it. That he stated he was going to do nothing in regard to it and for her to keep her chin up and her feet on the ground. That he had dinner at her home all during this time. That she asked him about the other woman with whom he had become involved. That he stated he wasn't going to see her for a long time as she was going to New Orleans.

"That affiant first discovered he had obtained a decree about the end of January. That affiant called her husband the first Monday in February and asked him if he had done anything about those papers which were given to her and he said that the divorce was granted on January 24th.

"That affiant asked him why he hadn't told her and he stated he thought affiant had been hurt enough."

Plaintiff husband answered with a counteraffidavit denying the accusations contained in defendant's affidavit and alleged affirmative matter tending to refute them.

While the motion was under submission, an answer and cross-complaint was filed by respondent. Neither in the affidavit, answer, nor cross-complaint was there anything indicating any dissatisfaction with a property settlement agreement which had been executed by the parties.

It is contended by appellant that the affidavits in support of the motion do not establish fraud as a matter of law and that the record shows *laches* and "prejudicial delay."

[1,2] It should be noted at the outset that an interlocutory judgment although

intermediate, for all intents and purposes has the effect and dignity of a formal judgment and at the end of one year becomes such upon the performance of a mere clerical act. That a final judgment is subject to direct attack on the grounds of fraud by an action in equity, there can be no question. There is no statutory authority for a direct attack on the judgment by motion. The origin of such procedure is explained in *Norton v. Atchison*, etc., R. Co., 97 Cal. 388, 30 P. 585, 32 P. 452, 33 Am.St.Rep. 198. See, also, *Bell v. Thompson*, 19 Cal. 706. There the motion was based on an alleged lack of jurisdiction of the trial court. Since the *Norton* decision the use of such a motion has been extended by judicial decision to include actual fraud. The decisions are numerous in support of such procedure; *McGuinness v. Superior Court*, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110; *George Frank Co. v. Leopold & Ferron Co.*, 13 Cal.App. 59, 108 P. 878; *Thompson v. Thompson*, 38 Cal.App. 2d 377, 101 P.2d 160; and *Chiarodit v. Chiarodit*, 218 Cal. 147, 21 P.2d 562, are examples.

Earlier cases, however, held to the contrary. For example in *Bancroft v. Bancroft*, 178 Cal. 367, at page 368, 173 P. 582, the following appears:

"The main contention of the appellant upon this appeal is that the trial court has power, upon the motion of either party, to set aside the interlocutory decree in a divorce case at any time prior to the entry of the final decree. This contention cannot be sustained. It is well settled that an interlocutory decree of divorce is only subject to attack in the proceeding in which it is entered upon appeal, or by proceedings under section 473 of the Code of Civil Procedure, within six months after the entry of such decree, and that after the expiration of the period within which either of these forms of attack may be made, the trial court is without jurisdiction to alter or set aside its interlocutory decree" (citing cases).

[3] It is also well settled that where the invalidity of a judgment must be shown by extrinsic fraud, a motion to vacate it can only be entertained when made within a reasonable time.

[4] A charge of fraud in connection with the obtaining of a judgment is by no means trivial, nor is it unimportant. Compared with the opportunities afforded by a trial of the issue of fraud, a hearing on

such a motion, supported only by affidavits, is more or less limited. And even if referred to a referee or commissioner, the procedure lacks the advantages of an actual trial on the merits. In *People v. Harrison*, 84 Cal. 607, 608, 24 P. 311, 312, the court observed that, "when the attempt is made to vacate the judgment by a proceeding in court for that purpose, it should be done by bringing an action as in other civil cases, that the opposing party may be regularly served with summons, and issues formed, and the case regularly tried."

[5] Notwithstanding the apparent lack of uniformity in the decisions, the later ones, as noted above, uphold the court's power to determine the issue of fraud on a motion supported by affidavits. The foregoing brief review of opinion is noted for the purpose of emphasizing the importance of, and the necessity for, a strong showing if the procedure herein considered is to be followed. In that regard, the affidavits relied on to support the within motion are lacking. The showing is in no sense substantial, indeed it is superficial. And, such a motion, after the lapse of almost a year and in the circumstances revealed by the record, is unavailing. As noted above, it must be made within a reasonable time.

For the foregoing reasons the order setting aside the interlocutory judgment is reversed.

YORK, P. J., and WHITE, J., concurred.

Hearing denied; GIBSON, C. J., and SHENK and CARTER, JJ., dissenting.



WARDALL v. STATE et al. *
CAVAGNARO v. SAME.
Civ. 12949.

District Court of Appeal, First District,
Division 1, California.

Feb. 19, 1946.

Rehearing Denied March 21, 1946.

Hearing Granted April 18, 1946.

1. Intoxicating Liquors ⇨94

Collecting excise taxes on sale of distilled spirits for a specified period where examinations and investigations disclose

* Subsequent opinion 177 P.2d 270.

that taxpayer through error has made insufficient payment is not inherently wrong. Gen.Laws, Act 3796, §§ 24, 24.4, 26-26b, 27, 33-33c.

2. Taxation ⇨585

A government agency may not ordinarily lose a right to collect taxes as the result of carelessness or incompetency of its employees.

3. Taxation ⇨438

Assessment rolls may be corrected to include new property or to revalue that already on the rolls and an additional or supplemental assessment made, but such cases generally involve a single revision after examination and investigation and not several re-assessments and re-levies.

4. Intoxicating Liquors ⇨90(1)

If a licensee is guilty of fraud in reporting for taxation distilled spirits acquired, an additional penalty may be imposed without resort to reassessment under provisions of Alcoholic Beverage Control Act. St.1935, p. 1134, § 26; Gen.Laws Act 3796, §§ 26a, 26b, 27, 27b.

5. Intoxicating Liquors ⇨92

The distilled spirits licensee merely files a monthly statement upon receipt of which the board of equalization computes the amount of the tax due. Gen.Laws Act 3796, § 26.

6. Limitation of actions ⇨11(1)

Statutes of limitation, unless expressly provided, do not run against the state.

7. Taxation ⇨466

The board of equalization may exercise only such power as is expressly conferred by statute.

8. Intoxicating Liquors ⇨94

The excise tax on the sale of distilled spirits becomes due at the time of sale and is payable after board of equalization computes the amount of the tax. Gen.Laws Act 3796, § 24.

9. Taxation ⇨295, 309

When applied to taxation, the word "levy" may mean to assess or charge a person or property with an amount already ascertained, or the declaration of the amount, or part of the amount, in the form of a demand or lien for payment.

See Words and Phrases, Permanent Edition, for all other definitions of "Levy".

10. Intoxicating Liquors ⚖️92

Alcoholic Beverage Control Act providing that the amount of the "levy" which board of equalization is authorized to make against retailer or wholesaler for the amount of deficiency in payment of distilled spirits excise tax becomes final if petition for review is not filed within 15 days after service of notice of levy uses quoted word as covering the deficiency between full amount of assessment and amount paid, and the amount ascertained as a deficiency is the amount of levy that becomes final. Gen.Laws Act 3796, §§ 24.2, 27, 27a, 27b.

11. Intoxicating Liquors ⚖️92

Assessment by board of equalization for balance due on distilled spirits excise tax originally paid by stamps bought by licensee became "final" when paid by licensee without petition for review and board could not thereafter reassess new deficiency amounts and levy thereon for the same period. St.1935, p. 1134, § 25; Gen.Laws Act 3796, §§ 24, 24.4, 26-26b, 27, 27b.

See Words and Phrases, Permanent Edition, for all other definitions of "Final".

12. Intoxicating Liquors ⚖️92

Under statute requiring licensees to keep records showing all purchases of distilled spirits made during the previous two years, the board of equalization cannot compel production of such records for examination more than two years after the period to be covered by examination. Gen. Laws Act 3796, §§ 24.4, 27.

PETERS, P. J., dissenting.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Separate actions by William J. Wardall, trustee of the estate of McKesson & Robbins, Inc. (a debtor), and Ray Cavagnaro against State of California and others to recover distilled spirits excise taxes paid under protest. From a judgment for plaintiff in each case, defendants appeal, and the actions were consolidated on appeal.

Judgments affirmed.

Robert W. Kenny, Atty. Gen., and Carl W. Wynkoop, Deputy Atty. Gen., for appellants.

Sefton & Quattrin, of San Francisco, for respondents.

WARD, Justice.

Defendant State of California appeals from a judgment in favor of plaintiffs, taxpayers, in a suit to recover excise taxes, imposed upon wholesalers on the sale of distilled spirits, which were paid under protest.

The agreed statement states "The question on this Appeal relates to the right of the State Board of Equalization to make new deficiency assessments or levies under the Alcoholic Beverage Control Act, as amended in 1937, for a prior period and after the Board had already levied an assessment for that same period for which assessment had been paid by the licensee."

The facts in the Wardall case are as follows: In 1937 the board made an examination and investigation covering the taxable period July 1, 1935, to December 31, 1936, the taxes for which period had originally been paid by stamps bought by the licensee. As a result of this investigation the board levied an assessment for the balance of tax due, or deficiency in payments, which levy was paid by the licensee without petitioning for a relevy. Two years later the board made another examination of the licensee's books to discover if there was a deficiency covering *another* period—January 1, 1937, to June 30, 1937. As a result of this examination and investigation the board levied an assessment for the specified 1937 period in the sum of \$1,991.77. The licensee contested by filing a petition for a relevy within the fifteen-day statutory limitation. Sec. 27b, Gen. Laws, Act 3796. The board made a re-examination and re-investigation and re-audit and determined that the last levy for 1937 imposed by the board in the sum of \$1,991.77 was an error, but as a result of the re-investigation made another levy for the original period—July 1, 1935, to December 31, 1936—of \$1,685.58.

The facts in the Cavagnaro case, except as to dates and the amounts, are the same as in the Wardall case, even to the extent of the board levying a specified amount covering a designated period which the board subsequently admitted was an error. Thereafter a levy was imposed for 1935-1936 based upon an examination in 1939. In each case the amount was paid under protest followed by separate superior court

actions, with judgments for plaintiff in each case and the consolidation of actions on appeal.

It has been suggested that unless the licensees are compelled to pay the assessments they will pay a smaller tax than the full tax due. *There is no evidence in the record to support such contention.* It has also been suggested that if the licensee had paid the tax when he should have, subsequent levies would be unnecessary.

It is pertinent to summarize generally the basic facts in both cases: The original tax payment for the periods in question, prior to any investigations, examinations and levies under the provisions of sec. 27 et seq. of the act, was fixed by an assessment by the board monthly. Sec. 26 of the 1935 act, and sec. 26b of the 1937 act. In both cases the board re-assessed, having discovered errors in the first assessment, and levied a tax pursuant to secs. 27 and 27b which levy the taxpayers paid without protest. Then, after an attempted levy for another period and protest thereon pursuant to the provisions of sec. 27b, the third assessment or second re-assessment, and attempted second levy for the periods here involved were made. It was at this point that the taxpayers availed themselves of the protective provision in sec. 27b.

Covering the period in question, the pertinent sections of the Alcoholic Beverage Control Act, Stats.1935, Ch. 330, p. 1132, as amended in 1937, Stats.1937, Ch. 758, p. 2144, imposing an excise tax upon the sale of all distilled spirits by rectifiers or wholesalers in this state and fixing the rates thereof, read:

"Sec. 24.2. It shall be presumed that all distilled spirits acquired by any rectifier or distilled spirits wholesaler have been sold in this State by such rectifier or wholesaler unless proven to the satisfaction of the board, in verified reports on forms prescribed by the board, that such distilled spirits are (1) still in the possession of such licensee, or (2) that such distilled spirits have been sold or delivered to another licensed distilled spirits manufacturer, rectifier, importer or wholesaler, or (3) that such distilled spirits have been exported without this State or sold for export by the licensee making the report and actually exported from this State within thirty days from the date of such sale, or (4) that prior to the termination of possession such distilled spirits have been lost

through unintentional destruction, or (5) that prior to the termination of possession there has been an unaccounted for loss, but such unaccounted for loss shall not exceed a tolerance to be fixed by the board, or (6) that such distilled spirits have been consumed as samples on the licensed premises; or (7) that such distilled spirits are otherwise exempt from taxation under this act." Stats.1937, p. 2145.

"Sec. 24.4. On- or off-sale distilled spirits licensees shall keep books of accounts in which shall be kept records of all distilled spirits acquired by such licensees, or in lieu thereof shall preserve all original bills and invoices for distilled spirits acquired. Such records shall be in the form prescribed by the board and shall show at all times all purchases of distilled spirits made during the previous two years." Stats.1937, p. 2145. A portion of sec. 27 was repealed in 1937 and the quoted sec. 24.4 apparently governed the investigations and examinations here in question.

The means to be used in the collection of the tax referred to in sec. 24 is set forth in secs. 26, 26a, 26b, 33, 33a, 33b and 33c, Stats.1937, pp. 2146, 2147, 2153. At the time of the levies in question, sec. 27 of the act provided: "Sec. 27. If any examinations or investigations made by the board shall disclose that any reports theretofore filed with the board * * * have shown incorrectly the amount of * * * the excise tax accruing thereon, the board shall have the power, and is hereby authorized, to make such changes by a subsequent assessment as may be necessary to correct the errors disclosed." Stats.1937, p. 2147. Section 27, as amended, then provides for a hearing and the giving of a notice of the board's decision, and further provides for a rehearing and that if "affirmed it shall become due and payable at the time of such service of the notice thereof." Section 27 also provides: "If, after giving effect to the provisions of section 24.2, any examinations or investigations made by the board shall disclose that the amount of excise stamps purchased from the board by any rectifier or wholesaler is not sufficient to represent payment of the excise tax imposed upon the sale of distilled spirits sold by such rectifier or wholesaler, the board shall have the power, and is hereby authorized, to make a levy against such rectifier or wholesaler in the amount of the deficiency in the payment of the distilled spirits excise tax so disclosed."

Stats.1937, p. 2148. Section 27a provides that notice of any levy must be given by the board.

"Sec. 27b. Any wholesaler or rectifier against whom a levy is made by the board under the provisions of sections 27 or 27a hereof may petition for a relevy thereof within 15 days after service of the notice thereof. If such a petition for relevy is not filed within said 15 day period the amount of the levy becomes final at the expiration thereof." Stats.1937, p. 2148. Section 32 provides for a limitation of sixty days upon an action to recover a tax paid under protest. Stats.1935, p. 1139.

The crux of this case is the use of the word "final" in sec. 27b. Appellants suggest that the court will find when the statute as a whole is considered that the act permits "any examinations or investigations" and that it is only "the amount of the levy" resulting from a particular examination or audit that becomes final. It is also argued that if the trial court is correct then the finality of making an additional audit is left in the hands of a wholesaler by neglecting to petition for a relevy. *The respondents' contention is that after a taxpayer has submitted his sales report and an assessment has been computed by the board and paid by the taxpayer, and a subsequent examination and investigation (or examinations and investigations) are made, resulting in a levy for a deficiency, that if the taxpayer does not contest the amount of the levied deficiency, a third assessment or second levy for deficiency may not be made under the plain language of the statute.* Appellants urge that the use of the words "examinations" or "investigations" permits a levy after each repeated examination or investigation covering the same period. There may be more than one examination or investigation resulting in one levy, but if appellants' position is correct, no investigation, examination or audit or levy resulting therefrom could ever become "final." Thus the question involved is the right of the State Board of Equalization arbitrarily to make additional alleged deficiency levies covering a specified period when the board has once computed and assessed and subsequently re-computed and levied for that period—when the original assessment and the subsequent assessment and levy have been paid without protest.

[1-3] There is nothing inherently wrong in collecting excise taxes for a spec-

ified period where, after "examinations and investigations," it appears that the taxpayer through error has made insufficient payment. It is also true that ordinarily a government agency may not lose a right to collect as the result of carelessness or incompetency on the part of its employees. 51 Am.Jur. 676, 26 R.C.L., p. 351, § 308. It has been held that assessment rolls may be corrected to include new property or to revalue that already on the rolls, and an additional or supplemental assessment made. *People v. Nat. Bk. of D. O. Mills & Co.*, 123 Cal. 53, 55 P. 685, 45 L.R.A. 747, 69 Am.St.Rep. 32; *City and County of San Francisco v. La Societe, etc.*, 131 Cal. 612, 63 P. 1016. Cases holding as above generally involve a single revision after "examinations and investigations." They do not involve several or more reassessments and re-levies. An exception is *People v. Buckles*, 57 Cal.App.2d 76, 134 P.2d 8, wherein two assessments were made apparently for the same period. The statute did not provide that a levy should be final. The point presented in this case was not raised in the *Buckles* case. Here the statute provides that the levy, if not contested, is final.

[4, 5] There is no claim or evidence that the taxpayer practiced fraud. If fraud were involved the state and the board would have a remedy against the taxpayer irrespective of the provisions of sec. 27b. The Alcoholic Beverage Control Act provides that if the licensee is guilty of fraud an additional penalty may be imposed. Sec. 26a. There is also a provision that such licensee may be criminally prosecuted for felony. Sec. 36. The subject of fraud is mentioned here because it has been suggested that the taxpayer is responsible for any and all errors in the levies and attempted re-levies. It may be well to note that the taxpayer merely files a monthly statement, sec. 26 which, if untrue, subjects the taxpayer to a severe penalty, sec. 26a. Upon receipt of the monthly statement *the board computes the amount of the tax due.*

[6] If delayed levies are caused by the board's repeated carelessness in auditing, or in "examinations and investigations," repeated re-levies should not be viewed with favor. If the board has had a fair opportunity to make "examinations and investigations," and imposes a levy, the licensee should not be harassed and annoyed by further re-examinations and re-investigations, followed by further re-levies. If

the state may make a re-levy after a levy which has been uncontested, it may make any number, resulting in depriving the taxpayer of the use of his books and subjecting him to the annoyance of appearing before the board or of having state auditors audit and re-audit without limitation at the place of business of the taxpayer. The error here was the error of the board. It is a distinct injury that a taxpayer may be left in a position where he can not budget approximately for taxes. Statutes of limitation, unless expressly provided, as herein, do not run against the state. Here the taxpayer is limited to a specified period of sixty days from the date of the payment of taxes to institute an action for their recovery.

[7] In *Carpenter v. Pacific Coast Ins. Ass'n*, 10 Cal.2d 304, 306, 74 P.2d 511, 512, a case holding that assessments and penalties may be fixed in a subsequent year, the court said: "If the delayed assessment in the present case were an error caused by the board's own neglect, to the substantial injury of the taxpayer, it might be that a different conclusion would be indicated." Except upon the theory heretofore stated—that a government agency authorized to collect taxes should not ordinarily be prevented from exercising such right—there is no authority for repeated re-levies. In *County of Colusa v. County of Glenn*, 124 Cal. 498, 57 P. 477, a re-assessment case, it was held that the Board of Equalization may exercise only such power as is expressly conferred by statute.

[8] Section 24 fixes the tax and the amount of the tax becomes due at the time of sale, and is payable after the board computes the amount of the tax. *Rathjen Bros. v. Collins*, 50 Cal.App.2d 774, 123 P.2d 930. The point raised in this case, namely, may a levy be made subsequent to a levy which was uncontested if the taxpayer protests the second levy, was not presented in the *Rathjen* case. Section 24 of the act authorizes an assessment, and sec. 27 provides for an investigation and a levy to cover any deficiency that may have occurred in the assessment, but there the authority stops. Under section 27b if the taxpayer does not deny the accuracy of the levy by requesting a re-levy within a designated time limit, the levy is final. There is no provision for a re-investigation or a re-levy covering the same period of time.

[9, 10] The levy refers back to the assessment which is imposed to cover a specified period. The "amount" computed as the tax becomes "final" for such period. If the Legislature intended that there should be levies without limit covering the same period, it was unnecessary to provide that "the amount of the levy becomes final." The word "levy," as generally accepted, refers to a demand or seizure to make a lawful order effective. When applied to taxation, it may mean to assess or to charge a person or property with an "amount" already ascertained, or the declaration of the amount, or part of the amount, in the form of a demand or lien for payment. 25 Words and Phrases, Perm.Ed., p. 7 et seq.; Black's Law Dictionary, 2nd Ed., p. 714. As the word is used in the Alcoholic Beverage Control Act in the sections applicable to this appeal, the levy covers the deficiency between the full amount of the assessment and the amount paid. "* * * the board shall have the power, and is hereby authorized, to make a levy against such rectifier or wholesaler in the amount of the deficiency in the payment of the distilled spirits excise tax so disclosed." (Italics added.) *Deering's General Laws*, Vol. 1, 1937, sec. 27, pp. 1740, 1741; *Stats. 1937*, p. 2147. It is plain that the amount ascertained as a deficiency is the amount of levy that becomes final.

In support of this conclusion is the use of the word "final." The word "final" is generally used to express the thought of completeness—conclusiveness. 16 Words and Phrases, Perm.Ed., p. 573 et seq. When applied to a contested matter, it means that the issue is decided and therefore is at an end (*Bixler's Appeal*, 59 Cal. 550) so far as the jurisdiction of the court or board or commission wherein the matter was pending is concerned. In *re Beers*, 100 Cal.App. 796, 280 P. 1033. If the investigation could be renewed and a different or additional levy made, this would be a new proceeding. A levy to be followed by another levy would merely be an interlocutory order which would leave the taxpayer in a state of suspension pending further indefinite action by the board. Referring to final termination of a proceeding, the Supreme Court said in *Jaffe v. Stone*, 18 Cal.2d 146, 152, 114 P.2d 335, 339, 135 A.L.R. 775: "In stating the requirement of termination, courts often say that the proceeding must be 'finally' termi-

nated. Such a statement is entirely accurate if the ordinary reasonable meaning of the words is taken. The *proceeding* must be finally terminated; that is, the particular criminal proceeding commencing, for example, by complaint and arrest, must have passed through some such stage as preliminary hearing and dismissal, or trial and acquittal or abandonment by the prosecuting authorities. When this has occurred, *that proceeding is finally terminated*. If the termination was such as not to constitute a bar to a new prosecution, the accused may be charged and tried again for the same offense; but this will be a *new proceeding*, with a new court number, new pleadings, new judge and jury, and a new judgment."

[11, 12] Reading the statute as a whole undue emphasis can be placed on the plurality form of the words "investigations and examinations." Section 24.4 recognizes that there must be an end to examinations, audits, etc. by placing a two year limitation period on the time for which records must be kept. Section 27 authorizes the board to make only *a* levy. Moreover the taxpayer's time is limited in instituting proceedings for credits for overpayments and suits to recover taxes paid under protest. Secs. 27, 32. Consequently, the amount of the "deficiency" or balance having become final, if there is no contest thereto, no other amount may be levied. In brief, the statute limits the power of the board to make a second levy if the first is uncontested. If contested the board may stand by the amount, may correct the amount of the levy or may re-levy. If uncontested, the state is benefited by collection without possibility of legal action. The compromise of tax contests is a well recognized method of "finally" adjusting a contest. There accrues to the taxpayer by his acknowledgment of liability to pay the additional amount assessed, through failure to contest, the benefit that the assessment is now final and that he will not be harassed and annoyed further over matters within the specified period. The language used in the statute is plain, definite and unambiguous. The board's action was final and for that reason it could not at a later date renew and re-assess new deficiency amounts and levy thereon for the identical prior periods involved. In this case if the licensees had not voluntarily presented their records for re-examination the board could not have compelled such

production in 1939 of the records for 1935 and 1936. Sec. 24.4.

The trial court not only gave a correct legal construction to the language used in section 27b but also decided the issues fairly and justly under all the circumstances.

The judgments are affirmed.

ATTERIDGE, Justice pro tem., concurs.

PETERS, Presiding Justice (dissenting).

The rules of law set forth in the majority opinion are violative of fundamental principles of the law of taxation, and, for that reason, bound to lead to confusion. Moreover, under the rules there announced, the taxpayers involved are relieved from paying taxes which they do not deny they owe, resulting in discrimination against other taxpayers in the same class who paid the full tax when due. These results are reached in reliance on an interpretation given to § 27b of the statute—a section that obviously was passed to protect the state but which the majority interpret as a restraint against the state.

At the outset two things should be made clear. First, the taxpayers involved do not contend that they do not owe the taxes which are the subject of these actions. Their sole contention is that under § 27b the state is prohibited from making more than one relevy, even if the first relevy was erroneous. The agreed statement and the briefs contain no other contention. In the second place, it does not appear how the error necessitating the second relevy occurred. The majority opinion first assumes that the auditors of the State Board of Equalization were careless, and then holds (166 P.2d 27): "The error here was the error of the board." There is nothing in the record to support this assertion. The record is completely silent as to the cause of the error. There is no more reason to assume that it was because of carelessness on the part of the board employees than there is to assume it was caused by the submission of incomplete or inaccurate records by the taxpayers.

As the majority opinion points out, the tax involved is the excise tax imposed upon wholesalers on the sale of distilled liquors by the terms of the Alcoholic Beverage Control Act as amended in 1937, Stats. of 1937, Chap. 758, p. 2126. It is admitted that the two plaintiffs were duly licensed by the State Board of Equaliza-

tion for the years in question as distilled spirits wholesalers and importers of distilled spirits under the terms of the statute.

In the Wardall case, the Board, in 1937, made an audit of the books and records of the licensee for the period July 1, 1935, to December 31, 1936, and determined that there was a tax deficiency of \$30.59. An assessment was made in this amount and the licensee was notified in writing of the amount of the assessment, the notice reciting that the licensee could petition for a relevy within fifteen days, but upon failure to so petition "the amount of this levy becomes final at the expiration thereof." No petition for relevy was filed and the licensee paid the amount so assessed. In 1939 the Board made another audit of the licensee's books for the period January 1, 1937, to June 30, 1937, and thereafter notified the licensee that an assessment in the amount of \$1,991.77 had been levied against him for that period. The licensee filed a petition for relevy, which resulted in a further audit of the books and records of the licensee. On this petition for relevy the Board determined that nothing was due for the 1937 period involved, but determined there was \$1,685.58 due for the period July 1, 1935, to December 31, 1936. This sum was paid under protest by the licensee and this action brought to recover the same. The action resulted in a judgment against the State.

In the Cavagnaro case the appeal is from the judgment for the licensee in the amount of \$259.49. The agreed statement shows that in January, 1938, the Board made an audit of this licensee's books and records for the period July 1, 1935, to December 31, 1937, and determined that \$647.31 was due from the licensee for this period. An assessment was levied in this amount, the licensee was so notified, and the licensee paid the assessment. Thereafter in 1939 the Board made an audit for the period January 1, 1938, to June 30, 1939, and the auditor for the Board determined that \$590.58 was due from the licensee for this period. Before an assessment was levied, however, the licensee convinced the auditor that but \$18.62 was due for this period. Thereafter the Board, for reasons that do not appear, levied an assessment for this 1938-1939 period in the amount of \$294.82. The licensee petitioned for a relevy. The Board thereupon determined that but \$18.62 was due for the 1938-1939 period, but also determined that for the period

July 1, 1935, to December 31, 1937, there was \$259.49 due. This sum was paid under protest and this action instituted.

The sole question to be decided on both appeals relates to the validity of the levies for taxable periods for which there has already been a levy under the statute. It is the contention of the State that it can collect past due taxes regardless of the number of prior levies, while the licensees urge that under the statute but one levy may be made. The parties are agreed that the statute as it read in 1937 is applicable.

The majority opinion sets forth most of the pertinent provisions of the applicable statute, and only those sections not quoted in the majority opinion will be here set forth. Section 24 of the statute provides: "An excise tax is hereby imposed upon all distilled spirits sold in this State by rectifiers or wholesalers thereof * * *." Stats. of 1937, at p. 2144.

The act then provides that the tax imposed by § 24 shall be collected by means of attaching to each package containing such distilled spirits, stamps in such denominations as are equivalent to the amount of the tax. This method of collection has since been repealed. This method, while in force, was designed to keep the payment of the tax current with sales, but it was contemplated that additional assessments might be necessary. To this end statutory authority was given the Board to make investigations and additional assessments, and a statutory method of protesting and litigating the validity of such assessments set forth.

Following § 24 appear the various sections of the statute set forth in the majority opinion. Section 27a requires the Board to give to the licensee "against whom any levy is made under the provisions of section 27 of this act notice of such levy." Stats. of 1937, at p. 2148. Section 27d provides: "Upon payment to the board of the amount of any levy paid under the provisions of sections 27, 27b or 27c hereof [providing for hearing on petition for relevy] the board shall credit the distilled spirits excise tax stamp account of the wholesaler or rectifier against whom the levy was made with the amount of such payment for the period for which such levy was made. * * *" Stats. of 1937 at p. 2149.

The majority opinion holds that the provisions of § 27b compel the conclusions

therein reached. That section provides: "Any wholesaler or rectifier against whom a levy is made by the board under the provisions of sections 27 or 27a hereof [providing for notice] may petition for a relevy thereof within 15 days after service of the notice thereof. If such a petition for relevy is not filed within said 15 day period the amount of the levy becomes final at the expiration thereof." Stats. of 1937 at p. 2148.

The majority opinion holds that under § 27b, but one relevy is permitted for any particular period, and, if not protested, the amount of the tax fixed for that period becomes final against the state in the amount of the levy fixed by the Board. The state contends that § 27b places no such limitation on the Board's powers, and that, properly interpreted, the act permits as many levies by the Board for any particular period as may be necessary to collect the full tax owed by the licensee.

The majority opinion must place its sole reliance on its interpretation of § 27b. Were it not for that section there can be no doubt at all but that the relevies here involved would have been proper. The law is well settled without substantial contradiction that, in the absence of a limiting statute, when property or a taxable right escapes taxation, either because of acts of the taxpayers or by reason of mistakes of the collecting officials, the collecting officials may make as many relevies as may be necessary to collect the full amount of the tax due. The rule, amply supported by authorities from many jurisdictions, is stated as follows in 51 Am.Jur. p. 676, § 734: "The omissions of the taxing officers, in previous years, to assess certain property cannot control the duty imposed by law upon their successors or the power of the legislature. Taxes are not canceled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation, and until payment the state may proceed by all proper means to compel the performance of the obligation. No statutes of limitation run against the state, and it is a matter of discretion with it to determine how far into the past it will reach to compel performance of a taxpayer's obligation." See, also, *City and County of San Francisco v. La Societe, etc.*, 131 Cal. 612, 63 P. 1016; *Security Savings Bank v. San Francisco*, 132 Cal. 599, 64 P. 898; *Kern Valley etc. Co. v.*

County of Kern, 137 Cal. 511, 70 P. 476; *Rosasco v. County of Tuolumne*, 143 Cal. 430, 77 P. 148; *Fullerton Oil Co. v. Johnson*, 2 Cal.2d 162, 39 P.2d 796.

Thus, unless § 27b limits the power of the Board, it has the power to make as many levies as may be necessary to collect the tax due from the licensee.

Now what does § 27b provide? Simply that when a levy is imposed the wholesaler or rectifier is entitled to notice and may petition for a relevy. If he does not petition for such relevy within fifteen days "the amount of the levy becomes final." It seems perfectly clear to me that such section places no limitation on the state at all. The section was obviously passed not to provide a restraint against the state but to protect the state. The lawmakers were careful to protect the rights of the taxpayer by requiring notice, etc., and by permitting him to challenge a levy, and if he did not do so that levy becomes final—final against him, not final against the state.

To say, as do the majority, that § 27b places an absolute limitation of but one levy on the Board is to give that section a distorted meaning, and, not only disregards the language of § 27b, but entirely disregards all of the other provisions of the statute. It must be remembered that under the statute the amount of the tax is not fixed by any levy of the Board. Under the statute the excise tax becomes due at the time of the sale, but is payable at a future date if it be discovered upon audit that the taxpayer has not paid the amount he owes the state. *People v. Buckles*, 57 Cal. App.2d 76, 134 P.2d 8. It has heretofore been held in reference to this very statute that § 24 imposes the tax and fixes the amount due and that no assessment or reassessment is necessary to create the liability. *Empire Vintage Co. v. Collins*, 40 Cal.App.2d 612, 105 P.2d 391; *Rathjen Bros. v. Collins*, 50 Cal.App.2d 774, 123 P.2d 930. In the *Rathjen* case it is stated page 783 of 50 Cal.App.2d, page 935 of 123 P.2d: "Section 24 imposed the tax, and no assessment or reassessment was necessary to create the liability or to make the taxpayer personally liable therefor. *Dollar Sav. Bank v. United States*, supra [19 Wall. 277, 86 U.S. 277, 240, 22 L.Ed. 80]; *United States v. Chamberlin*, 219 U.S. 250, 31 S.Ct. 155, 55 L.Ed. 204."

If the above principles be kept in mind there is no difficulty at all in interpreting § 27b, either alone, or with the balance of

the statute as a whole. The language of the section is that unless the licensee petitions for a relevy within a specified time "the amount of the levy becomes final." It should be noted that what is made final is not the amount of the tax but the amount of the particular "levy." As already pointed out, when an additional levy is made it is not the levy that imposes the tax. The amount of the tax is fixed under § 24 at the time of the sale. The subsequent levy, or levies, are merely means provided by the statute for collecting a tax already due. The Legislature must be presumed to have known the difference between making the amount of a tax final and making the amount of a particular levy final. When it used the word "levy" it must have meant exactly what it said—namely, that that particular levy would become final against the taxpayer unless he petitioned for a relevy.

This interpretation is strengthened, if not in fact compelled, when the statute is read as a whole. Section 27 provides for "examinations or investigations" of the books and records of the licensee. Section 27a refers to "any levy" and requires notice thereof to the licensee. Obviously these sections imply that the Board shall have the power to make as many investigations, examinations and levies as may be necessary to collect the tax.

This interpretation not only gives effect to the actual language of the statute but it is also in accord with public policy. These taxpayers owe the tax which is the subject of these levies. At least, they do not contend to the contrary. If they are not compelled to pay the tax they will have paid a smaller tax than those who have paid their full tax. Had the full tax been paid by stamps, no further levy or levies would have been necessary. Moreover, if the interpretation contended for by the licensees were correct it would mean that if the Board once made a levy on an incomplete record the licensees could, by failing to petition for a relevy, make the amount of the tax final, thus escaping the payment of their just tax.

It is true that under the interpretation given the statute in this opinion the Board may make investigations and subsequent levies for taxes due for some indefinite period in the past. The majority places great weight on this consideration. Conceivably, this could be a great inconvenience to the licensee and in some circumstances might cause the licensee financial

loss. But it certainly cannot be assumed that the Board will abuse its powers. If it does, legal remedies exist to prevent such abuse. In a proper case, where facts not here present exist, an estoppel may operate against the government. *La Societe Francaise v. Cal. Emp. Comm.*, 56 Cal. App.2d 534, 133 P.2d 47; *Times-Mirror Co. v. Superior Court*, 3 Cal.2d 309, 44 P.2d 547; *McGee v. City of Los Angeles*, 6 Cal.2d 390, 57 P.2d 925; *City of Los Angeles v. County of Los Angeles*, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370; *Farrell v. County of Placer*, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323. No facts to substantiate an estoppel here appear.

In my opinion the judgments appealed from should be reversed.



Application of PACIFIC VEGETABLE OIL CORPORATION.*

PACIFIC VEGETABLE OIL CORPORATION
v. C. S. T., Limited.
Civ. 12901.

District Court of Appeal, First District,
Division 2, California.

Feb. 21, 1946.

As Modified on Denial of Rehearing
March 23, 1946.

Hearing Granted April 18, 1946.

1. Action ⇐ 10

Exhaustion of administrative remedies is prerequisite to court proceedings.

2. Contracts ⇐ 292½

A corporation, purchasing copra under contract subject to published rules of foreign commerce association of San Francisco Chamber of Commerce, was bound to exhaust its remedies under such rules for seller's alleged breach of contract before appealing to court, and by moving to vacate award in seller's favor by arbitrators, to whom parties' dispute was submitted pursuant to such rules, within three months after affirmance of award by association's board of appeal, satisfied statutory requirement that such motion be made within three months after award. Code Civ.Proc. § 1290.

* Subsequent opinion 174 P.2d 441.

3. Trial ⚡63(1)

Parties to action should present all their evidence in chief at first opportunity and should not be allowed to hold back such evidence for introduction in guise of rebuttal, unless such rule is relaxed in trial court's sound discretion. Code Civ.Proc. §§ 607, 2042.

4. Contracts ⚡292½

In arbitration under rules of foreign commerce association of San Francisco Chamber of Commerce, requiring presentation of written statements of fact to association for submission to arbitrators and respective parties, who may reply thereto, all evidence in chief must be included in opening statements.

5. Contracts ⚡292½

Where major portion of evidence in chief, supporting corporation's claims of impossibility of performance and termination of its contract for sale and delivery of copra, was omitted from seller's opening statement, submitted to arbitrators and buyer pursuant to applicable rules of foreign commerce association of San Francisco Chamber of Commerce, and reserved for seller's reply statement, thus depriving buyer of opportunity to meet or rebut such evidence, arbitrators' award, reciting simply that evidence confirmed seller's contention of termination of contract by force majeure, was invalid.

6. Contracts ⚡292½

Exhibition of reply statement, in which successful party to arbitration proceedings included most of its evidence in chief, to other party pending appeal from arbitrators' award to board of appeal of foreign commerce association of San Francisco Chamber of Commerce, did not cure previous error in omitting most of such evidence from such party's opening statement, where board simply upheld arbitrators' decision and association's rule, authorizing appeal to board, contained no provision for submission of additional evidence thereto.

7. Contracts ⚡292½

A corporation seeking to uphold award in its favor on arbitration held under superior court's order for compulsory submission to arbitration of dispute as to termination of contract between corporation and another corporation, cannot contend that court's determination that con-

tract bound parties to submit to arbitration was erroneous. Code Civ.Proc. § 1282.

8. Contracts ⚡292½

A contract made subject to published rules of foreign commerce association of San Francisco Chamber of Commerce must be construed as incorporating the then existing published rules of such association and not subsequent amendments thereto.

9. Contracts ⚡292½

The rule that party whose evidence is improperly excluded must show materiality of such evidence by offer of proof to support claim that ruling was prejudicial is inapplicable to arbitration proceedings, wherein one party was afforded no opportunity to offer evidence rebutting, nor to make argument on, other party's evidence in chief, omitted from its opening statement, but included in its reply statement, before making of award in such other party's favor.

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

In the matter of the application of the Pacific Vegetable Oil Corporation for an order directing arbitration of a dispute between applicant and C. S. T., Limited, as to impossibility of performance or termination of respondent's contract for sale and delivery of copra to applicant. From an order denying applicant's motion to vacate an award of arbitrators in respondent's favor, applicant appeals.

Reversed.

Manson, Allan & Miller, of San Francisco, for appellant.

Lillick, Geary, Olson & Charles, Joseph J. Geary, and Edwin L. Gerhardt, all of San Francisco, for respondent.

DOOLING, Justice.

This is an appeal from an order of the superior court denying a motion to vacate an award in arbitration.

Appellant, Pacific Vegetable Oil Corporation, and respondent, C. S. T., Ltd., entered into a contract by which respondent agreed to sell and deliver to appellant, with the ultimate destination Mexico, a specified quantity of "South Sea sun and/or hot air dried copra." The contract provided

for: "Shipment: per S. S. Edna scheduled to load in Fiji Islands during late January and/or February 1942." It further contained the following provision: "This contract is subject to published rules of the Foreign Commerce Association of the San Francisco Chamber of Commerce except insofar as these rules may be abrogated by special conditions written into this contract."

Respondent having failed to make the delivery called for by the contract, appellant demanded of respondent the submission of their dispute to arbitration pursuant to the published rules of said Foreign Commerce Association, and upon respondent's refusal, procured an order of the superior court compelling such submission.

The award of the arbitrators was in favor of respondent and appellant prosecuted an appeal pursuant to rule 511 of the rules of the Foreign Commerce Association, the first sentence of which reads:

"An appeal from any award of arbitrators may be made to a Board of Appeal of this Association, no member of which shall have been an arbitrator in the matter appealed from."

The board of appeal having affirmed the award the motion to vacate the award as affirmed was made in the superior court.

[1,2] Respondent makes the preliminary point that the motion to vacate was not made within three months of the award as required by section 1290, Code of Civil Procedure. While more than three months elapsed from the date of the original award, the motion was within the time limit measured from the date of the award on appeal. We find nothing in the point. The rule requiring the exhaustion of administrative remedies as a prerequisite to court proceedings is so well settled in California as hardly to require any citation of authority. See *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; *Simpson v. The Salvation Army*, 49 Cal.App.2d 371, 121 P.2d 847. Appellant was bound to exhaust its remedies under the rules of the Foreign Commerce Association before appealing to the court and by proceeding within three months after those remedies were exhausted with the award on appeal it satisfied the requirement of Code Civ.Proc. sec. 1290.

It was respondent's contention before the board of arbitration that the performance

of its contract was excused under rule 557 which is quoted hereunder:

"Casualty—Seller shall not be responsible to Buyer for delayed or non-shipment directly or indirectly resulting from a contingency beyond his control, such as embargo, act of government, strike, fire, flood, drought, hurricane, war, insurrection, riot, explosion, epidemic, pestilence, earthquake, accident, perils of the sea, tidal wave, or any other contingency beyond Seller's control not herein enumerated. If, due to any of the causes provided herein, shipment by steamer is not made within two months or by sailing vessel within three months after the contractual time for shipment, contract shall terminate with respect to any goods not then shipped."

Rules 505 and 506 of the rules governing the arbitration read as follows:

"Rule 505. Written statements of fact, together with written arguments thereon, must be presented in quadruplicate to the Foreign Commerce Association of the San Francisco Chamber of Commerce, which shall be submitted in their entirety to the arbitrators, but no oral evidence shall be given or personal appearance of the parties permitted unless requested by the arbitrators.

"Rule 506. Immediately upon receipt thereof, the Chairman of the Association shall submit a copy of the statement of fact to the respective parties to the arbitration, and each shall have the right to reply thereto, but if no such answer is made by either party within a reasonable time, it shall be considered a waiver of the right of answer."

Pursuant to the rules each party submitted an opening statement, a copy of which was duly submitted to the other. Appellant claimed before the trial court and claims here that because of the fact that the respondent's opening statement was a mere skeleton, and its real proofs were withheld for the reply statement, appellant was denied the opportunity of meeting and attempting to rebut the evidence in support of respondent's defense. To clearly appraise this argument requires an extensive quotation from respondent's opening statement. Herewith is copied verbatim every assertion dealing with claimed impossibility of performance contained in the opening statement, omitting the recital of the dealings and negotiations between the parties (the references are ob-

vously to the S.S. Edna although its name is omitted throughout):

"* * * Seller contends that performance was impossible because the S.S. ——— was delayed by causes beyond its control, i. e. repairs and war conditions, and because the government of the Fiji Islands refused at any time to grant the necessary export license and in addition purchased all copra in the Fiji Islands—and that the seller is thereby excused.

* * * * *

"In January, 1941 (sic), the S.S. ——— was still in the United States, having been delayed as the result of necessary repairs and the necessity of proceeding on various phases of its voyage in convoy due to war conditions.

"By reason of the necessary delay, which was recognized by the Buyer, it in turn advised the Seller that it was agreeable to an extension of the letter of credit to permit loading at a later date. However, regardless of the fact of vessel's delay it became impossible during January and continuing during subsequent months to load the contracted copra no matter when the vessel had called at Suva.

"During the first week in January Seller understood that an export license from Suva had been refused and this was confirmed on January 8th by the receipt of a telegram from Seller's Suva representative advising that the next trip to Mexico was refused and that it 'must be Canada.'

* * * It is important to note, however, that the information from Seller's Suva representative specified Canadian shipment and no other. This information of January 8th was again confirmed on January 17th, when Seller obtained further word that the government intended for the present to refuse licenses for destinations other than Canada. There was never any subsequent modification or change in the government's position, and on February 18, 1942, the British Ministry of Food became the buyer of all copra in the Fiji Islands.

* * *

"The same situation continued to prevail in the Fiji Islands during the subsequent months and it was not only impossible to export copra from the Fiji Islands to Mexico or the United States, but it was not even possible to send such copra to Canada on behalf of private parties.

"The contract between Buyer and Seller was specifically made subject to 'prevailing

government regulations', which were such, not only during the time the vessel was scheduled to load but also during subsequent months, as to prevent Seller from making the contemplated shipment. The contract was therefore terminated because of the prevailing government regulations and because of the impossibility of performance."

Rules 505 and 506 contemplate the submission of the dispute to the arbitrators entirely on the parties' written statements and written replies, unless the arbitrators request otherwise. If the arbitrators chose to accept the bare, unsupported narrative above quoted it may well be that they would be acting within their authority under the rules in doing so. Appellant's complaint is that the bald narrative assertions in the opening statement were supplemented in the respondent's reply statement by a great amount of supporting evidence and by an additional and new defense which were not properly or at all matters in rebuttal of appellant's opening statement, but constituted a part of respondent's case in chief, that appellant received no copy of this reply statement before the award was made and had no opportunity to meet or rebut the new matter therein contained.

The new defense is found in the following quotation from respondent's reply statement: "It (the S.S. Edna) had previously been delayed as a result of war conditions, which were known to Buyer and which alone, considering the fact that the crew refused to sail on account of war conditions and the fact of other delays encountered because of the war, would have been sufficient to terminate the contract under Foreign Commerce Association Rule 557. The contract called for late January or February loading. Due to causes beyond Seller's control, recognized by Buyer, the vessel was unable to load before June. Therefore, the contract clearly had expired under Rule 557 providing for termination if the goods are not shipped by steamer within two months after the contractual time for shipment."

Of the just quoted language it is well to note that nowhere in the respondent's opening statement was it asserted that the S.S. Edna was unable to load at Suva within two months after February, 1942, nor that the delay was in part due to the crew's refusal to sail on account of war conditions, nor was the express claim made that the contract expired under rule 557

because the S.S. Edna was unable to load within two months after February, 1942. The only fact about the S.S. Edna's movements contained in respondent's opening statement, outside of vague generalities, was that in January, 1941 (clearly a misprint for 1942), it was still in the United States. This would not support a finding that it did not reach Suva in time to load in March or April nor an argument that it was impossible for it to load within the two months grace period provided in rule 557.

The new evidence comprised a detailed recital of the negotiations between the respondent's representative in the Fiji Islands and the government in respect to its fulfilling this contract and its efforts to get an export license, supported by quotations from numerous letters and telegrams, some of them from government representatives. The statement contained an offer to submit the originals of these documents to the arbitrators and it is an admitted fact that they were examined by the arbitrators before they made their award.

[3] The distinction between evidence in chief and rebuttal evidence is too well established to need extensive comment. It is recognized by our code (secs. 607, 2042, Code Civ.Proc.) and is a common place of our procedure (24 Cal.Jur., 764, 765, 767; 64 C.J. 145; 53 Am.Jur. 101, 107). Under the established rules, except where relaxed in the sound discretion of the trial court, the plaintiff and defendant should present all of their evidence in chief at the first opportunity, not being allowed to hold back evidence in chief to be introduced in the guise of rebuttal. The reasons for this rule have probably never been better expressed in a few words than by Mr. Justice Story in *Philadelphia and Trenton Railroad Co. v. Stimpson*, 14 Pet. 448, 463, 39 U.S. 448, 463, 10 L.Ed. 535:

"If every party had a right to introduce evidence, at any time, at his own election, without reference to the stage of the trial in which it is offered, it is obvious, that the proceedings of the court would often be greatly embarrassed, the purposes of justice be obstructed, and the parties themselves be surprised by evidence destructive of their rights, which they could not have foreseen, or in any manner have guarded against."

[4] The reasons for requiring all evidence in chief to be included in the open-

ing statements in an arbitration under the quoted rules are much more compelling than in the ordinary judicial proceeding. The rules contemplate only an exchange of opening statements and one reply statement by each party to his adversary's opening statement. Under such procedure if a party omits most of his evidence in chief from his opening statement and inserts it in his reply statement his adversary is given no opportunity to meet or rebut it either by evidence or argument. That this is just what occurred in this case needs no elaboration to establish.

We can find no distinction in principle between this case and *Christenson v. Cudahy Pack. Co.*, 198 Cal. 685, 247 P. 207. There an award given under the same rules (then differently numbered) was held invalid because through an oversight the opening statement was not delivered to the other party, so that he had no opportunity to reply. The court said (page 691, of 198 Cal. page 209 of 247 P.):

"In fact these statements and replies were the only means offered by said rules whereby the parties might present the facts of their respective claims before the board of arbitrators. To deprive either of the parties of this right would be to deny to such a party his right to present his case, or to make his defense, as the case might be, and for the arbitrators to make an award before either party had been given the opportunity to present his statement and reply would be to decide the matter before such party had an opportunity to submit his evidence in support of said cause." Cf. *La Prade v. Department of Water and Power*, Cal.Sup., 162 P.2d 13; *Olive Proration, etc., Comm. v. Agricultural etc. Com.*, 17 Cal.2d 204, 109 P.2d 918; *McLaurin v. McLaughlin*, 4 Cir., 215 F. 345; *Speer v. Bidwell*, 44 Pa. 23; *Cameron et al. v. Castleberry et al.* 29 Ga. 495.

[5] We can see no difference in principle between the failure to permit a party to meet his adversary's case by a failure to submit to him the adversary's opening statement, and a similar failure to permit him to meet his adversary's case by the adversary reserving for his reply statement the major portion of his evidence in chief. A simple reading of respondent's opening and reply statements demonstrates that appellant was deprived of the opportunity to meet or rebut the most persuasive evidence in support of respondent's case in

chief supporting its claim of impossibility of performance by reason of government interference, and was entirely deprived of the opportunity to meet respondent's claim that the contract was terminated by the unavoidable absence of the S.S. Edna from the point of loading in the Fiji Islands beyond the two months period of grace provided by rule 557.

The award of the arbitrators recited simply that: "Evidence submitted confirmed Seller's contention of termination of contract by force majeure."

It was the opinion of the trial judge, as evidenced by a memorandum filed at the time his decision was announced, that by the use of the expression "force majeure" the arbitrators clearly excluded the respondent's claim of termination of the contract by the impossibility of loading the S.S. Edna within two months after February. If the arbitrators believed the statements of respondent that the delay was caused by necessary repairs, refusal of the crew to sail because of war conditions and necessity of sailing in convoy they might well have held that these were contingencies beyond Seller's control within the meaning of rule 557 and have embodied their conclusion to that effect in the expression "force majeure."

[6] Appellant was allowed to see respondent's reply statement after the original award. It argued on appeal to the Board of Appeal the same matters here argued. The award of the Board of Appeal did not pass on the matters herein discussed but decided simply that: "Following a careful review of the complete evidence submitted, the Board of Appeals unanimously upholds the decision of the original Arbitration Committee." We cannot see that the exhibition of the reply statement to appellant pending the appeal in any way cured the previous error. Under rule 511 there is no provision for submitting additional evidence to the Board of Appeal and a reading of the rule indicates that the only powers of the Board of Appeal are to uphold or reverse the award.

At the time the contract was entered into and at the time of the submission to arbitration rule 508 of the published rules of the Foreign Trade Association read:

"The findings and award of the arbitrators shall be in writing, signed by the ar-

bitrators, fully setting forth the facts of the case and a copy thereof shall immediately be furnished the parties to the dispute."

After the submission and before the award Rule 508 was amended by deleting the words "fully setting forth the facts of the case." The arbitrators set forth no facts in their award other than their conclusion of "termination of contract by force majeure."

[7] Respondent objects that the arbitration is not one held pursuant to the agreement of the parties contained in their contract. There is substantial authority supporting their claim that the language of the contract is not sufficient to bind them to arbitration under the rules of the Foreign Trade Association. *General Silk Importing Co. v. Gerseta Corporation*, 198 App.Div. 16, 189 N.Y.S. 391; *In re General Silk Importing Co.*, 200 App.Div. 786, 194 N.Y.S. 15; *Bachmann, Emmerich & Co. v. S. A. Wenger & Co.*, 204 App.Div. 282, 197 N.Y.S. 879; *Western Vegetable Oils Co. v. Southern Cotton Oil Co.*, 9 Cir., 141 F.2d 235. However, the order of compulsory submission made by the trial court under which the arbitration was actually held could only have been made on the theory that the contract did bind the parties to submit to arbitration. Sec. 1282, Code Civ.Proc. Respondent is here seeking to uphold the award made pursuant to that order. It does not lie in its mouth to insist on the validity of the award and at the same time to attack the basis upon which the superior court ordered the arbitration. It cannot at the same time seek the benefits of the arbitration award made pursuant to the order of the superior court and contend that the determination of the superior court that its contract bound it to submit to the arbitration under the published rules of the Foreign Commerce Association is erroneous.

[8] In making their contract "subject to published rules of the Foreign Commerce Association" the reference must be construed as incorporating the then existing published rules, and not subsequent amendments thereto. The reference to "published rules" appears to make this perfectly clear. The parties bound themselves by the rules then published and hence actually or constructively known to them. They did not even bind themselves to existing rules if not then published, much less to rules not yet adopted. Rule 508 as then published

was thereby made a part of their agreement, and the arbitrators should have followed it in making their award. The attempted analogy of procedural changes in the law is not apt. The question is strictly one of contract and the parties are entitled to have the arbitration carried out pursuant to their agreement. *Christenson v. Cudahy Pack. Corp.*, 198 Cal. 685, 247 P. 207, *supra*; *William H. Low Estate Co. v. Lederer Realty Corp.*, 35 R.I. 352, 86 A. 881, Ann.Cas.1916A, 341; *Hines v. Fisher*, 61 W.Va. 565, 56 S.E. 904. If the trial court directs a resubmission to arbitration the arbitrators will have no difficulty in proceeding under rule 508 as it was published at the time of the contracting.

[9] Respondent urges that appellant must not only show error in the proceedings but must further show that the error was prejudicial, citing *Manson v. Wilcox*, 140 Cal. 206, 73 P. 1004 and *Moore v. Griffith*, 51 Cal.App.2d 386, 124 P.2d 900. Those cases apply the familiar rule to arbitration proceedings that where evidence is improperly excluded upon a trial the party against whom the ruling is made must by offer of proof show the materiality of the excluded evidence in order to support a claim that the ruling was prejudicial. The rule can not be applicable here because, under the peculiar procedure provided by rules 505 and 506, no opportunity was afforded appellant to make any such offer of rebutting evidence to, nor indeed any argument upon, the evidence in chief included in respondent's reply statement before the making of the award. The case is similar in this respect to *Christenson v. Cudahy Pack. Co.*, 198 Cal. 685, 247 P. 207, *supra*, wherein there appears to have been no showing of what evidence might have been presented in the reply statement. There, as here, no opportunity to make any such showing before the award was presented. The case is analogous to and even stronger than the situation presented in *Lawless v. Calaway*, 24 Cal.2d 81, 91, 147 P.2d 604, 609, where the court said:

"Where, however, an entire class of evidence has been declared inadmissible or the trial court has clearly intimated that it will receive no evidence of a particular type or class, or upon a particular issue, an offer of proof is not a prerequisite to arguing on appeal the prejudicial nature of the exclusion of such evidence." Cf. *To-*

maier v. Tomaier, 23 Cal.2d 754, 760, 146 P.2d 905; *Caminetti v. Pacific Mut. Life Ins. Co.*, 23 Cal.2d 94, 100, 142 P.2d 741.

The order appealed from is reversed.

NOURSE, P. J., and GOODELL, J.,
concur.



73 Cal.App.2d 150

MOTT v. NARDO et al.
Civ. 14983.

District Court of Appeal, Second District,
Division 3, California.
Feb. 19, 1946.

1. Deeds ⇨140, 143

A reservation or exception in deed in favor of stranger thereto creates no estate or interest in him, though it may operate as admission in his favor, estoppel against grantor, or exception from thing granted.

2. Waters and water courses ⇨156(8)

A reservation of right of way over land for water conduits in deed from bank owning land and trustee, who was stranger to title, was a nullity as to trustee, who had no interest subject to reservation or exception in deed.

3. Deeds ⇨140, 143

A reservation or exception in deed creates no estate or interest in thing reserved.

4. Estoppel ⇨52

The office of "equitable estoppel" is to protect one from loss which he cannot otherwise escape, and vital principle thereof is that one whose language or conduct leads another person to do what he would not otherwise do, shall not subject such person to loss or injury by disappointing expectations on which he acts.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

5. Estoppel ⇨52

To constitute "equitable estoppel" respecting title to property, party estopped must have made admissions or declarations or done acts with intention to deceive another party regarding title or with such carelessness or culpable negligence as amounts to constructive fraud.

6. Waters and water courses ⇨156(4)

A bank, with which an officer thereof, as trustee, joined in conveying bank's land by deed reserving right of way over it for water ditch, was not negligent in failing to take action for removal of cloud on its title to such easement by reservation in trustee's favor, but had right to treat such reservation as nullity, and did not impliedly represent, by such inaction, that trustee had valid interest in easement, so that subsequent purchaser of land, to whom bank's successor executed quitclaim deed of all rights reserved by bank in previous deed, was not estopped from questioning validity of trustee's deeds, conveying such rights to water company, or privilege granted lessee of adjoining land by such company to use ditch.

7. Estoppel ⇨54, 58

There can be no estoppel respecting title to property, where knowledge of both parties concerned is equal and nothing is done by one of them to mislead the other.

8. Banks and banking ⇨116(1)

Knowledge of bank officer's wrongful acts in asserting his ownership of interest in water ditch easement, reserved in deed of bank's land by bank and such officer as trustee, and transferring such easement to water company, will not be imputed to bank, as such acts were adverse to bank's interests.

9. Principal and agent ⇨180

Knowledge of agent's acts in interest of himself or others and adverse to principal's interests will not be imputed to principal because of mere existence of agency.

10. Estoppel ⇨117

In action for damages from destruction of water ditch across defendant's land, evidence, offered by plaintiff to establish estoppel of defendant to question ownership of ditch easement by water company which permitted plaintiff to use ditch, that bank, which conveyed land to defendant's predecessor in title with reservation of such easement, did not notify water com-

pany that bank's co-grantor, who conveyed easement to such company, had no valid title thereto and was trustee of bank, and that plaintiff inquired whether water company owned easement when he arranged to receive water therefrom, was properly excluded as insufficient to establish estoppel.

11. Appeal and error ⇨1071(6)

Where evidence was insufficient to establish estoppel of defendant to question plaintiff's right to use water ditch across defendant's land with water company's permission, declining to make findings on such issue was not prejudicial to plaintiff, since such findings would have been adverse to plaintiff.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by George J. Mott against L. Nardo and others for damages from destruction of water ditch and injunctive relief. Judgment for defendants, and plaintiff appeals.

Affirmed.

Phillip W. Silver, of Los Angeles, for appellant.

John W. Preston, of Los Angeles, for respondents.

SHINN, Justice.

Plaintiff brought this action for damages and for injunctive relief, alleging that he was a lessee of agricultural land, that he had arranged to receive water from Moneta Water Company by means of a ditch which extended across the land of defendant Chester, consisting of 10 acres, being the north half of the north half of lot 52, McDonald's tract of Rancho San Pedro; that defendants Chester and his agents destroyed the ditch on the Chester land, depriving him of water for irrigation and that his crops were thereby destroyed. He alleged that Moneta Water Company was the owner of an easement for the maintenance of the ditch over the Chester land. Defendants denied the existence of the alleged easement, admitted the destruction of the ditch, and denied that it had been destroyed wrongfully. The court found that the water company did not own an easement over the Chester land and rendered judgment for defendants. Plaintiff appeals.

The above described land was owned on June 11, 1903, by German-American Trust and Savings Bank. On that day the bank and M. N. Avery, Trustee, made a deed of the land to one L. K. Stamps, which contained the following reservations: "A right-of-way for the construction and maintenance of water conduits for irrigation and domestic purposes is reserved. The right to develop water for irrigation purposes, excepting for the land hereby conveyed, is also reserved from this conveyance." At the date of the deed M. N. Avery, individually or as trustee, had no title to or interest in the land and he thereafter acquired none. On March 17, 1910, Avery, as trustee, gave a quitclaim deed to Moneta Water Company of all rights reserved by him in deeds theretofore issued by him to purchasers in the McDonald tract, namely, reservations such as the one in the deed to Stamps. On October 10, 1928, Avery and wife executed a similar deed to the water company. These three deeds constitute plaintiff's evidence in support of the claimed ownership of the easement by the water company. The court found, after a partial trial of the case, that the water company had a prescriptive right to the easement, but the case was reopened for further evidence and plaintiff abandoned the claim of title to the easement by prescription. Plaintiff stood upon the claimed record title of Avery to ownership of an interest in the easement and contended that if the title of record was not good, defendants were estopped to deny its sufficiency. Defendants denied that Avery ever had any interest in the easement and they alleged and proved that on May 14, 1943, Security-First National Bank of Los Angeles, successor to German-American Savings Bank, executed and delivered to defendant Chester a quitclaim deed covering all rights reserved by the bank in its deed to Stamps. There was no evidence that when Chester purchased this land he had any knowledge that the water company claimed an easement by virtue of the Avery deeds. In the deed by which he took title or those to his predecessors, other than Stamps, no reference was made to the reservation in the Stamps deed.

[1-3] Plaintiff does not question that it is the rule that a reservation or exception in a deed in favor of a stranger to the deed creates no estate or interest in the latter. He points out that Avery was

named as a grantor but concedes that he was a stranger to the title. He quotes a statement from *Butler v. Gosling*, 1900, 130 Cal. 422, 426, 62 P. 596, 597, as follows: "A reservation or an exception in a conveyance will not confer title upon a stranger to the instrument, although under certain circumstances it may operate as an admission in his favor, or as an estoppel against the grantor," and from *Boyer v. Murphy*, 1927, 202 Cal. 23, 33, 259 P. 38, 41, quoting *Devlin on Deeds*, 3d Ed., sec. 982, as follows: "'A stranger to a deed cannot take title by reservation. But it may operate, when so intended by the parties as an exception from the thing granted.'" The same rule is stated in *Elliott v. McCombs*, 1941, 17 Cal.2d 23, 109 P.2d 329, where supporting cases are cited, and in *Deaver v. Aaron*, 159 Ga. 597, 126 S.E. 382, 39 A.L.R. 128. Avery was a stranger to the title and, of course, had no interest which could be subject to a reservation or exception in the deed. The deed did not purport to operate as a conveyance of an interest to him. Although he was named as a grantor and signed the deed as trustee, the reservation was a nullity so far as he was concerned. A reservation or exception in a deed does not create an estate or interest in the thing reserved.

Moneta Water Company ran an irrigation ditch across the land in 1912 and it was used for the conveyance of water for many years, but for a number of years prior to Chester's purchase in 1940 the ditch had not been used. The duration of these several periods is not material, inasmuch as there is no claim of a prescriptive title to the easement. Early in 1943 plaintiff cleaned out what was left of the ditch and used it for the conveyance of water until the summer of 1943, when its further use was prevented by defendants.

[4,5] Plaintiff's theory of estoppel is based upon the bank's "allowing M. N. Avery to assume that joint title to the right-of-way was being reserved unto him, and further thereupon enabling him thereafter on that assumption to make and execute a deed to said right-of-way to the Moneta Water Company, who in turn relied upon the validity of said deed from M. N. Avery, and who, likewise in turn led the plaintiff herein to believe that he would be entitled to the use of the right-of-way for the passage of water by permission of the Moneta Water Company, the grantee of said right-of-way, all to the ultimate

damage of the plaintiff." These facts, it is asserted, are sufficient "to estop the defendant, Chester, the successor in interest of the German-American Savings Bank, from questioning the right or the validity of the deed from M. N. Avery to the Moneta Water Company and of the privilege of the plaintiff to the use of said ditch through the permission granted the plaintiff from the Moneta Water Company." Plaintiff quotes section 1962, subdivision 3, of the Code of Civil Procedure, which reads as follows: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it," and the following from 10 Cal. Jur. p. 626: "The whole office of an equitable estoppel is to protect one from a loss which, but for the estoppel, he could not escape. The vital principle of equitable estoppel, it has been said, is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position involves fraud and falsehood, and the law abhors both." Plaintiff's argument assumes that the bank either knowingly or with culpable negligence allowed Avery to hold himself out, and to deal with the water company, as the owner of an interest in the easement in common with the bank. It was held in *Davis v. Davis*, 1864, 26 Cal. 23, 85 Am. Dec. 157, and restated in *Gioscio v. Lautenschlager*, 1937, 23 Cal.App.2d 616, at page 620, 73 P.2d 1230, at page 1232, that: "In order to constitute an equitable estoppel with respect to the title of property, it must appear that the party to be estopped has made admissions or declarations, or done acts with the intention of deceiving the other party with regard to the title, or with such carelessness or culpable negligence as to amount to a constructive fraud, * * *."

Plaintiff did not prove or offer to prove that there was ever any communication between the water company and the bank with reference to the easement or that the bank ever made any statement concerning the same. There was no evidence that the bank had knowledge of any negotiations between the water company and Avery or

of the execution of the quitclaim deeds by Avery.

[6,7] We have seen that plaintiff's first premise in presenting his theory of estoppel is that Mr. Avery held record title to the easement in common with the bank, and that this is a false premise. It appears further that the bank did not by word or act lead the water company to believe that Mr. Avery held title or ownership. The next step in plaintiff's argument is that the bank allowed it to appear of record that Mr. Avery owned an interest in the easement and thus made it possible for the water company to be deceived as to Mr. Avery's apparent interest. Plaintiff, indeed, insists that the water company relied upon the record, and we think it is clear from the evidence that it relied solely upon the record. Since the reservation in the deed to Stamps did not vest in Avery any interest in the easement, the bank and its successors were free to dispute any claim asserted by Avery or his assigns. The bank was not negligent in failing to take action for the removal of a cloud upon its title to the easement, originating in the attempted reservation in favor of Avery, as well as the bank, in the Stamps deed. It had a right to treat the attempted reservation in favor of Avery as a nullity, as indeed it was. There was no implied representation, in the mere inaction of the bank, that Avery had a valid interest of record or an interest other than that shown by the record. The bank therefore could feel secure in the belief that anyone undertaking to acquire the easement would learn from the record that it belonged to the bank and would govern himself accordingly. It is a familiar rule that there can be no estoppel with respect to title where the knowledge of both parties is equal and nothing is done by the one to mislead the other. *Eltinge v. Santos*, 1915, 171 Cal. 278, 284, 152 P. 915, Ann.Cas.1917A, 1143. See also *Gioscio v. Lautenschlager*, supra, 23 Cal.App.2d 616, 73 P.2d 1230; *Selinger v. Milly*, 1942, 51 Cal.App.2d 286, 294, 124 P.2d 631; *Jones v. Coulter*, 1925, 75 Cal. App. 540, 551, 243 P. 487; 31 C.J.S., Estoppel, § 90, p. 309.

[8,9] There was testimony to the effect that at the time the ditch was installed the water company notified the then owner of the Chester land that it was locating and installing the ditch and that no objection was made thereto. There was no evidence that there was any communication between

the water company and the bank at that time or thereafter with reference to any claims of the water company, nor was there evidence that the bank had knowledge that the water company, in constructing the ditch, was claiming ownership of the easement through the deeds from Avery.

It is plaintiff's theory that the bank had constructive knowledge of the water company's purchase of the easement from Avery and should therefore have notified the water company that Avery had no title. It was stipulated that at the time of the execution of the Stamps deed and also when Avery executed the later deeds, he was an officer of the bank. From this fact plaintiff argues that knowledge of the acts of Avery in asserting ownership of an interest in the easement, and in transferring it to the water company, will be imputed to the bank. This argument must fail because the assertion of title to an interest in the easement and the attempted transfers of the same by Avery would have been acts adverse to the interests of the bank. It is the invariable rule that knowledge of the acts of an agent which are in his own interest or in the interest of others and adverse to those of his principal will not be imputed to the principal because of the mere existence of the agency. 2 Am. Jur. 298, sec. 379; 3 C.J.S., Agency, § 269, p. 202; 1 Cal.Jur. 852, sec. 129. Plaintiff's evidence was insufficient to establish facts which would estop the bank or its assigns from questioning the claim of the water company to ownership of the easement.

[10,11] Plaintiff made various offers of proof to which objections were sustained. Among these were the following: That the bank did not notify the water company that Avery had no valid claim of ownership of the easement and no right to transfer it; that Avery was a trustee of the bank in 1910; that the water company paid a consideration to Avery for conveyance of the easement, and that plaintiff inquired of the water company as to whether it owned an easement over the Chester land at the time he arranged to receive water from the company. This evidence was offered in support of the claimed estoppel, but no evidence was offered to supply the deficiencies of proof hereinbefore enumerated. The court did not err in its rulings. The evidence, if received, would have been wholly insufficient to establish an estoppel. Likewise, it was

not error for the court to decline to make findings upon the issue of estoppel, since the findings, if they had been made, would have been adverse to plaintiff. 2 Cal.Jur. 1033, 1034.

The judgment must be affirmed for the reasons stated; it is unnecessary to mention other matters which are discussed in the briefs.

The judgment is affirmed.

DESMOND, P. J., and WOOD, J., concur.



73 Cal.App.2d 119

WATSON v. ROTARY COLORPRINT,
Inc., et al.
Civ. 14880.

District Court of Appeal, Second District,
Division 1, California.
Feb. 19, 1946.

1. Contracts ⇨143

A contract reduced to writing, measures parties' rights, duties and obligations. Code Civ.Proc. § 1856.

2. Contracts ⇨147(2)

Where language of written contract is clear, and involves no absurdity, court is justified in interpreting it and ascertaining parties' intention from language thereof, in absence of any charge of fraud, mistake or accident. Civ.Code, §§ 1638, 1639, 1647.

3. Damages ⇨65

Under paragraph of contract to print newspapers, providing that neither party should be responsible for failures or delays due to elements, acts of God, etc., and that in no event should either party be responsible to the other for consequential damages, parties waived responsibility for all such damages, in view of publisher's abandonment of theory of fraud or mistake in omitting words, "that might arise by reason of the things set forth in this paragraph," at end thereof.

4. Damages ⇨65

In action for breach of contract to print newspapers, where complaint, alleg-

ing defendant's unauthorized cancellation of contract set out in *haec verba* defendant's letters to plaintiff, stating that reason for cancellation was plaintiff's failure to pay for printing, but offering to continue to print papers for cash, plaintiff's loss of amount of rentals paid to enable him to carry out his part of contract and loss of newspaper subscriptions constituted consequential damages, which were not recoverable, in view of contract provision that neither party should be responsible for such damages.

—◆—
Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Thomas D. Watson against the Rotary Colorprint, Inc., for a declaration of the parties' rights under, and damages for defendant's breach of, a lease and agreement to print plaintiff's newspaper publications. From a judgment of dismissal and an order denying permission to file an amended complaint after sustaining demurrers to the complaint, plaintiff appeals.

Judgment affirmed, and appeal from order denying application to file amended complaint dismissed.

Oliver O. Clark and Robert A. Smith, both of Los Angeles, for appellant.

Hone & Hone and Daniel W. Hone, all of San Francisco, for respondent.

YORK, Presiding Justice.

The trial court sustained a general and special demurrer to plaintiff's complaint without leave to amend on November 15, 1943 and notice thereof was given on November 16, 1943. On July 31, 1944, plaintiff filed his notice of motion to vacate the order sustaining the demurrer and for leave to file an amended complaint. Such motion was denied on August 9, 1944, on the ground that the proposed amended complaint did not state a cause of action on either of the two counts therein alleged, whereupon judgment of dismissal was filed and entered. This appeal is prosecuted by the plaintiff from such judgment of dismissal and also from the order denying permission to file his amended complaint.

The action is one for declaratory relief and for damages, the complaint alleging a written lease and agreement, dated January 2, 1940, running for a period of two years from December 20, 1939, subject to the right of either party to cancel the

same upon 180 days' written notice. By the terms of the lease defendant was to print plaintiff's newspaper publications "of the same type and kind as those now being published" weekly or semiweekly, and "In the event that any such publication is published daily, or any other material change made from present practices, mutual agreements satisfactory to both parties shall be entered into regarding price or other changes which may be required by reason of such changes." It was alleged in the complaint "IV. That at the time of entering into said lease and said agreement, as well as for sometime prior thereto, it was the purpose, understanding and agreement that said plaintiff, as first party in said agreement, was the sole owner of the Glendale Star and associated newspapers, then being published weekly or semi-weekly in the City of Glendale, California, and circulated therein and in the surrounding territory, and that plaintiff at that time had a composing room with all necessary machinery for the composing of his publications, and that plaintiff was desirous of securing a press and stereotyping machinery on or near his premises for the printing of his publications, and that the defendant * * * as second party, was the owner of a twenty-four (24) page duplex tubular printing press and all the necessary stereotyping equipment that can be used for said purposes, and that said defendant was desirous to have said equipment installed at or near the plant of plaintiff for the purpose of printing said first party's publications, as well as doing such other printing of publications and miscellaneous printing as said second party may desire; and that at said times aforesaid, it was the purpose, understanding and agreement that during the term of said lease and said agreement, the Glendale Star or its successor, and any other publication published by first party, shall be printed by said second party, and that second party was to furnish the press work, the paper, and the ink; and that at said times it was also the purpose, understanding and agreement between the parties to said contract, and was well known to second parties that first party, plaintiff herein, was by entering into this said lease and agreement preparing to and was to publish, in addition to his established papers, a daily newspaper, and that plaintiff was making available said space mentioned" in said lease and agreement, "so that he could publish those already established and the daily then to be

started, and that plaintiff was in need of said equipment and service from defendant so that he could publish same."

The complaint also alleged breach of the agreement by defendant on June 5, 1940, and that plaintiff had been substantially damaged by reason thereof.

Incorporated in the complaint were copies of two communications dated June 5, 1940 signed by defendant in which it notified plaintiff of its election to cancel the agreement because of plaintiff's breach thereof in that he had failed to pay for the work of printing his publications as specified by the terms of said agreement. Accompanying said notices of cancellation were two other communications (also set out *haec verba* in the complaint) by which defendant offered to continue to print plaintiff's publications from day to day until further notice "at the prices and on the conditions heretofore prevailing, save and excepting that payment therefor shall be made in advance prior to the commencement of work thereon each day; such payment to be made in cash at Glendale."

Article 10 of said agreement provided that "Neither party shall be responsible to the other for any failures or delays hereunder due to the elements, fire, earthquake, acts of God, labor disturbances, shortages or inability to obtain labor or materials, or any other like or unlike cause hindering performance hereunder by the respective parties in accordance with their usual practices. *In no event shall either party be responsible to the other for consequential damages.*" (Emphasis added.)

With respect to said clause of the agreement, it was alleged in the complaint, in part, as follows: "That said paragraph 10 was intended and agreed to refer to the damages only such as are set forth in the said paragraph and not to the entire instrument or damages for the breach thereof by defendants. That said provision above set forth was attempted to be put into said written contract as Paragraph 10, but that in writing said written contract, it was by mutual mistake of the plaintiff and the defendant, or by the mistake of plaintiff and fraud of the said defendant in concealing its knowledge thereof, said agreement did not embody the actual provision as agreed upon, but said provision failed to carry out the intent and purpose of the last sentence therein and omitted therefrom the words *'that might arise by reason of the things set*

forth in this paragraph.'" (Emphasis added.)

In his prayer for relief, appellant seeks a judicial declaration of the rights of the parties under the contract, and also damages in the aggregate sum of \$210,000, of which amount \$100,000 is for general damage and the balance for special damage suffered by him.

Appellant urges that the complaint herein states a cause of action, if the agreement can be interpreted "so as to give to the term 'consequential damages' the meaning as understood and intended by the parties at the time of contracting." Also, that the last sentence of paragraph 10 should be interpreted to mean that exemption from responsibility for consequential damages applies only if such consequential damages are the result of acts of God or the other causes enumerated in the preceding sentence of said paragraph.

An examination of the complaint and the exhibits attached thereto discloses that the agreement of January 2, 1940 (Exhibit A) was the result of many weeks of negotiation between the parties thereto, Exhibit B having been drawn on the — day of November, 1939, and Exhibit C bearing date of December 5, 1939.

[1, 2] "It is a familiar rule that where a contract has been reduced to writing the instrument measures the rights, duties and obligations of the parties. *Harding v. Robinson*, 175 Cal. 534, 166 P. 808; *Code Civ. Proc.*, sec. 1856. * * * In the absence of any charge of fraud, mistake or accident, the language of the contract being clear, explicit and certain, and not involving an absurdity, the trial court was justified in interpreting it and ascertaining the intention of the parties from the language thereof. *Estate of Gaines*, 15 Cal.2d 255, 100 P.2d 1055; *Civ.Code*, secs. 1638, 1639 and 1647. We see no extrinsic ambiguity in the contract before us." *Tillis v. Western Fruit Growers, Inc.*, 44 Cal.App.2d 826, 831, 113 P.2d 267, 269.

[3] The complaint here under consideration alleged that "in writing said written contract, it was by mutual mistake of the plaintiff and the defendant, or by the mistake of plaintiff and fraud of the said defendant in concealing its knowledge thereof, said agreement did not embody the actual provision agreed upon, but said provision failed to carry out the intent and purpose

of the last sentence therein and omitted therefrom the words 'that might arise by reason of the things set forth in this paragraph.'" However, appellant made no further attempt to allege fraud or mistake in either his original complaint or his proffered amended complaint, and has apparently abandoned such theory, because in his reply brief he makes the statement: "This action does not rest upon fraud. It rests upon the contract properly interpreted in accordance with the intentions of the parties as permissibly determined and the respondent's wilful breach of its obligations under that contract."

In view of the foregoing, a reasonable interpretation of paragraph ten of the agreement would appear to be that the parties intended to waive responsibility for consequential damages.

[4] In his closing brief, appellant contends that the damages he seeks to recover are not all consequential damages, to-wit:

"Clearly the rental which plaintiff obligated himself to pay in order to enable him to carry out his part of this contract and which became, as alleged, a total loss in the sum of \$5,700.00, is a direct and not an indirect damage flowing from respondent's breach and as such is not within any definition of exclusion.

"In the same class is the \$1,350.00 which respondent agreed to pay to plaintiff at the rate of \$75.00 per month for its use of a portion of the premises controlled by appellant. This loss is a direct and not an indirect loss.

"In the same class is the loss to appellant of \$22,720.00 representing the value at \$5.00 each of 4,544 subscriptions to appellant's publications. The loss of these subscriptions, as alleged, is a loss resulting directly from the defendant's breach and not indirectly, and in no sense is it a consequential damage even in the absence of a definition of that term as alleged, by the parties."

In his allegation with respect to respondent's cancellation of the lease contrary to the terms thereof, appellant sets out in *haec verba* the four letters which he received from respondent dated June 5, 1940. In these communications respondent specifically states that the reason for the cancellation of the agreement on its part was the failure of appellant to pay for the printing of his publications pursuant to the terms of the agreement. However, these letters, as heretofore related, contained an offer by respondent to continue to print appellant's publications for cash. Therefore, the complaint affirmatively shows that respondent agreed to continue printing provided it was paid. Hence, any damage sustained by appellant resulted from his being required to pay cash in lieu of the credit extended by the terms of the agreement. The complaint does not allege a causal connection between respondent's refusal to print unless paid and appellant's loss with respect to rentals or his daily publication. As to this last item, the complaint affirmatively shows that no contract for the printing of appellant's daily was ever made as provided in the agreement, therefore, appellant's claim for damages for rentals and for loss of subscriptions must be denominated consequential and not recoverable. And this is true, even if respondent's failure to pay such rental and to print such dailies was without valid excuse.

An analysis of both the original complaint and the proffered amended complaint reveals that appellant failed to state a cause of action for breach of contract by respondent and that the trial court properly sustained the demurrer to the original complaint and committed no error when he denied appellant's application for permission to file the amended complaint.

For the reasons stated, the judgment of dismissal is affirmed. The appeal from the order denying application to file the amended complaint is dismissed.

DORAN and WHITE, JJ., concur.

73 Cal.App.2d 184

PEOPLE v. KRITON.

Cr. 2372.

District Court of Appeal, First District,
Division 2, California.

Feb. 21, 1946.

1. Perjury ☞34(1)

To comply with statute requiring that perjury be established by testimony of two witnesses or of one witness and necessary corroboration, prosecution must produce by necessary witnesses positive testimony as to facts absolutely incompatible with accused's innocence, and testimony proving facts contrary to those sworn to by accused or absolutely incompatible or physically inconsistent with his evidence is sufficient. Pen. Code, § 1103a; Code Civ.Proc. § 1968.

2. Perjury ☞34(1)

Evidence was sufficient to satisfy statutory requirement that perjury be established by testimony of two witnesses or of one witness and necessary corroboration. Pen.Code, § 1103a; Code Civ.Proc. § 1968.

3. Perjury ☞26

An indictment for perjury need not designate with particularity wherein matter sworn to was false, but if statement charged as false is of particular fact, averment negating such fact is sufficient.

4. Perjury ☞26

A perjury indictment, charging that defendant falsely testified on his trial for petty theft of two books that he received sales tag as receipt for payment for books and averring that he knew that all his testimony was false, was sufficient. Pen. Code, §§ 666, 966.

5. Perjury ☞19(2)

An indictment for perjury, alleging that defendant, under oath, knowingly gave material false testimony set forth in detail, and pointing out wherein such testimony was false, is sufficient as advising defendant of charge against him in such manner as to enable him properly to prepare defense thereto. Pen.Code, § 966.

6. Perjury ☞25(6)

A perjury indictment, alleging that defendant falsely testified on his trial for petty theft of two books that he received sales tag as receipt for purchase price thereof,

was not defective as setting out allegedly sworn facts showing that testimony was not material when given

7. Perjury ☞11(2)

In prosecution for perjury, test of materiality of defendant's alleged false testimony is met when such testimony could have properly influenced tribunal hearing case in which testimony was given on issues involved.

8. Perjury ☞37(1)

In perjury prosecution, instruction that materiality of defendant's alleged false testimony on his trial for petty theft was for court, not jury, to determine, negated defendant's contention that court submitted to jury question whether such testimony was material to issue by failing to instruct thereon.

9. Indictment and Information ☞125(1)

An indictment for perjury in testifying falsely at defendant's trial for petty theft of two books that he received sales tag as receipt for purchase price of books was not defective as charging two assignments of perjury, so that court did not err in failing to instruct jury that they must agree unanimously on either or both of such assignments in order to convict.

10. Criminal law ☞863(2)

In perjury prosecution, trial court's statement that he could not answer jury's question as to whether certain testimony of state's witness was direct testimony because that was jury's function did not warrant reversal as submitting law question to jury by failing to instruct it as to whether such testimony was direct or circumstantial where instructions as a whole fully advised jury as to kind, quality and degree of proof necessary to convict. Pen.Code, § 1103a; Code Civ.Proc. § 1831.

Appeal from Superior Court, City and County of San Francisco; William F. Traverso, Judge.

Thomas Kriton was convicted of perjury, and he appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener and Alberta Gattone, Deputy Attys

Gen., and Edmund G. Brown, Dist. Atty., and Bert Hirschberg, Jr., Asst. Dist. Atty., both of San Francisco, for respondent.

GOODELL, Justice.

This appeal is from a judgment of conviction of perjury after a trial by jury and from an order denying a new trial. The indictment charged that the appellant had given false testimony in a case theretofore tried in the Superior Court wherein he had been accused of petty theft after a prior conviction of petty theft (see sec. 666, Penal Code). In the theft case this appellant was accused of stealing, on December 14, 1943, two books entitled "Queens Die Proudly" and "Paris Underground", from the Emporium, in San Francisco. At that trial he testified that he had paid for the books, and in substantiation of this testimony he produced a tag showing a sale to him of two books so entitled for \$5.13. There is no dispute that the two books came into the appellant's possession on December 14, 1943, on which day he was arrested. He was released on bail on the 16th, and it was and is the theory of the prosecution that on the 17th he, or somebody acting for him, actually purchased at the Emporium two books of the same titles, paid for them across the counter, and had the said sales tag made out for the purpose of making it appear in his forthcoming defense that such tag evidenced a cash sale made on the 14th.

The evidence shows that the appellant entered the Emporium on December 14, 1943 and took two books, "Queens Die Proudly" and "Paris Underground", from the counters of the book department on the first floor. While there he was observed by Walter Craig, a special officer, who noted that he placed the books in a paper bag which he had brought with him. Craig followed him to the branch post-office on the same floor, watched him remove the books from the original bag which had become torn and place them in another bag he found on the counter. Craig apprehended him as he left by the Market Street arcade.

Appellant returned with Craig to the book department, where they were joined by Edward Dalton, the store's protection superintendent. Although the appellant then realized he was under suspicion, he did not exhibit to Craig or Dalton the sales tag nor did he tell them he had it. Craig and Dalton escorted the appellant to the elevator and took him to an upstairs office where

they questioned him. In the elevator Dalton removed from appellant's vest pocket a piece of paper with the names of four books on it, including the two which he had in his possession.

At the theft trial the appellant produced, as already noted, a sales tag which had been torn in such a way that only the initial and the first syllable of appellant's surname appear (i. e. "T. Kri") but his address, 296-3rd St., fully appears. It shows a sale of two books, "Paris Underground" and "Queens Die Proudly" for \$5.13. It had been torn in such a way that the date of the sale does not appear—simply the numeral "12" indicating the month of December.

The appellant at the theft trial attempted to account for the mutilated condition of the tag by testifying that it was torn in a scuffle in the Emporium elevator and that he had succeeded in retaining the torn fragment by concealing it in his watch pocket. He stated that he had kept it during his three days in the city prison and that the torn sales tag which he offered in evidence in the theft trial was the same tag as had been torn in the scuffle in the elevator. At that trial he testified that the tag was given him by a sales attendant at the Emporium on December 14th, as a receipt for payment for the two books. As will presently appear, the evidence establishes (and the verdict of guilty implies the finding) that the torn sales tag was written on the 17th of December, three days after the appellant had been arrested for the theft of the two books.

[1,2] The appellant contends that the evidence is not sufficient to support the conviction as the charge of perjury is not made out by the testimony of two witnesses, or of one witness and the necessary corroboration required by the statute. (Penal Code, sec. 1103a; Code of Civil Procedure, sec. 1968). To comply with the statute the prosecution must produce by the necessary witnesses "positive testimony as to the facts that are absolutely incompatible with the innocence of the accused. * * * Testimony proving a state of facts contrary to that sworn to by the accused, or absolutely incompatible or physically inconsistent with his evidence, will be sufficient." *People v. Pustau*, 39 Cal.App.2d 407, 415, 103 P.2d 224, 228; *People v. Casanova*, 54 Cal.App. 439, 442, 443, 202 P. 45; 20 Cal.Jur. 1023. The evidence in this case satisfies this requirement.

Craig testified that he observed the appellant in the book department on December 14, 1943; that he carried a paper bag into which he placed two books which he selected from the counters; that the appellant was under Craig's continuous observation from the first time he saw him, and that he did not see the appellant make any payment to any employee.

Margaret Quagliano, a desk attendant in the book department at the time, identified the handwriting on the torn tag as her own; she testified that a sales tag is so made out as to produce by one operation an original, and two carbon copies, one of which is on tissue paper; that the writing on the torn tag matched the tissue copy of a tag written by her on December 17th; that the handwriting on the original tag dated the 17th covering the sale of two books to "T. Krikon" was her own; that no sales tag made out to the appellant was included among the duplicates of the sales tags she wrote on December 14th; that the original sales tag of the 17th introduced in evidence by the appellant, the torn sales tag and the carbon tissue introduced in evidence by the prosecution, were all made by one simultaneous operation on the 17th of December. A comparison of the three papers indeed demonstrates this—the writing is identical and "fits" when the three sheets are laid on top of one another. Moreover in making out the sales tag the witness had started to write the first letter of appellant's surname with a "C", but corrected herself and wrote a "K" over the "C". This plainly appears in all three copies.

Miss Quagliano's testimony established that the torn tag which the appellant stated was given to him as a receipt on the 14th was actually written on the 17th of December, three days after he knew he was charged with theft. This was positive testimony, absolutely incompatible and inconsistent with that of the appellant. The testimony of Craig was at the very least corroborative of the testimony of Miss Quagliano, if, indeed, it did not constitute direct evidence inconsistent with the testimony of the appellant. Moreover, Miss Quagliano's testimony is demonstrably substantiated by the physical evidence of the three manifold tags. It is corroborated, also, by the negative evidence supplied by a strip of cash register "tape" showing the sales registered through that machine on December 14th, were numbered from 44,671 to 45,222 (and including no number 46,883), and by

the evidence of a similar "tape" showing the sales on the 17th, numbered from 46,380 to 46,942 which includes the number 46,883 stamped by the register when the sale is rung up. This appears in a line on the tape reading: "115 D-5.13 46883" all likewise stamped in purple type when the sale is rung up. The purple type on the "tape" and the purple type on the original pencil sales tag dated December 17 are identical; they match when placed one over the other.

[3] The appellant interposed a demurrer to the indictment on the ground that it "not only fails to state a public offense but it alleges nothing but matters of evidence and not ultimate facts * * *." The demurrer was overruled. The appellant contends that the indictment was fatally defective in failing to negative the truth of the alleged false testimony by setting forth the "true facts" by way of antithesis. This special ground of objection was never presented to the trial court, and is not encompassed within the grounds of general demurrer presented to that court. *People v. Bradbury*, 155 Cal. 808, 103 P. 215, cited by appellant, does not hold that the indictment must in all cases designate with particularity wherein the matter sworn to was false; it is authority, rather, for the proposition (155 Cal. at page 811, 103 P. at page 217) that "if the statement charged as false is of a particular fact, it is sufficient in the averment to negative that fact."

[4, 5] The indictment states that the appellant was sworn as a witness in his trial for petty theft, on October 4, 1944; it sets forth portions of his testimony as a witness at that trial to the effect that the torn tag then offered in evidence was given to him when he paid for the books; that it was material to know in that proceeding whether the appellant carried away two books without paying for them and without obtaining any cash receipt or other evidence of payment; "That in truth and in fact he the said defendant Thomas Kriton then and there well knew all of said testimony and statements and things so given, sworn to and stated by the said defendant, Thomas Kriton, in the evidence aforesaid were then and there false and untrue * * *."

The particular fact charged as false was the appellant's statement as a witness that he had received the tag (later torn) as a receipt for the payment for the books. His testimony to that effect was negated by the averment in the indictment that all of his testimony was false and untrue, com-

plying with the requirements of *People v. Bradbury*, supra. The indictment in question also conforms to the test laid down by *People v. Pustau*, supra, 39 Cal.App.2d at page 413, 103 P.2d at page 227, to the effect that the indictment is sufficient if it "sets out that the defendant under oath knowingly gave certain false testimony; that the testimony so given was material, and then sets forth in detail such testimony, and points out wherein it was false and untrue * * *, because such allegations advise the defendant of the charge against him in such a manner as to enable him to properly prepare a defense thereto." Penal Code, sec. 966; *People v. Curtis*, 36 Cal. App.2d 306, 317, 98 P.2d 228.

[6, 7] Appellant also contends that the indictment is defective because the facts allegedly sworn to, as set out in the indictment, show that the testimony was not material at the time it was given. It is difficult to perceive how there can be the slightest question of the materiality of testimony by the appellant to the effect that he received a particular sales tag as a receipt for the purchase of two books, given on his trial for the theft of the self-same books. "The test of materiality is met when it can be said that the testimony could have properly influenced the tribunal before which the case was being heard, upon the issues involved." *People v. Pustau*, supra, 39 Cal. App.2d at page 413, 103 P.2d at page 227.

[8] The jury were instructed in part as follows: "The court instructs the jury that the question of the materiality of the testimony given by the defendant in the prior prosecution for petty theft and charged herein to be perjurious is one for the court, and not for the jury, to determine. The court instructs the jury that the testimony set forth in the indictment which was material to the issue involved in said prior prosecution is, in substance, that on the 14th day of December, 1943, the defendant bought from and paid The Emporium for two books named 'Queens Die Proudly' and 'Paris Underground' and at said time obtained a receipt evidencing payment of said books."

That instruction clearly shows that there is no merit to the appellant's contention that the court submitted to the jury the question of whether or not the testimony given by the appellant on the theft trial was material to the issue there pending, by failing to instruct them thereupon.

[9] Appellant makes the further contention that the indictment charged two assignments of perjury and that the court erred in failing to instruct the jury that they must reach unanimous agreement upon either or both of the assignments. He fails to point out the two assignments so charged in the indictment. The respondent's position that the indictment charges but one act of perjury, and that all the testimony set forth in the indictment was in proof of the fact that the torn sales tag was given to the appellant as a receipt, clearly appears from a reading of the indictment; it is supported by the court's instruction to the jury that it must be convinced that the defendant took a duly administered oath and "that he testified * * * in substance that on the 14th day of December, 1943, he bought from and paid The Emporium for two books named 'Queens Die Proudly' and 'Paris Underground' and at said time obtained a receipt evidencing payment thereof * * *."

[10] Shortly after the jury retired it returned for further instructions.

The foreman told the court that there was a point of law "that wasn't too clearly in our minds". The record then shows the following:

"The Foreman: The point was, the girl that testified on the stand there as to writing the sales ticket in The Emporium, whether that would be direct testimony.

"The Court: Well, the court can't answer that for you, because if I attempted to answer that I would be invading the province of the jury. That is the function and responsibility of the jury. All that I can do for you in that regard, if you desire it, is to read again the instruction that I gave on that particular phase of the case as to direct evidence and what is required in a perjury case. Do you desire that I do that? It isn't my province to answer your question, because that is your function.

"The Foreman: I believe that we should have it read again."

The court thereupon reread its prior instruction as to the type of proof required to establish perjury, in conformity with Penal Code, sec. 1103a: "Perjury must be proved by the testimony of two witnesses or of one witness and corroborating circumstances; and the testimony of the witness or witnesses must be positive or direct testimony as to facts contrary to the testimony sworn to by the accused or absolutely incompatible with the innocence of the ac-

cused." The judge then read the definition of direct evidence contained in the Code of Civil Procedure, sec. 1831.

Appellant now contends that the court submitted a question of law to the jury by failing to instruct the jury whether the sales attendant's testimony was direct or circumstantial evidence. It is apparent from the guarded language of the judge that he was taking extreme care to avoid saying anything that might be construed as passing upon the facts. The appellant cannot complain of such an attitude or of such conduct. When the instructions read as a whole show as the instructions in this case do, that the trial judge fully and fairly advised the jury as to the kind, quality and degree of proof necessary before the appellant could be convicted of perjury, he has done "all the law requires." *People v. Curtis*, supra, 36 Cal.App.2d at page 322, 98 P.2d at page 235, and cases cited; *People v. Macken*, 32 Cal.App.2d 31, 42, 89 P.2d 173.

The judgment of conviction and the order denying the motion for a new trial are affirmed.

NOURSE, P. J., and DOOLING, J, concur.



73 Cal.App.2d 226

**OJEDA v. MUNICIPAL COURT OF CITY
AND COUNTY OF SAN FRANCISCO.**

No. 12982.

District Court of Appeal, First District,
Division 1, California.

Feb. 25, 1946.

Hearing Denied April 25, 1946.

1. Dismissal and nonsuit ☞60(2)

Whether action shall be dismissed for failure to bring it to trial within five years, as provided by statute, depends on whether plaintiff has had a reasonable opportunity to bring the action to trial. Code Civ.Proc. § 583.

2. Appeal and error ☞1024(3)

Whether plaintiff has had a reasonable opportunity to bring a case to trial within five years, as required by statute, is for the

trial court to decide upon the facts of the particular case. Code Civ.Proc. § 583.

3. Appeal and error ☞1024(3)

The trial court's determination of whether plaintiff has had a reasonable opportunity to bring case to trial within five years, as required by statute, will not be disturbed on appeal if there is substantial evidence to support it. Code Civ.Proc. § 583.

4. Dismissal and nonsuit ☞60(6)

A motion by defendant to dismiss an action for failure to bring it to trial within five years as required by statute was properly denied, where defendant had been absent from the state for most of the five-year period and plaintiff alleged that he had been unable to locate any property of defendant within the state. Code Civ. Proc. § 583.

5. Dismissal and nonsuit ☞60(6)

The amendment of statute authorizing dismissal of action for failure to bring it to trial within five years, by addition of exception where defendant has been absent from the state, did not evidence a legislative intent that dismissal after expiration of five years should have been mandatory prior to amendment, but was intended rather to clarify the law to make it conform to the various court decisions construing it. Code Civ.Proc. § 583.

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Proceeding by Eugene Ojeda for a writ of prohibition to prevent the Municipal Court of the City and County of San Francisco from entering a summary judgment against petitioner in an action to renew a money judgment theretofore obtained against him. Judgment for defendant, and plaintiff appeals.

Affirmed.

Charles A. Christin, of San Francisco, for appellant.

G. D. Schilling and W. J. Kirkpatrick, both of San Francisco, for respondent and real party in interest.

SHOTTKY, Justice pro tem.

Appellant petitioned the superior court for a writ of prohibition to prevent the municipal court from entering a summary

judgment against him in an action to renew a money judgment theretofore obtained against him. Following the issuance of an alternative writ and the filing of an answer, a trial was had, and the superior court rendered judgment against appellant denying him the relief sought. This appeal is from said judgment and is presented upon the judgment-roll.

We shall review briefly the undisputed factual situation as shown by the record. The complaint in the municipal court action was filed, and summons was issued, on September 27, 1939. On December 6, 1944, appellant made a motion to dismiss said action under section 583 of the Code of Civil Procedure upon the ground that the action had not been brought to trial within five years. No stipulation in writing was ever entered into between the parties extending the time of trial. In opposition to said motion, H. C. Winklemen, plaintiff in said action, filed affidavits showing that during the years 1940, 1941, 1942, 1943, and a considerable part of 1944, appellant was absent from the state and a resident of Nevada, and that because of his continued absence from this state it was impossible to obtain valid personal service of summons upon him and bring the action to trial within the five-year period; and, further, that said plaintiff was unable to locate any property of appellant within this state and that, therefore, service of summons by publication would have been an idle act. This motion to dismiss was denied on January 11, 1945, and on January 20, 1945, appellant filed his answer to the complaint in the municipal court action, in which he pleaded as a defense that the municipal court was without jurisdiction except to dismiss the action. On February 13, 1945, plaintiff Winklemen filed a motion for summary judgment, and appellant filed his second motion to dismiss, based also on the provisions of section 583. A hearing was had upon the motion for summary judgment, during which the full record of all the proceedings theretofore had before another judge of the municipal court relating to the hearing and determination of appellant's first motion to dismiss was placed before the court. At the conclusion of this hearing the judge stated that he was prepared to grant the motion for summary judgment, and would enter judgment the next day—February 14, 1945. Thereafter, on February 15, 1945, appellant's second motion to dismiss was denied.

In support of his contention that the superior court erred in denying the writ of prohibition, appellant relies upon the second sentence of section 583 of the Code of Civil Procedure, which, at the time here involved, read as follows: "Any action heretofore or hereafter commenced *shall be dismissed* by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended." (Italics added.)

The principal, and in fact the only, contention made by appellant in his brief is that the five-year rule for dismissal provided for in said section is mandatory; that the only exception to its operation is the one noted in the section, namely, that a written stipulation has been entered into between the parties extending the time of trial; and that, therefore, since the action was not brought to trial within five years after the commencement thereof, and there was no written stipulation extending the time of trial, it was mandatory upon the municipal court to dismiss the action. In support of this contention, appellant quotes the following language from the recent case of *Smith v. Bear Valley Milling & Lumber Co.*, 26 Cal.2d 590, 599, 160 P.2d 1, 6:

"In *Miller & Lux, Inc., v. Superior Court*, 1923, supra, 192 Cal. 333, at page 338, 219 P. [1006], it is said that, 'An examination of the cases construing section 583, supra, discloses that no case decided by this court has held that anything short of a written stipulation extending in express terms the time of trial to a date beyond the five-year period, or expressly waiving the right to a dismissal under that section, will suffice to toll the running of the statutory time. * * * The provision that a written stipulation be entered into was intended to preclude all disputes, with their attendant charges and countercharges of overreaching and unethical conduct, by a requirement that clear and uncontrovertible evidence be presented to the court that the statutory time was deliberately intended to be extended by both parties.'"

However, in the case relied on by appellant, and also in *Miller & Lux, Inc., v.*

Superior Court, quoted from therein, the question before the court was whether a written stipulation extending the time of trial had been entered into within the meaning of the exception specified in said section 583, and the language of the court quoted by appellant was, of course, directed to the point then under consideration.

There is nothing in either of the cases cited by appellant that qualifies or overrules the many decisions which have recognized exceptions to the five-year rule stated in section 583 other than the one specified in the section.

In *Judson v. Superior Court*, 21 Cal.2d 11, 129 P.2d 361, which was a proceeding in prohibition, petitioners sought to restrain the trial court from proceeding against them. They had filed in the trial court a motion to dismiss the action for want of prosecution by reason of the fact that five years had elapsed since the filing thereof, but the motion had been denied on a showing that the defendants had either secreted themselves within the state to prevent service of summons or had resided outside of the state, by reason of which the court was powerless to proceed to trial in said action. In holding that the five-year rule set forth in section 583 was not controlling, our Supreme Court said, 21 Cal.2d at page 14, 129 P.2d at page 363: "* * * the rule is not so rigid as to be without exception, and an action should not be dismissed when, as a result of the conduct or action of a defendant, the plaintiff may not proceed to trial with reasonable certainty that a judgment would conclusively determine the rights of the parties." Continuing, the court said: "Under these circumstances, to require the plaintiffs to take the uncertain path of publication of summons against defendants who, they had been informed, were non-residents, would reward subterfuge and make dishonesty profitable. The courts have recognized that the statute relating to dismissals although mandatory in form, should not be applied where, although the defendant was not guilty of acts tending to obstruct the administration of justice, it would have been impracticable for the plaintiff to have brought the action to trial. *Christin v. Superior Court*, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; *Estate of Morrison*, 125 Cal.App. 504, 14 P.2d 102; and *Kinard v. Jordan*, 175 Cal. 13, 164 P. 894. The facts of the present case show much greater justification for an exception to the

statutory requirement than those heretofore presented as the basis for an order denying a motion to dismiss."

In *Carmichael v. Superior Court*, 55 Cal. App.2d 406, 130 P.2d 725, it was shown also that the defendant was out of the state, and in denying the petition for a writ of mandate the court, after quoting from the *Judson* case, said, 55 Cal.App.2d at page 408, 130 P.2d at page 726: "That language is applicable to the instant case for it would have been impracticable for plaintiff to bring this action to trial. Service of summons on defendant by publication would have been an idle act as no money judgment could have been based upon such service, and it is not shown or contended that defendant had property within the state. Other cases also hold that there may be circumstances which constitute exceptions to the rule of section 583, supra, requiring a dismissal when a case is not brought to trial within five years."

In *Christin v. Superior Court*, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153, the court held that dismissal is mandatory after five years, under section 583, unless circumstances in some way interrupted the running of the period; and because in that case an appeal from an order changing venue was pending for three years during the five-year period, it held that the statute did not run, as it was impossible for plaintiff to bring the case to trial—that there are implied exceptions to the rule. The court said, 9 Cal.2d at page 532, 71 P.2d at page 208, 112 A.L.R. 1153: "The purpose of the statute is plain: to prevent avoidable delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years, for it permits the parties to extend the period without limitation, by written stipulation. And, as we have already pointed out, despite the mandatory language implied exceptions are recognized."

[1-3] Upon the oral argument counsel for appellant sought to distinguish the *Judson* and *Carmichael* cases upon the ground that in those cases the defendant was out of the state for the full five-year period, whereas in the instant case the defendant was absent from the state for only four years and a portion of the fifth. We do not believe that the cited cases should be given so narrow a construction as to hold that they require the absence of defendant from the state to be for the full five-year period, but we believe that the true test is whether

the plaintiff has had a reasonable opportunity to bring the action to trial. There is no evidence in the present record as to when appellant returned to this state, and no evidence that it was possible to serve summons upon him and bring the case to trial within the five-year period. The question of whether plaintiff has had a reasonable opportunity to bring the case to trial, is for the trial court to decide upon the facts of the particular case, and the determination of the trial court will not be disturbed if there is substantial evidence to support it.

[4] We are convinced that the municipal court was fully justified, upon the record before it, in denying appellant's motion to dismiss the action, and that the superior court did not err in denying a writ of prohibition.

[5] Upon the oral argument counsel for appellant also called the attention of the court to the fact that at the 1945 session of the Legislature section 583 had been amended by adding to the sentence hereinbefore set forth the following: "* * * and except where it be shown that the defendant has been absent from the State or concealed therein and his whereabouts unknown to plaintiff and not discoverable to said plaintiff upon due diligence, in which event said period of absence or concealment shall not be a part of said five-year period." Stats.1945, ch. 1310, p. 2460. Counsel argued that the addition of this clause was persuasive evidence that the Legislature intended that it should be mandatory to dismiss after the expiration of five years where there was no stipulation in writing extending the time. However, in the case of *Union League Club v. Johnson*, 18 Cal.2d 275, 115 P.2d 425, cited with approval in *Standard Oil Co. v. Johnson*, 24 Cal.2d 40, 147 P.2d 577, our Supreme Court said, at pages 278, 279 of 18 Cal.2d, at page 426 of 115 P.2d: "As against these contentions, the respondent takes the position that because the legislature in 1939 * * * expressly amended the statute to impose a tax upon social clubs, this court should construe the former law as not including them. This statement is based upon the general rule that courts ordinarily assume from a new enactment, a legislative purpose to change the existing law. *People v. Weitzel*, 201 Cal. 116, 255 P. 792, 52 A.L.R. 811; *Loew's Inc. v. Byram*, 11 Cal.2d 746, 82 P.2d 1. But in view of the fact that at the time this amendment was made, social clubs were re-

sisting the collection of sales taxes, a legislative intent to clarify rather than to change the law, may well be inferred."

We do not agree with this contention of appellant. As we view the matter, the Legislature, in adding the 1945 amendment to section 583, was seeking to clarify the law to make it conform to the various court decisions construing it, and to express in clearer terms what must have been the intention of the Legislature when it was originally enacted. For we do not believe that it was ever the intention of the Legislature to enact a statute that would compel the dismissal of an action which plaintiff had not had a reasonable opportunity to bring to trial.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.



73 Cal.App.2d 241

DAVIS v. CALIFORNIA MOTORS et al.
Civ. 12933.

District Court of Appeal, First District,
Division 2, California.
Feb. 25, 1946.

Rehearing Denied March 27, 1946.

Hearing Denied April 25, 1946.

1. Executors and administrators $\hookrightarrow$ 451(1)

In action by administratrix of estate of deceased member of joint venture for an accounting, trial court, in its discretion, could have appointed a referee. Code Civ.Proc. § 639; Probate Code, § 613.

2. Appeal and error $\hookrightarrow$ 931(1)

In examining sufficiency of evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish correctness of the finding as made, taking into account all inferences which might reasonably have been thought by trial court to lead to same conclusion.

3. Appeal and error $\hookrightarrow$ 931(1)

On appeal, every substantial conflict in the testimony is resolved in favor of trial court's finding.

4. Joint adventures Ⓒ5(2)

In action by administratrix of estate of deceased member of joint venture for an accounting, trial court had duty to take into account both sides of ledger, and amounts of firm money used to pay hospital bill of decedent and insurance premiums for him were properly allowed as an offset against salary owing to decedent, even though such offset was not pleaded.

5. Alteration of instruments Ⓒ2, 24(2)

An alteration to correct a written instrument is an immaterial alteration, and if sufficiently explained, the instrument is admissible in evidence.

6. Evidence Ⓒ116

In action by administratrix of estate of deceased member of joint venture for an accounting, where one of plaintiff's exhibits was a statement of consolidated operations and balance sheet of joint venture, which contained nine items and under which an incorrect total appeared, defendants could show that one item was inadvertently omitted and that with insertion of omitted item, the original total was correct.

7. Joint adventures Ⓒ5(1)

The representative of a deceased party to a joint venture has a right to an accounting on dissolution. Civ.Code, § 2416; Probate Code, § 571.

8. Account Ⓒ19

In absence of a reference, a mere statement of balance due in findings of trial court is not a proper disposition of action for an accounting.

9. Account Ⓒ19

Any procedure or record from which issues and disposition thereof may be ascertained is a sufficient statement of account, whether the matter appears from the findings, decree or bill of exceptions.

10. Joint adventures Ⓒ5(2)

Evidence supported finding that entire assets remaining upon liquidation of partnership of which plaintiff's decedent was a member were transferred to a joint venture entered into by partners under an oral agreement, and that at decedent's death, there was no surplus belonging to the joint venture.

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by Helen Davis and Helen Davis, as administratrix of the estate of John A. Davis, also known as Jack Davis, deceased, against California Motors and others, for a declaratory judgment and an accounting. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Walter S. Stevenson and Morgan V. Spicer, both of San Francisco, for appellant.

James R. Agee and Leonard J. Meltzer, both of Oakland, for respondents California Motors, California Motors, Inc., Motor Credit Co., Harry C. Falkell and Mrs. Sue R. B. Falkell.

* GOODELL, Justice.

This is an appeal from a judgment in favor of the defendants for their costs in a suit for a declaratory judgment and an accounting, and from an order denying a new trial.

In 1939 the respondents Harry C. Falkell and Robert A. Baxter as copartners were engaged in a used car business in San Francisco under the name California Motors. On November 10, 1939, John A. Davis came into this business upon his payment of \$225 for a fractional interest therein. The used cars on hand were not moving satisfactorily and it was decided by the three to change their base to Martinez. On January 31, 1940 they acquired the Ford sales agency at that place and on that day a bill of sale was made by Alhambra Motors, Incorporated, to Motor Credit Company, a California corporation, of that agency and all that went with it. To acquire the Martinez business a little over \$10,000 was needed and that capital was advanced by said Motor Credit Company, a finance company which for some time had been run by Falkell and Baxter, who were its only stockholders.

Falkell, Baxter and Davis commenced at once to run the business and moved to Martinez the used cars which had been their stock in trade in San Francisco and sold them off in the regular course of business.

The court found that in January, 1940, the three men entered into a joint venture

to purchase and operate the Martinez business under an oral agreement that each was to devote his entire time and effort to it; that Falkell was to draw \$225 a month, Davis \$225 a month and Baxter \$200 a month. With respect to when and how profits were to be shared the court found: "that the capital needed by said joint venture was to be furnished by defendants Motor Credit Co. and Harry C. Falkell; that all of the earnings of the said joint venture were to be used to liquidate, pay and return to defendants Harry C. Falkell and Motor Credit Co. such contributions and advances as were made by them to said joint venture; that after all outstanding indebtedness of said joint venture had been paid, including the said monthly withdrawals of the three joint venturers as aforesaid, and all said advances and contributions had been paid and returned to defendants Motor Credit Co., and Harry C. Falkell, then any surplus remaining was to be and become the property of said joint venturers, share and share alike."

In May, 1940, they branched out and acquired the Studebaker sales agency at Vallejo under an oral agreement, so the court found, "that the terms of their previous joint venture agreement would apply to and include said Studebaker Sales Agency." The money needed to acquire the Vallejo agency was likewise furnished by Motor Credit Company.

On October 12, 1940 Mr. Davis died. The appellant, his widow and administratrix, sought an accounting from Falkell and Baxter but without immediate results. She then invoked the provisions of section 613, Probate Code, and obtained from the Superior Court in San Francisco an order requiring them to account. Pursuant thereto they furnished her with a balance sheet of California Motors as of January 31, 1940; a balance sheet as of December 31, 1940 showing the consolidated operations at San Francisco, Martinez and Vallejo, and a consolidated profit and loss statement as of December 31, 1940. She was not satisfied with this as an accounting, and, alleging that this showing "was and is inaccurate, untrue, and made for the purpose of deceiving and defrauding" her, appellant filed this suit.

[1] The court, instead of appointing a referee, as it might have done (sec. 639, Code Civ.Proc.), proceeded (see Berko-

witz v. Kiener Co., 37 Cal.App.2d 419, 99 P.2d 578) to go into the whole question. The trial lasted for three days, and 24 exhibits were introduced, mostly all dealing with the accounts, and with the financial condition of the business at all three places during the ten or eleven months while the decedent was a member of the enterprises, and after his death. The Martinez and Vallejo businesses were continued through 1942. The court's conclusion was that the plaintiff was "not entitled to any relief under her said amended complaint."

It might be noted, incidentally, that a California corporation known as California Motors was formed in March 1940, with its principal place of business in Contra Costa County, with Falkell, Baxter, Davis, Falkell's son and Falkell's attorney as directors, but no application was ever made for the issuance of stock. However income tax returns were filed with the franchise tax commissioner on behalf of "California Motors" for 1940, 1941 and 1942.

The court found that the decedent never "acquired any other or additional interest in said 'California Motors', a copartnership" (above his \$225. investment) and that in January 1940 (when the San Francisco business was terminated) "the assets of California Motors, * * * did not exceed its liabilities * * * that at said time said business did not have any value or worth over and above its liabilities". Appellant contends that there is no evidence whatever in the record to support this finding. The record discloses, however, that respondent Falkell testified that "what little money had been accumulated through profits in November and December, plus a good deal of the investment I had at that time" was lost before the business could be liquidated; that the automobiles unsold in San Francisco at the time of liquidation were moved to Martinez in an effort to sell them to pay off indebtedness still owing to the bank.

[2] In Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 142, 134 P. 1157, 1158, the court says that " * * * in examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion." See,

also, *Juchert v. California Water Service Co.*, 16 Cal.2d 500, 503, 106 P.2d 886; *Wescoatt v. Meeker*, 63 Cal.App.2d 618, 625, 147 P.2d 41.

Evidence relied upon by the appellant at the most shows that whatever assets remained upon liquidation of the San Francisco concern were transferred to the joint venture, and that the parties to that venture recognized Davis' original investment of \$225 as a charge against it. Davis of course acquiesced in the transfer of whatever assets remained. Appellant pleaded that by agreement of the parties "the entire assets of the said California Motors was to be used as capital investment of the said joint venture." It is true that the cars which were moved from San Francisco to Martinez became part of the stock in trade there, and were absorbed into that new business, but the fact remains that to acquire the Martinez business fresh capital in a sum upwards of \$10,000 was required, and it was all furnished by Motor Credit Company, and none of it was furnished by the decedent. The \$10,000 plus, so furnished had to be repaid before the decedent could participate in any profits. That fact must always be borne in mind.

The court found that at the time of decedent's death there was no surplus belonging to the joint venture under the terms of the oral agreement. The appellant claims that there is no evidence to support this finding. It is supported by Falkell's testimony that on October 12, 1940, there was no net profit, and by plaintiff's Exhibit 16, a statement of consolidated operation and balance sheet as of December 31, 1940, which shows a "loss-to-date" of \$878.84. No objection is made, and none can be made, to the court's finding that *none of the moneys advanced to acquire the Martinez and Vallejo agencies had been repaid*, and the latter finding itself lends further support to the finding objected to.

[3] Appellant relies upon the amended return filed with the franchise tax commissioner in 1940 showing net income for the year in the sum of \$3,822.94. Respondent Falkell's explanation of this apparent contradiction of his testimony apparently satisfied the trial court, which resolved whatever conflicts there were, in respondents' favor. "Every substantial conflict in the testimony is, under the

rule which has always prevailed in this court, to be resolved in favor of the finding." *Bancroft-Whitney Co. v. McHugh*, supra.

[4] In addition to suing generally for an accounting the appellant alleged that at the time of her husband's death \$214 remained owing to him as salary. This was denied. The court found that no salary was owing. Ledger sheets of Davis' account from April 5 to October 12, 1940 were introduced in evidence. In addition to credits this account showed various payments made on Davis' behalf, and other charges against him. There is testimony in the record that a hospital bill of his was paid out of firm money during his last illness and that insurance premiums were likewise paid for him. The debits came to \$438.25, exceeding whatever credit he had for salary. Appellant now claims that this offset should not have been allowed without it having been pleaded. It must be remembered that this was not an action for a certain sum of money, wherein an offset would have to be pleaded; it was a suit for an accounting and in such a case the court would certainly have the power, and it would be its duty, to take into account both sides of the ledger. It was simply a case of the debits exceeding the credits. That being so it is unnecessary to discuss the cases cited by appellant on the subject of pleading offsets.

[5,6] One of appellant's exhibits was a statement of consolidated operations and balance sheet as of December 31, 1940. It contained nine items under which the total appeared as \$10,217.33, which was incorrect; they actually totalled \$8,778.87. During the course of the trial the missing item \$1,433.96 [\$1,438.46?] was written in, which made the original total correct. The court accepted the explanation of respondent Falkell and his attorney that it was a mere clerical error of the typist in overlooking this omitted item. It appears, also, from the record that appellant's counsel knew of this inadvertence some time before the trial and could not, therefore, have been taken by surprise. Appellant contends that the trial court erred in permitting the insertion of this additional item. An alteration to correct a written instrument is an immaterial alteration (1 Cal.Jur. 1072, sec. 7), and if sufficiently explained, the instrument is ad-

missible in evidence. *Le Franc v. Hewitt*, 7 Cal. 186; *Brooks v. Calderwood*, 34 Cal. 563, 567.

[7-9] The appellant claims that the court "erred in not ordering an accounting as prayed for". There can be no doubt that the representative of a deceased party to a joint venture has a right to an accounting on dissolution. The cases cited by appellant so hold. *Cottle v. Leitch*, 35 Cal. 434; *Gardner v. Smith*, 211 Cal. 350, 295 P. 36; *Ferem v. Olson & Mahony*, 176 Cal. 652, 169 P. 386; Civ. Code, sec. 2416; Probate Code, sec. 571. It is also true that in the absence of a reference, a mere statement of the balance due in the findings of the court is not a proper disposition of the action. *Whann v. Doell*, 192 Cal. 680, 221 P. 899. "On the other hand, the contention that an account must be stated in accepted bookkeeping fashion cannot be maintained. * * * *Any procedure or record from which it can be intelligently ascertained what the issues were as to the controverted items and how these issues were disposed of* by the trial court will suffice for the purpose, whether the matter appears from the findings, the decree or a bill of exceptions, showing the controversy, and the disposition thereof. * * *" *Whann v. Doell*, supra, 192 Cal. at page 684, 221 P. at page 901, emphasis added; *Margolis v. Leonard & Holt*, 94 Cal.App. 716, 271 P. 758; *Sears v. Rule*, Cal., 163 P.2d 443; 14 Cal.Jur. 769. The record in the instant case in our opinion complies with the requirements of *Whann v. Doell*, supra.

[10] The primary problem with which the court was confronted was to determine whether or not during the comparatively short duration of this venture its net earnings were such as to yield the decedent any profit. In the first place, his financial contribution was \$225 and no more. Secondly, the capital for the Martinez and Vallejo ventures, amounting to over \$10,000, all advanced by Motor Credit Company, and other indebtedness (the rec-

ord shows that Mrs. Falkell also lent the firm money) had to be first repaid before *anybody* was entitled to share in the profits. That the trial judge was mindful of this appears from the following colloquy: "Mr. Stevenson: Yes * * *. It is my theory of the case that he had a one-third interest in a substantial profit at the time of his death on October 12, 1940. The Court: That is, after those advances were paid. Mr. Stevenson: Yes." The court found, as above stated, that the \$10,000, plus, never was paid back. Regardless of bookkeeping entries indicating that the business at one time or another was making money, the fact remains that before the decedent could, under the agreement found by the court on uncontradicted evidence, participate in any profits or surplus, this comparatively large amount, which was the very capital of the business, had to be repaid. The court's findings that there was no such surplus, and that the \$10,000, plus, never was repaid, are amply supported by the record. In reaching this conclusion the court had before it, in addition to the oral testimony, various financial statements prepared from the books and tax returns, and delved into the entire matter with painstaking care. The record shows this. It must be remembered, also, that before this litigation was started the appellant had in hand the three exhibits already described which enabled her and her counsel to prepare for the trial of this case. In our opinion the appellant had, in the trial court, the accounting for which she prayed. We are satisfied, moreover, that the court's conclusion was correct. The fact that the conclusion of law says "that plaintiff is not entitled to any relief" after a three-day trial in which the accounts were thoroughly gone into can only mean that, after a full hearing and accounting, she is not entitled to recover any money judgment from the respondents.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

73 Cal.App.2d 76

BARKELEW v. BARKELEW.
Civ. 15126.

District Court of Appeal, Second District,
Division 3, California.

Feb. 15, 1946.

As Modified on Denial of Rehearing
March 15, 1946.

Hearing Denied April 15, 1946.

1. Judgment ⇨326

A clerical error in a judgment appearing on the face of the record may be corrected by a nunc pro tunc order, and such correction may be made at any time.

2. Judgment ⇨326

The purpose of a nunc pro tunc order correcting a clerical error in a judgment appearing on the face of the record is to make the judgment as entered conform to the judicial decision actually made.

3. Judgment ⇨313

Amendments to judgments can only be made for purpose of making the record conform to the truth, and not for purpose of revising and changing the judgment.

4. Divorce ⇨245(1)

An interlocutory divorce decree would not be amended nunc pro tunc on theory of correcting "clerical error" so as to limit defendant's obligation to make \$125 monthly payments for wife's support to those months when wife's income from outside sources was less than \$150 per month, where the amendment would change and enlarge the judgment rather than make the judgment conform to the decision actually rendered.

See Words and Phrases, Permanent Edition, for all other definitions of "Clerical Error".

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Divorce action by Faye L. Barkelew against James T. Barkelew, wherein defendant filed a motion for a nunc pro tunc order to correct the interlocutory decree. From a special order made after final judgment of divorce denying the defendant's motion, the defendant appeals.

Order affirmed.

166 P.2d—4½

McLaughlin & McGinley and William L. Baugh, all of Los Angeles, for appellant.
Morgan & Davidson, of Alhambra, for respondent.

FOX, Justice pro tem.

This is an appeal by the defendant from a special order made after final judgment of divorce denying defendant's motion: (1) For a nunc pro tunc order to correct the interlocutory decree; and (2) for an order declaring that under the terms of said interlocutory decree, as amended nunc pro tunc, the defendant's duty to make monthly payments for plaintiff's support has terminated until the further order of the court, since the plaintiff is now receiving more than \$150 per month from a trust fund.

On March 14, 1931, the plaintiff filed an action for divorce. In her complaint she alleged that the parties had previously entered into a written agreement settling their property rights and that the defendant had agreed to pay her \$125 per month for her support. (Payments for the support of a minor son are not here involved.) Plaintiff prayed that the property settlement agreement be approved and that defendant be ordered to pay her said sum per month. The defendant did not answer and the case was heard as a default on April 14, 1931. The minutes of the proceedings, after reciting the names of those who testified for the plaintiff, simply state: "Interlocutory Decree of Divorce is granted to the Plaintiff." There is no reference in the minutes to any property settlement agreement, nor is any exhibit shown to have been introduced or offered in evidence.

The interlocutory decree provided that "the property settlement agreement entered into by and between the parties hereto, dated June 20th, 1927 * * * is hereby approved." It also contained the following provision: "It Is Further Ordered, Adjudged and Decreed, in conformity with the terms of said agreement, that the defendant, James T. Barkelew, pay to the plaintiff, Faye L. Barkelew, for her support and maintenance the sum of One Hundred Twenty-five Dollars (\$125.00) per month, commencing May 1st, 1931, and on the 1st day of each and every month thereafter as long as the said plaintiff shall live, or until she remarries * * *."

The final decree of divorce was entered April 25, 1932.

Under the property settlement agreement of June 20, 1927, it was contemplated that one designated parcel of property would be sold for \$75,000 and the proceeds divided between the parties. It was provided, however, that pending the sale of said parcel the plaintiff would have the privilege of occupying the same and the defendant would pay the plaintiff \$175 per month for her support, and that after said sale and the division of the proceeds therefrom the payments to plaintiff would be \$100 per month. The said property was thereafter sold and the proceeds divided some time prior to the filing of plaintiff's complaint. As a consequence, an additional agreement was entered into dated March 20, 1931. The latter agreement refers to the former and recites the sale of the said parcel of property and the division of the proceeds therefrom and further recites, among other things, that the return from the investment of plaintiff's share of the proceeds of said sale had not equalled the amount the parties had anticipated when the original agreement was executed, hence the defendant agreed to pay the plaintiff an additional \$25 per month, thus making the monthly payments \$125.

The agreement of June 20, 1927, contains the following paragraph: "*The second party [wife] agrees, in the event of a divorce and her remarriage, that such remarriage shall constitute a termination of all liability to make the foregoing payment for her support, and also agrees, in the event she secures or receives an income equal to One Hundred Fifty Dollars (\$150.00) per month from any source other than the property which she is acquiring under this agreement or the proceeds therefrom, that during such time as such income shall continue she will waive the said foregoing payment for her support.*" (Italics added.) Defendant bases his motion to correct the interlocutory decree on the italicized portion of this paragraph. He contends that an appropriate provision based on this italicized language should have been included in the interlocutory decree and that the failure to incorporate such provision therein was due to a clerical error, and further that such provision may now be inserted in said decree nunc pro tunc.

[1,2] The law is well settled that a clerical error (the definition of which has been considerably expanded in the more recent decisions) in a judgment appearing

on the face of the record may be corrected by a nunc pro tunc order and that such correction may be made at any time Estate of Goldberg, 1938, 10 Cal.2d 709, 76 P.2d 508. The purpose of this procedure is "to make the judgment as entered conform to the judicial decision actually made." Benway v. Benway, 1945, Cal.App.2d, 159 P.2d 682, 684. In the instant case, however, the record does not establish that the "judicial decision actually made" in awarding plaintiff an interlocutory decree of divorce and \$125 per month for her support included any provision to the effect that if the plaintiff received an income of \$150 per month from any source other than the property which she acquired in her settlement with the defendant that defendant would be relieved of making any payments for her support during such time as she received such other income. As previously noted, the minute order does not show that any judicial decision was actually made touching that question. The minutes do not show that either of the agreements between the parties was introduced in evidence. No transcript of the testimony taken at the default hearing in 1931 was offered in this proceeding to show that the said agreements, or either of them, were introduced in evidence or were otherwise before the trial judge. No testimony was offered through the attorney who represented the plaintiff at the default hearing or the judge who presided at said hearing to establish that either of said agreements was actually before the court at that time.

The complaint merely alleged that the parties had entered into "a written agreement settling their property rights, wherein and whereby the defendant promised and agreed to pay to the plaintiff the sum of \$125 per month" for her support, but did not identify it by date or otherwise. In the prayer plaintiff asked that the property settlement agreement be approved and that defendant be ordered to pay plaintiff the stated monthly payments. No reference was made in the complaint to the provision of the property settlement agreement here under consideration. No reference is made to the agreement of March 20, 1931, in the default proceedings or in the interlocutory judgment.

[3,4] In denying defendant's motion to correct the interlocutory judgment nunc pro tunc the trial judge may well have concluded that neither of the agreements herein referred to was before the court on the de-

'fault hearing in April 1931, and that no judicial decision was then actually made or intended to be made by the court with respect to the problem here under consideration. Under such circumstances it would not now be proper to amend, in effect, the interlocutory decree upon the theory of correcting a clerical error so as to add a limitation to the defendant's obligation to pay plaintiff \$125 monthly which the court did not in fact place thereon when said decree was granted. As was said in *Felton Chemical Co. v. Superior Court*, 1939, 33 Cal.App. 2d 622, 627, 92 P.2d 684, 687, where the propriety of a nunc pro tunc order was under consideration, the proposed nunc pro tunc order in the instant case "does not by its terms amend the already entered judgment to make the latter conform to the decision which the court actually rendered, but attempts to amend by new modifications and enlargements the judgment which the court originally rendered. This the court is not empowered to do. It may not make the judgment express anything not embraced in the court's decision, even though the proposed amendment contains matters which ought to have been so pronounced." Citing authorities. The proposed amendment would indisputably change the interlocutory judgment in an important respect, and as pointed out in the *Felton Chemical Co.* case, supra, (33 Cal.App.2d at page 627, 92 P.2d at page 687), "amendments to judgments can only be made for the purpose of making the record conform to the truth, and not for the purpose of revising and changing the judgment." See, also, *O'Brien v. O'Brien*, 1899, 124 Cal. 422, 57 P. 225.

Defendant bases his argument principally on the provisions of the interlocutory decree that approved the property settlement agreement "dated June 20th, 1927" and recited that "in conformity with the terms of said agreement" defendant was ordered to pay plaintiff for her support \$125 per month as long as she lived or until she remarried. These provisions, however, do not necessarily establish that the agreements which the parties had executed, or either of them, were actually before the court on the default hearing. These provisions likewise do not necessarily establish that the court made or intended to make any such limitation on defendant's obligation to pay plaintiff \$125 per month, as he contends for here. It seems clear that the agreement of March 20, 1931, was not before the court. It is not referred to in

the interlocutory decree or elsewhere in the record. It likewise seems doubtful that the agreement of June 20, 1927, was actually before the court. It nowhere provided for the payment of \$125 per month for plaintiff's support. Under that agreement plaintiff was to receive \$175 per month until a specified piece of property was sold and thereafter \$100 per month. The payments were to be made "on or before the tenth day of each calendar month." The interlocutory decree provided that the monthly payments of \$125 should be made "on the first day" of each month. This agreement also provided that defendant should be relieved of the liability to make the aforesaid payments to plaintiff in the event sickness or other physical disability rendered him unable to carry on his profession unless his income was \$10,000 per year. No such limitation, however, on defendant's liability to make said monthly payments for plaintiff's support was placed in the interlocutory decree.

It is entirely likely that the court was simply informed that the parties had settled their property rights and that the defendant had agreed to pay plaintiff \$125 per month for her support until she remarried; that the portion of the agreement with respect to their property rights had been executed but that its approval by the court was desired and that the defendant should be ordered to make the monthly payments for plaintiff's support. While such informal procedure is not to be encouraged, it would afford a possible explanation for the failure of the interlocutory decree to contain any order based on the provision of the agreement of June 20, 1927, here in question, or to contain any order based on other provisions of that agreement, and would also explain the absence of any approval of or reference to the agreement of March 20, 1931.

In view of our conclusion that the court properly denied defendant's motion to correct the interlocutory decree nunc pro tunc, it becomes unnecessary for us to interpret said decree as it was proposed to be amended. The rights of the parties under the contracts herein mentioned are not before us on this appeal.

The order is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

GARTHOFNER v. EDMONDS. *

Civ. 7235.

District Court of Appeal, Third District,
California.

Feb. 27, 1946.

Rehearing Granted March 28, 1946.

See 167 P.2d 789.

1. Bills and notes ¶120

Where a married woman joins with her husband as maker of a note, the liability thereon becomes joint and several. Civ. Code, § 158.

2. Novation ¶1

A wife who had joined with her husband as maker of note was under obligation to pay entire note and her subsequent alleged oral agreement to personally assume and pay debt was without consideration, and did not constitute a "novation" of the original obligation. Civ. Code, §§ 158, 1530, 1531.

3. Novation ¶1

Contracts of novation, like other contracts, must be based on sufficient consideration to be enforceable. Civ. Code, §§ 1530, 1531.

4. Novation ¶11

A complaint alleging execution of note by husband and wife and an oral agreement by wife after husband's death to cancel note and personally assume the obligation did not allege facts constituting a valid novation because agreement was not between all of the same parties to the note. Civ. Code, §§ 1530, 1531.

5. Novation ¶1

"Novation" is a new contract to which all of the parties concerned agree.

See Words and Phrases, Permanent Edition, for all other definitions of "Novation".

Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

Action by Edward Garthofner against Ina Edmonds, as administratrix of the estate of Amanda B. Carter, also known as Mrs. James F. Carter, also known as Mrs. J. F. Carter, deceased, on a claim against estate. From a judgment rendered pursuant to an order sustaining a demurrer

to amended complaint without leave to amend, plaintiff appeals.

Affirmed.

Harry W. Falk, of Eureka, for appellant.

Irwin T. Quinn, of Eureka, for respondent.

THOMPSON, Justice.

The plaintiff appealed from a judgment which was rendered pursuant to an order sustaining a demurrer to the amended complaint without leave to amend the pleading. The complaint is founded on an alleged oral agreement of Amanda B. Carter to personally assume and pay a joint and several obligation of herself and her deceased husband on a promissory note for \$495, due "on the very day" or when "J. F. Carter receives his thousand dollar inheritance, from William Carson's Will." The trial court held that the oral agreement did not constitute a novation of the original obligation under Sections 1530 and 1531 of the Civil Code.

The respondent contends that the amended complaint fails to allege a novation because it appears therefrom that all of the parties to the original indebtedness on the promissory note did not consent to the alleged oral agreement that Amanda B. Carter would personally assume and pay the debt since her husband was then dead and his representative did not accept that new obligation; that there was no consideration for the new obligation since the note created a joint and several liability of the makers thereof and the wife was bound by the terms of the note to pay the entire amount and that the note was not yet due, nor was the obligation created by the alleged oral agreement to pay it, according to the terms of the note, due until "J. F. Carter receives his thousand dollar inheritance, from William Carson's Will," which the amended complaint alleges he never received. It is also asserted that if the alleged oral agreement for the new obligation was a substitution for the obligation created by the promissory note which extinguished the obligation created thereby, this action based on the new oral agreement is barred by the statute of limitations, which was pleaded in the demurrer.

The amended complaint alleges that plaintiff held the note of J. F. and Amanda B. Carter, husband and wife, for payment of the sum of \$495, dated in January, 1938,

* Subsequent opinion 167 P.2d 789.

"on the very day (or soon thereafter) that J. F. Carter receives his thousand dollar inheritance, from William Carson's Will"; that said inheritance was never received; that the makers of the note were jointly and severally liable therefor; that J. F. Carter died November 21, 1943; that subsequent to the death of J. F. Carter, his widow orally agreed to and did cancel the note and she agreed to become solely and individually responsible for the payment of that obligation; that Mrs. Carter died May 17, 1944, and the administratrix of her estate was thereafter duly appointed and qualified; that a claim for the obligation incurred by the oral agreement was filed with said administratrix and rejected. The complaint asks for judgment for said sum of \$495 and interest, amounting to \$702.40 against the estate of Mrs. Carter, to be paid in due course of administration. A demurrer to the amended complaint was sustained without leave to amend. Judgment was accordingly rendered that plaintiff take nothing by his said action. From that judgment this appeal was perfected.

We are persuaded the amended complaint fails to allege an action against the estate of Amanda B. Carter, deceased, founded on the oral agreement, chiefly because there was no valid consideration for the alleged novation and cancellation of the promissory note of Mr. and Mrs. Carter, since they were severally liable as makers of the note and she was legally obligated to pay the entire amount thereof regardless of her new alleged oral agreement to do so. It follows that the demurrer was properly sustained without leave to amend.

[1] This suit is not based on the promissory note. It is specifically alleged that note was canceled, and that the obligation was substituted by the subsequent oral agreement of Amanda B. Carter to assume and individually pay that debt upon the terms provided for in that instrument. The oral agreement was not a contract to substitute a new debtor, nor was it Mrs. Carter's agreement to pay the debt of another person. It was her agreement to pay her own debt which she was already legally obligated to pay in full. Either the husband or wife, having the statutory right to enter into any engagement or transaction with another person, was authorized to bind himself to pay the promissory note. When a married woman joins with her husband as maker of a note, the liability thereon be-

comes joint and several. *McClintick v. Frame*, 98 Cal.App. 338, 343, 276 P. 1033; *Civil Code*, sec. 158; 41 C.J.S., *Husband and Wife*, p. 664, § 185 b. Section 158 of the *Civil Code* provides: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; * * *."

The text in 41 *Corpus Juris Secundum*, *Husband and Wife*, § 185 b, *supra*, provides that: "In a jurisdiction in which the wife has power to make a note, * * * a married woman who joins with her husband in making the note is personally liable thereon. In such case both spouses become liable on the note jointly and severally; and both are liable primarily."

[2,3] In the present case, since the wife was already under legal obligation to pay the entire note, her subsequent alleged oral agreement to personally assume and pay the debt was without consideration. *Parrino v. Rallis*, 116 Cal.App. 364, 2 P.2d 515; *Tipton v. Tipton*, 133 Cal.App. 500, 506, 24 P.2d 525; *Marinovich v. Kilburn*, 153 Cal. 638, 642, 96 P. 303; *Rietz v. Hovden Food Products Corp.*, 49 Cal.App.2d 376, 382, 121 P.2d 775; *Gordon v. Green*, 51 Cal.App. 765, 768, 197 P. 955. Contracts of novation are not different from other contracts in that they must be based on sufficient consideration to constitute a valid enforceable agreement. 39 *Am.Jur.* 267, § 22. It has been held that if the novation contains the promisor's agreement to pay the debt of a person other than the makers of the original contract, in consideration of the promisor's discharge from the original debt, no new consideration is required. *Leslie v. Conway*, 59 Cal. 442; 39 *Am.Jur.* 267, § 22. But in this case the promisor was not merely agreeing to pay the debt of another person. She was promising to pay her own debt for which she was already liable on the joint and several obligation of the note.

In the case of *McClintick v. Frame*, *supra* [98 Cal.App. 338, 276 P. 1035] under circumstances similar in principle to those of the present case, it was held that the failure of one of the spouses who had joined in a written contract to sell land, to consent to a subsequent oral agreement, was void under Section 1698 of the *Civil Code*, and that the new agreement did not constitute a novation because it was not acquiesced in by Catherine McClintick, one

of the parties to the original written agreement. The judgment was reversed on that account. The court said: "Respondents urge that the original contract was modified by the subsequent April agreement, and that new terms in the April agreement take the place of the terms in the February agreement and therefore the old contract stands, with substitution of the new terms for the old terms that were by the new contract modified. Such claim amounts to a substitution of the individual obligation of W. P. Frame for the joint and several obligations of W. P. and Theodosia Frame, and amounts to a claim of novation, Civ. Code, § 1530. A novation contract is subject to all the rules concerning contracts in general. Civ. Code, § 1532. It would require a consideration from Theodosia Frame to support it, and, as the February agreement is in writing, a substitution could only be made by another agreement in writing or by an executed oral agreement. Civ. Code, § 1698. It would have to be joined in by all the parties to the original agreement. California Canning Peach Growers v. Downey, 76 Cal.App. 1, 243 P. 679. The April agreement, not being joined in by Catherine McClintick, can have no binding effect upon her."

[4,5] We are of the opinion the amended complaint fails to allege facts constituting a valid novation. The alleged oral agreement to cancel the note and substitute a new obligation was not between all of "the same parties" to the promissory note. It is alleged that J. F. Carter, one of the makers of the note was then dead. He did not and could not consent to the novation. Novation is the substitution of a new obligation for an existing one. Civil Code, sec. 1530. It may be consummated by, (1) The substitution of a new obligation between the same parties, or (2) By the substitution of a new debtor in place of the old one, with intent to release the latter. Civil Code, sec. 1531. A novation is made by contract, and is subject to all the rules with relation to contracts in general. Civil Code, sec. 1532. Novation is a new contract to which "all of the parties concerned agree." Colley v. Chowchilla National Bank, 200 Cal. 760, 770, 255 P. 188, 192, 52 A.L.R. 569; United States Gypsum Co. v. Snyder-Ashe Co., 139 Cal.App. 731, 733, 34 P.2d 767; California Canning Peach Growers v. Downey, 76 Cal.App. 1, 18, 243 P. 679; Young v. Benton, 21 Cal.App. 382,

384, 131 P. 1051; 39 Am.Jur. 262, § 17. In the authority last cited it is said: "It is a well-settled principle that an essential element of every novation is a new contract to which all the parties concerned must agree, and in the absence of such agreement or consent a novation cannot be effected."

It appears from the amended complaint that the obligation to pay the debt under the oral agreement may not have accrued for the reason that it was to be paid only when "J. F. Carter receives his thousand dollar inheritance, from William Carson's Will." It is affirmatively alleged that he "never did receive said inheritance." The amended complaint alleges that Amanda B. Carter orally agreed to personally assume and pay "said obligation as hereinbefore alleged." It was previously alleged that the debt was to be paid on "the very day (or soon thereafter) that J. F. Carter receives his thousand dollar inheritance, from William Carson's Will", and that he "never did receive said inheritance." The Civil Code, Section 3166, provides that: "Every negotiable instrument is payable at the time fixed."

Ordinarily an instrument made payable by its terms upon the occurrence of a specified event or condition, such as when "the balance of the purchase price" of property is paid, *Green v. Robertson*, 64 Cal. 75, 28 P. 446, or when real estate "becomes the property of the heirs of the late George Hood" *Egilbert v. Hall*, 44 Cal.App.2d 305, 112 P.2d 291, 294, the debt is payable upon the happening of the specified event. If the happening of the event or condition is within the control of the maker of the instrument the debt may become due, after demand, within a reasonable time. 8 Am. Jur. 27, § 281. But in the present case the makers of the promissory note had no control over the time of payment of J. F. Carter's legacy of \$1,000 from the Estate of Carson. He inherited that sum of money by the terms of the will of Carson. The note was made payable "on the very day" when that legacy was paid. That was a definite time when, according to the intention of the parties to the note, the debt was to mature. However, in view of what we have previously said regarding the invalidity of the alleged novation, it is unnecessary to determine whether or not the note was payable on demand.

For the reason that the court properly sustained the demurrer to the amended complaint for failure to allege facts sufficient to constitute a valid novation, the judgment against the plaintiff should be affirmed. It is so ordered.

ADAMS, P. J., and PEEK, J., concur.



73 Cal.App.2d 154

PEOPLE v. WILLIAMS.
Cr. 3934.

District Court of Appeal, Second District,
Division 2, California.
Feb. 19, 1946.

1. Criminal law ⚖️1159(3)

Discrepancies in testimony of witnesses is a proper subject for argument to trial court, but they do not concern appellate court.

2. Criminal law ⚖️1159(2)

Where verdict is attacked on ground of insufficiency of evidence, the reviewing court's function is to decide whether testimony is inherently credible and whether a person of reasonable judgment is warranted in believing it.

3. Larceny ⚖️1

Larceny is one of the varieties of theft, and essential elements of larceny are taking of property from owner's possession without her consent, asportation and intent without claim of right wholly to deprive owner thereof. Pen.Code, § 484.

4. Larceny ⚖️40(2)

To prove larceny, it is essential only to establish the corpus delicti and the identity of the accused as the thief.

5. Larceny ⚖️56

In prosecution for petty theft, proof that defendant and no other person visited the victim's home on the afternoon offense was allegedly committed and that purse and its contents were last seen on end table about time of defendant's visit made proof of corpus delicti complete and established

defendant's opportunity to commit the crime. Pen.Code, § 484.

6. Larceny ⚖️55

Mere opportunity to steal is not alone sufficient to justify a conviction for theft, but such opportunity together with co-existing inculpatory circumstances is ample support for a verdict against accused if satisfactory proof of corpus delicti has been received. Pen.Code, § 484.

7. Criminal law ⚖️351(10)

Larceny ⚖️50

In prosecution for petty theft, evidence of attempt of defendant to return property and to suppress testimony of prosecuting witness indicated a consciousness of guilt, and were properly received for that purpose. Pen.Code, § 484.

8. Larceny ⚖️57

In prosecution for petty theft, intent may be established by surrounding circumstances. Pen.Code, § 484.

9. Larceny ⚖️55

Evidence was sufficient to sustain conviction for petty theft with prior convictions of felonies.

Appeal from Superior Court, Los Angeles County, Clement D. Nye, Judge.

Alonzo Williams was convicted of petty theft with prior convictions of felonies, and he appeals.

Affirmed.

Alonzo Williams in pro. per.

Robert W. Kenny, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted of petty theft with prior convictions of felonies. He appeals from the judgment and from the order denying his motion for a new trial. Pursuant to stipulation of counsel the case was tried to the court without a jury. The only attack made upon the judgment is the insufficiency of the evidence to support it.

The facts given in evidence by the people's witnesses and adopted by the court are substantially these: On January 7, 1945, at the request of David Harris appellant was at the Harris home in Los Angeles for the purpose of assisting in the moving of some furniture. While there appellant was seat-

ed in the Harris living room for about 30 minutes on a divan at the end of which was a small table. While he was so seated Mrs. Harris was occupied in the kitchen and for 15 minutes or more Mr. Harris was intermittently in and out of the living room. Mrs. Harris had left her purse on the table where it lay during the forenoon. She last saw it about 11 o'clock. Her husband also observed it there both before he left the house about 12:30 p. m. and after his return with appellant. The two men departed from the house for the furniture in a truck driven by Williams. As they approached the intersection of Main and Almirra Streets appellant observed his brother-in-law, Lucian Haddocks, and stated that he desired to talk to him about a drink. Haddocks was there engaged in conversation with one Stokes. Appellant jumped from the truck and walked back to meet Haddocks. Leaving Stokes where he stood, Haddocks approached appellant and when they met the latter took from his pocket a coin purse impliedly found to have been the property of Mrs. Harris, gave it to Haddocks and asked him to keep it until appellant returned. He resumed his journey with Harris while Haddocks, without showing the purse to Stokes, took it to his home. About four o'clock in the afternoon he first examined the pocketbook and inspected its contents but removed nothing therefrom. He saw that it contained \$21 in currency, three pennies and three tokens; also a white gold watch and a lady's silver ring. About an hour later appellant called at the Haddocks' home, asked for the purse and received it, stating that he had found it. At the same time he repaid Haddocks \$1.75 borrowed a few days prior thereto. Mrs. Harris established the value of the jewelry and testified that she had never given appellant permission to remove it from her home. Five days after the disappearance of the purse and its contents Haddocks and appellant engaged in a fight in which Haddocks was cut, necessitating his hospitalization. During his convalescence he was visited by Harris when the missing property was discussed. While Haddocks denied that Harris had tried to induce him to testify against appellant the latter urges the incident of Harris' visit and conversation with Haddocks as a basis for the reversal of the judgment.

[1,2] While discrepancies in the testimony of the witnesses is a proper subject for argument to the trial court they do not

concern the appellate court. The altercation of Haddocks with appellant and the shedding of the former's blood may verily have caused Haddocks to warp the truth or to ignore his obligation to be veracious. On the other hand it may have prompted the witness to tell the truth with reference to his receipt of the purse. But whether he was accurate in his utterances or was motivated by malice to distort the facts were matters committed to the determination of the trial court. Its ultimate finding is final if the trial was legally conducted. When the verdict is attacked on the ground of the insufficiency of the evidence the reviewing court's function is to decide (1) whether the testimony is inherently credible and (2) whether a person of reasonable judgment is warranted in believing it. Mrs. Harris gave in detail the description of her lost property. It tallied with the description of that found by Haddocks in the purse and the trial court believed the testimony of both of them. The fact that Haddocks and appellant fought is no reason for holding that the former's testimony was false. The fight might have been the fact which satisfied the trial court that Haddocks did not offer to tell the truth until inimical relations had developed.

[3,4] Larceny is one of the varieties of theft. Penal Code, Sec. 484; *People v. Cook*, 10 Cal.App.2d 54, 57, 51 P.2d 169. The essential elements of larceny are all present in the crime of appellant: (1) the articles stolen were the property of Mrs. Harris; (2) he took them from her possession without her consent; (3) he asported them; (4) he had the intent without claim of right wholly to deprive the owner thereof. *People v. Edwards*, 72 Cal.App. 102, 236 P. 944. To prove larceny it is necessary only to establish (a) the corpus delicti and (b) the identity of the accused as the thief.

[5,6] In addition to the testimony showing that the property was removed by human agency with intent permanently to deprive Mrs. Harris thereof, appellant stated to Harris on the day set for the trial that the lost property would be returned if Harris did not appear against him. Also, Harris testified that directly after the preliminary trial defendant admitted to him that he had taken the purse away. Appellant did not deny that he was at the Harris home on January 7 or that he sat on the divan during his visit or that Mrs. Harris

was in the kitchen and that Mr. Harris intermittently left the living room during the 30 minutes. These facts and the proof that no other person visited the Harris home on the afternoon of January 7 and that the purse and its contents were last seen on the end table about the time of appellant's visit make proof of the corpus delicti complete and establish appellant's opportunity to commit the crime. *People v. Siderius*, 29 Cal.App.2d 361, 365, 84 P.2d 545. While the mere opportunity to steal is not alone sufficient to justify a conviction for theft yet such opportunity together with co-existing inculpatory circumstances is ample support for a verdict against the accused if satisfactory proof of the corpus delicti has been received. *People v. Viets*, 79 Cal. App. 576, 589, 250 P. 588.

[7] Evidence of the attempt of appellant to return the property and to suppress the testimony of the prosecuting witness indicate a consciousness of guilt and were properly received for that purpose. *People v. Moore*, Cal.App., 160 P.2d 857; *People v. Dempsey*, 63 Cal.App. 751, 755, 219 P. 1041.

[8,9] That the trial court might have determined that appellant did not remove the purse from Harris' home is not a sound reason for a reversal. Haddocks' testimony with reference to his receipt of the purse and its return to appellant, when believed, was sufficient to convince a trier of facts of the felonious intent which impelled the act of taking the property from Mrs. Harris. *People v. Payne*, 117 Cal.App. 108, 111, 3 P.2d 328. It was not inherently incredible. Intent is generally established by the surrounding circumstances. Assuming the truth of the facts and all inferences fairly deducible therefrom which the court adopted as the basis of its decision, the evidence is amply sufficient to support the finding and judgment. *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778; *People v. Savage*, 66 Cal.App.2d 237, 242, 152 P.2d 240.

With respect to the former convictions of felonies there is no controversy. Although they were admitted by appellant at the trial, documentary proof was also supplied of his convictions of three separate felonies for each of which he served a term in a state prison.

We can find no relief for appellant unless we first usurp the powers of the trial judge and thereafter derive a different conclusion. We are impotent legally to do the

first and we cannot say that we would do the latter.

The judgment and the order denying appellant's motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.



73 Cal.App.2d 192

Ex parte AGNEW.

Cr. 3994.

District Court of Appeal, Second District,
Division 3, California.

Feb. 21, 1946.

1. Bail ⚡44

Defendant convicted in superior court, after reversal of conviction in city court, of operating a vehicle while under influence of intoxicating liquor, had no right of appeal from judgment of superior court and hence he had no right to bail pending such appeal. Vehicle Code, § 502.

2. Habeas corpus ⚡85(1)

Grounds asserted for release from custody on habeas corpus, that petitioner's constitutional rights were violated and that he was convicted without due process of law, found no support in record showing that petitioner elected to defend himself in both city court and superior court after being advised concerning and fully understanding his right to be represented by counsel. Vehicle Code, § 502.

3. Criminal law ⚡641(1)

Where defendant was advised in city court of his right to be represented by counsel and fully understood such right, repetition of such advice upon appeal to superior court and retrial in superior court following reversal of city court judgment was unnecessary.

4. Criminal law ⚡260(13)

Upon reversal by superior court of city court judgment of conviction of a misdemeanor, defendant was triable in superior court upon the complaint that had been filed in city court, there being

no authority for filing of an information in superior court in such case.

5. Habeas corpus ☞109

Writ of habeas corpus, to obtain release from custody under judgment of conviction in superior court following reversal of conviction in city court of operating a vehicle while under influence of intoxicating liquor, would be discharged and petitioner remanded to custody in absence of showing of lack of jurisdiction of superior court to render judgment under which petitioner was confined. Vehicle Code, § 502.

Proceeding in the matter of the application of R. W. Agnew for a writ of habeas corpus.

Writ discharged and petitioner remanded to the custody of sheriff.

Lorin Andrews, of Los Angeles, for petitioner.

M. Arthur Waite, Dist. Atty., and Hal V. Hammons, Jr., Chief Criminal Deputy, both of Ventura, for respondent.

SHINN, Justice.

The court granted a petition for writ of habeas corpus in this matter, basing its order upon the assumed truth of the allegations of the petition, one of them being that the trial in the superior court was an original trial upon a misdemeanor charge, and not a retrial in that court after a reversal of a City Court judgment. Other allegations were that the petitioner had been denied his constitutional right to be represented by counsel, and that he had been convicted and sentenced without a trial, and we assumed he was seeking his release from custody because of the want of jurisdiction of the superior court to try him. It also appeared from the petition that the petitioner was attempting to prosecute an appeal from a judgment of the superior court, following an original trial and conviction in that court upon a misdemeanor charge, and that he had demanded and had been refused bail by the superior court. It appeared upon the hearing that he was convicted by a jury in the City Court of Oxnard of a violation of section

502 of the Vehicle Code, that he prosecuted an appeal to the superior court, and that there was a reversal and a retrial in the superior court resulting also in a jury verdict of guilty. His right to bail would depend upon his having a right to prosecute an appeal from that judgment.

[1] The court is of the opinion that he has no right of appeal (*Portnoy v. Superior Court*, 1942, 20 Cal.2d 375, 125 P.2d 487), and therefore that he has no right to bail.

[2-5] His contention that his constitutional rights were violated, that he was convicted without due process of law, finds no support in the record nor in the testimony that has been given. The record shows that petitioner was duly arraigned in the Justice's or City Court. He testified that he elected to defend himself in that court and we are satisfied that he was advised as to his right to be represented by counsel and that he fully understood it. It also appears from his testimony that he chose to represent himself upon the trial in the Superior Court, and the court is of the opinion that he understood his right to be represented by counsel and that there was no necessity for a repetition of the advice he had once received in that matter. The judgment having been reversed, petitioner was triable in the Superior Court upon the complaint that had been filed in the City Court. The filing of an information would have been an unauthorized procedure, and none of the code provisions applying to procedure in felony prosecutions which have been cited here have any application to the proceedings that were had in the Superior Court. There is, as we have said, no right to bail upon the attempted appeal from the judgment of the Superior Court. There is nothing to indicate in the slightest degree that the Superior Court was without jurisdiction to render the judgment under which the petitioner is now confined. For these reasons the writ is discharged and the petitioner is remanded to the custody of the Sheriff of Ventura County for execution of the judgment, which is set forth in the return.

DESMOND, P. J., and WOOD, J., concur.

73 Cal.App.2d 139

GIVENS v. JOHNSON.

JOHNSON v. GIVENS et al.

Civ. 15061.

District Court of Appeal, Second District,
Division 2, California.

Feb. 19, 1946.

**1. Husband and wife ☞264
Trusts ☞44(1)**

In suit to quiet title to lot, evidence supported findings that lot was community property of defendant and her former husband and that plaintiff held record title thereto as trustee for such former spouses.

2. Appeal and error ☞996, 1010(1)

A reviewing court cannot interfere with trial court's decision on findings supported by substantial evidence and reasonable inferences.

3. Trusts ☞37½

Indorsement of check by payees and delivery thereof to one of them constituted effectual transfer of money to such payee, as regards creation of trust.

4. Trusts ☞83

Where check for money loaned on husband's life policy was indorsed by him and his mother as payees and delivered to him, premiums on policy were paid by husband and wife, and they made payments on purchase price of lot out of community funds after making down payment with money borrowed, though husband's aunt executed note for balance and trust deed securing it, aunt's acceptance of conveyance of lot to herself created resulting trust in her for spouses' benefit, regardless of whether there was valid express oral agreement creating trust. Civ.Code, § 852.

5. Appeal and error ☞1060(1)

Refusal to hear argument by plaintiff's counsel at close of evidence was not prejudicial error, where issues were largely factual, court participated in eliciting and clarifying evidence and was fully informed at all stages of trial, and all issues presented on plaintiff's appeal were argued without hindrance on plaintiff's motion for new trial.

Action by Florence Givens, also known as Florence Banks, against Vivian L. Johnson, to quiet title to a certain lot, in which defendant filed a cross-action against plaintiff and Millard Johnson to establish plaintiff's record title to the lot as trustee for cross-complainant and cross-defendant Johnson. From a judgment for cross-complainant, plaintiff and cross-defendants appeal.

Affirmed.

Marshall Denton, Jr., of Los Angeles, for appellants.

H. R. McKee and Joseph Shane, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

Having the record title in her name, appellant Givens sued to quiet title to lot 23 described in the judgment. Inasmuch as she is the only cross-defendant concerned with this appeal she alone will be referred to as appellant. In addition to her denial of plaintiff's claims, respondent by cross-action alleged that the lot was purchased by herself and her husband by the payment of \$500 of their own money and by their agreement to pay their vendors \$30 monthly until the balance of \$2,000 should be wholly paid; that appellant took the title in her name with the understanding that she would hold it in trust for respondent and her husband pending the discharge of the incumbrance. Appellant is the aunt of cross-defendant Millard Johnson, respondent's former husband who declined to join respondent in the action. Because of his refusal to co-operate with respondent she joined him as cross-defendant and he appeared as a witness against her.

The judgment entered declares that the lot is the community property of defendant and her former husband; that appellant has no interest therein except the sum of \$450; and that she holds the record title as trustee for Vivian and Millard.

Appellant contends for a reversal on two grounds: (1) that the evidence is insufficient to support the findings and (2) the court abused its discretion in denying plaintiff's counsel opportunity to argue her cause at the conclusion of the evidence.

According to the findings, on August 4, 1939, respondent and her husband purchased lot 23 from Mr. and Mrs. Arra M. Reed, negotiations for the purchase having

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

been initiated by appellant. In order to effect the purchase Vivian and Millard borrowed the sum of \$500. While Mrs. Givens executed the note for the balance of \$2,000, payable in monthly installments of \$30, and the trust deed securing same, such payments were made by Vivian and Millard until November, 1943. Promptly upon the close of the transaction for the purchase respondent and her husband occupied the property but it was agreed that appellant should hold the title in trust for them until they should discharge the trust deed and note.

[1] While there is evidence contradictory of that adopted by the trial court the latter furnishes ample support for the findings. Respondent testified that she resided on the property from the date of its purchase until August, 1945; that her husband resided there until divorced in May, 1944; that she and Millard borrowed \$500 on his insurance policy and with such sum made the down payment on the purchase price; that previous to the loan she had paid the monthly installments of the premium on the policy with moneys earned by herself and her husband; that she and her husband likewise made the monthly payments on the property out of their community funds; that such payments were made to the Union Bank and Trust Company whose receipts therefor were admitted in evidence. She testified that she tendered no further payments after it had refused to accept them; that she then began to forward them to Mr. Reed at Oakland, but that he also declined to receive them from her.

During her occupancy respondent and her husband replanted the lawn, redecorated the interior, repaired the floors, installed new lighting fixtures and venetian blinds, all at their own expense. No sum invested in such improvements was ever repaid to them by appellant. With moneys furnished by her husband, in person she paid the taxes, while he paid premiums on the fire insurance. Other witnesses testified concerning the improvements made by Mr. and Mrs. Johnson and of conversations with them in the years following the purchase in which both asserted their ownership of the property and Millard stated his plans for the construction of a garage and driveway. Such testimony must have risen like a ghost before him when at the trial he testified that he had paid Mrs. Givens a monthly rental of "\$40.00 for the house."

[2] The entire record confirms the wisdom of the findings. The actual investment of Vivian and her husband of their own earnings in the insurance; the circumstances of the loan; their occupancy and the improvements prior to their divorce; their payment of the monthly installments; the evident insincerity of both Millard and his aunt,—these facts give reassurance that the trial judge was not arbitrary in deriving the findings, but was discriminating. However, even though we did not approve of the decision derived, yet under the attack of insufficiency of support the reviewing court is powerless to interfere where substantial evidence and reasonable inferences appear in support of the findings. *Fischer v. Keen*, 43 Cal.App.2d 244, 248, 110 P.2d 693; *Olivero v. Rosano*, 42 Cal.App.2d 740, 109 P.2d 976; *Erreca v. Western States Life Ins. Co.*, 19 Cal.2d 388, 397, 121 P.2d 689, 141 A.L.R. 68.

[3, 4] Mrs. Givens contends that contrary to the findings there is no proof of an express oral agreement establishing a trust in the property and that, if there had been, an oral agreement to create a trust in real property is void and violative of section 852 of the Civil Code as declared in *Dimity v. Dixon*, 74 Cal.App. 714, 720, 241 P. 905. However, the reference to an express trust is surplusage. *Lezinsky v. Mason Malt Whiskey Distilling Co.*, 185 Cal. 240, 196 P. 884. The facts found and the evidence accepted clearly show that a resulting trust was created. The \$500 check from the Metropolitan Life Insurance Company was endorsed by the payees thereof, to wit, Millard Johnson and his mother Elmira, and was delivered to Millard. This constituted an effectual transfer of the money to him. *Brown v. Spencer*, 163 Cal. 589, 126 P. 493. Payment of the premiums by Millard and Vivian had, moreover, established their ownership of the policy. Also, they paid all of the monthly installments on the trust deed while they dwelled on the property in amity, and thereafter Vivian paid them as long as the payee would accept them. Surely then, a resulting trust arose the moment Mrs. Givens accepted the conveyance of the property to herself. *Brown v. Spencer*, supra. Such a trust is a creation of the law and is essential to the protection of confiding persons who innocently entrust to others the money intended for investment for the benefit of its owner.

[5] Appellant deems herself aggrieved by reason of the court's refusal to hear ar-

gument at the close of the evidence. No prejudice appears to have resulted from such refusal. The issues were largely factual; the court had participated in eliciting and clarifying the evidence and appears to have been fully informed at all stages of the trial. But whatever disadvantage appellant may have suffered in not presenting an argument at the close of the evidence, such error was cured by the proceedings on the motion for a new trial. There all of the issues presented on this appeal were argued without hindrance. The controversy before the trial court was one of a variety which occurs frequently and where the task before the court is primarily that of resolving conflicting evidence, in which the jurist after many years of experience becomes a technician. It cannot be said that a litigant was prejudiced by the court's reaching a determination in such a case without the aid of oral argument, especially where the facts were subsequently argued on the motion for a new trial.

The attempted appeal from the denial of the motion for a new trial is dismissed.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.



PEOPLE v. ONE 1941 BUICK SPORT COUPE, SERIAL NO. 24131397, et al.*

Civ. 15025.

District Court of Appeal, Second District,
Division 3, California.

Feb. 20, 1946.

Hearing Granted April 18, 1946.

1. Appeal and error ⇨544(2), 907(3)

Where appeal is only upon the judgment roll, reviewing court is restricted to a case made by the findings of fact which, for purposes of the appeal, are deemed supported by the evidence.

2. Forfeitures ⇨5

In proceedings to forfeit an automobile because of transportation of narcotics, burden of establishing defenses that vehicle was not used to transport narcotics or that

narcotics were not unlawfully possessed by occupant of vehicle, or that interest of lien claimant was bona fide is on parties asserting them. Health and Safety Code, §§ 16, 11610, 11619, 11620.

3. Forfeitures ⇨5

In proceedings to forfeit an automobile, finding of fact that occupant of automobile had in his possession marihuana cigarettes, in absence of a further specific finding that possession thereof was lawful, required construction that cigarettes were not lawfully in possession of occupant. Health and Safety Code, § 11619.

4. Forfeitures ⇨3

Where an owner of an automobile consents to its use by another, he is not deprived of any constitutional right by forfeiture of automobile because of operator's violation of a statute even though owner was without knowledge of, or fails to acquiesce in illegal use.

5. Constitutional law ⇨303

Forfeitures ⇨3

One who intrusts his automobile to another accepts the risk that it may be used contrary to the law and result in a forfeiture, but where vehicle is taken without owner's consent or permission and is used by the taker for an unlawful purpose, it cannot be forfeited, since a forfeiture under such circumstances would amount to an unconstitutional deprivation of property without due process of law.

6. Constitutional law ⇨303

Forfeitures ⇨3

Where guest in automobile had in his possession, without knowledge or consent of owner of automobile, marihuana cigarettes, automobile was not subject to forfeiture because of unlawful possession of narcotics, since such a forfeiture would amount to an unconstitutional deprivation of property without due process of law. Health and Safety Code, §§ 11610-11629.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceedings by the People of the State of California against 1941 Buick Sport Coupe, Serial No. 24131397, Engine No. 54335476, License No. 40C138, Ignacio N. Marquez, registered owner, and the Kelley Kar Company, legal owner, claimants.

* Subsequent opinion 171 P.2d 719.

From a judgment of forfeiture, claimants appeal.

Reversed and remanded.

Sprague & Sparks and Philip S. Schutz, all of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

DESMOND, Presiding Justice.

The registered and legal owners of the forfeited vehicle appeal from an order which vacated and set aside a judgment rendered in their favor and which ordered instead a judgment of forfeiture pursuant to the provisions of the Health and Safety Code (secs. 11610-11629). The appeal comes to us on the judgment roll, under Rule 5, subdivision (f), Rules of Appeal.

The "Notice of Seizure and Intended Forfeiture Proceedings" was served upon Ignacio N. Marquez and the Kelley Kar Company, the registered and legal owners, respectively, of the seized vehicle, and alleged that on or about October 20, 1944, the vehicle was used to "unlawfully conceal, convey, carry or transport marihuana, and marihuana was in the possession of an occupant thereof," contrary to the force and effect of section 11610 of the Health and Safety Code of the State of California. Both owners filed answers, the registered owner disclaiming any knowledge of the possession of the marihuana by the occupant of the vehicle and the use of the vehicle for any unlawful transportation, and the legal owner setting up the defense of reasonable investigation of the moral responsibility, character and reputation of the registered owner and, further, that narcotics were not unlawfully possessed by any occupant of the vehicle and that the vehicle was not used for any unlawful purpose.

[1] Since the appeal comes to us only upon the judgment roll we are restricted to a case made by the findings of fact, which, for purposes of the appeal, are deemed supported by the evidence. The findings set up the following facts: That the vehicle was seized while in the possession of the registered owner; that in the car with him at that time were James Taylor, an acquaintance of his, and another passenger whose name does not appear in the record; that the three occupants "were enroute to attend a theatre at the time of the seizure of said vehicle and the arrest of said James Taylor and said registered owner; that at

said time while an occupant of said car the same James Taylor had in his possession marihuana cigarettes; that said possession was without the knowledge of said registered owner. * * * At the time of said seizure Kelley Kar Company had a right, title and interest in said vehicle equivalent to the sum of \$1336.19 which was secured by contract of conditional sale; that the right, title and interest of said Kelley Kar Company was bona fide and was made without any knowledge that said vehicle was being or was to be used in violation of the law relating to narcotics; that said Kelley Kar Company did not make any investigation relating to the moral responsibility, character and reputation of the said Ignacio N. Marquez before said contract of conditional sale was consummated and said vehicle delivered to said Ignacio N. Marquez; that at the time of said seizure said vehicle had a value in excess of the right, title and interest of the legal owner."

From these findings the court concluded that "the vehicle * * * was not used with the knowledge of either the registered or legal owner to unlawfully conceal, convey, carry or transport marihuana, or that marihuana was in possession of an occupant thereof, contrary to the force and effect of section 11610 of the Health and Safety Code * * * [and] should be released to the registered and legal owners thereof." Accordingly, on February 2, 1944, judgment was rendered in favor of the owners and the vehicle was ordered returned to them.

Thereafter, on February 7, 1944, plaintiff served and filed a notice of intention to move for a new trial and for the vacation of the judgment and the entry of a new and different judgment. The motion was based upon the following grounds, namely, that it was against the law; that error in law occurred at the trial and was excepted to by the plaintiff; that there was "an incorrect or erroneous conclusion of law not consistent with and not supported by the Findings of Fact." The trial court granted this motion and ordered the previous judgment vacated and set aside, and a new judgment forfeiting the vehicle to the State of California was entered.

The question, therefore, presented to us concerns the propriety of the trial court's action in vacating the first judgment and entering a different judgment based upon the same findings. This, in turn, raises the

query as to whether or not the original conclusions of law and the judgment based thereon were in conflict with the findings of fact.

[2] Section 11610 of the Health and Safety Code, under which the vehicle was forfeited, reads as follows: "A vehicle used to unlawfully transport any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed, *or in which any narcotic is unlawfully possessed by an occupant thereof, shall be forfeited to the State.*" [Italics ours.] To avoid the severe penalty of forfeiture, which is mandatory upon the courts (Health and Safety Code, sec. 16), the statute permits an owner who has filed a verified answer to show "that the vehicle was not used to transport narcotics, or that narcotics were not unlawfully possessed by an occupant of the vehicle" (sec. 11619). Likewise, a lien claimant of a vehicle is permitted to escape the penalty of forfeiture, even where there has been a violation of the statute, by proof that his interest was a bona fide one, without knowledge that the vehicle was used or intended to be used in violation of the narcotic act, after a reasonable investigation of the moral responsibility, character and reputation of the purchaser (sec. 11620). The burden of sustaining these defenses rests upon the parties asserting them.

[3] Appellants argue that there was no finding of "unlawful transportation" or any "unlawful possession of marihuana by an occupant of the automobile," and that with respect to the latter contention "the inference would be that the possession must have been legal." With respect to the "inference" we believe that since the court found that the occupant "James Taylor had in his possession marihuana cigarettes," there being no specific finding that the possession was "lawful," which, in our opinion is essential if the burden of the defense permitted by section 11619, supra, has been sustained, it must necessarily follow that the cigarettes were not *lawfully* in the possession of the occupant.

Appellants, in urging that the findings support the original conclusions, argue that the portion of section 11610, supra, reading "or in which any narcotic is unlawfully possessed by an occupant thereof" is "unreasonable, arbitrary and capricious * * * and is therefore unconstitutional as depriving a person of his property with-

out due process of law, contrary to the provisions of our state and federal constitutions." They suggest that in order to save the constitutionality of the statute the "court * * * make an exception and read into the statute a requirement of some knowledge or participation on the part of the owner."

The respondent argues that "proof of knowledge of the owner of the illegal use or possession of narcotics is not necessary" and asserts that this question of constitutionality "has been raised many times previously and the matter determined adversely to the appellants' contention by numerous decisions of the Supreme Court of California and the Supreme Court of the U. S. in the following cases: *People v. One 1941 Ford 8 Stake Truck*, [26 Cal.2d 503, 159 P.2d 641]; *People v. One 1933 Plymouth Sedan*, 13 Cal.2d 565 [90 P.2d 799]; *People v. One Ford V8 Tudor Sedan*, 12 Cal. App.2d 517 [55 P.2d 908]; *Goldsmith, Jr. v. Grant Co. v. United States*, 254 U.S. 505, 41 S.Ct. 189, 65 L.Ed. 376; *Van Oster v. Kansas*, 272 U.S. 465, 47 S.Ct. 133, 71 L. Ed. 354, 47 A.L.R. 1044."

[4] We have carefully examined the foregoing cases but in none of them do we find presented a situation similar to the one involved on this appeal. They merely hold that where an owner consents to the use of the vehicle by another, he is not deprived of any constitutional right by forfeiture of his property because of the operator's violation of a statute, even though the owner was without knowledge of or failed to acquiesce in its illegal use.

In *People v. One 1941 Ford 8 Stake Truck*, supra, 26 Cal.2d 503, 159 P.2d 641, the owner gave possession of the truck involved to an employee, who, in using the car to go to a place where he obtained the marihuana, violated his employer's instructions. In upholding the forfeiture, the Supreme Court, speaking through Mr. Justice Edmonds, said (26 Cal.2d at page 506, 159 P.2d at page 642): "It is true that the Health and Safety Code does not expressly exempt from confiscation an automobile taken in the first instance without the owner's consent and used to transport narcotics but it has been construed as not authorizing forfeiture under such circumstances. The reasoning leading to this conclusion is that a contrary determination would amount to an unconstitutional deprivation of property without due process

of law (People v. One 1937 Plymouth 6, supra [37 Cal.App.2d 65, 98 P.2d 750]), and where a statute is susceptible of two interpretations, one of which would satisfy constitutional guarantees, if possible the courts will uphold the legislation. [Citing case.] But there are no constitutional impediments to a forfeiture where the owner entrusts his vehicle to another who uses it illegally, even though the owner does not know of or acquiesce in such use. The distinction between such a situation and the plight of an automobile owner who failed to give possession of his car or consent to its operation is based upon the means by which the one found transporting the contraband obtained the vehicle. An owner who entrusts the possession of his vehicle to another thereby accepts the risk that it will be used contrary to law, but, in the operation of an automobile without the owner's consent to do so in any manner or at all, there is no element of choice or volition and a complete lack of permission, express or implied, on the part of the owner."

People v. One 1933 Plymouth Sedan, supra, 13 Cal.2d 565, 90 P.2d 799, likewise involved a situation where the owner of the car entrusted it to another, her son, the owner alleging, however, that she did not give him permission to use the automobile for the unlawful purpose of transporting narcotics. The court held that the owner of the vehicle, having consented to its operation by another, was not deprived of any constitutional right by the forfeiture of her property, even though she was without knowledge of or had failed to acquiesce in its illegal use.

The State appealed from a judgment in favor of the legal owner in People v. One Ford V8 Tudor Sedan, supra, 12 Cal.App.2d 517, 55 P.2d 908, 909. On appeal the judgment was reversed and the vehicle ordered forfeited. The ground of appeal was that the record did not disclose any evidence showing compliance by the claimant or its assignor with the provisions of section 15(e), which declared, in substance, that in order to establish priority of lien against the state in cases such as this, the claimant must prove, among other things, that his right, title or interest in the vehicle "was created after a reasonable investigation of the responsibility, character and reputation of the offender * * *." Respondent owner contended that section 15(e) contained unreasonable requirements. The court stated (12 Cal.App.2d at page

521, 55 P.2d at page 910) that this contention was "fully disposed of by the decision in the Harley-Davidson Motorcycle case, supra [People v. One Harley Davidson Motorcycle, 5 Cal.2d 188, 53 P.2d 970], which holds in effect that before a claimant is entitled to the release of a vehicle seized for violation of the Narcotic Act he must prove compliance with the provisions thereof; and the point is answered also by that group of decisions of the United States Supreme Court which hold that no constitutional guaranties are invaded by a statute which provides for the forfeiture of automobiles or other vehicles used for the unlawful transportation of narcotics, and that it is well within the power of a state, if it chooses so to do, to forfeit entirely all interests in a vehicle actually used in such unlawful enterprises, despite the fact that the owner or owners of such interests may have no knowledge of the unlawful purpose for which it is being used. Dobbins' Distillery v. United States, 96 U.S. 395, 24 L. Ed. 637; Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 41 S.Ct. 189, 65 L. Ed. 376; Van Oster v. Kansas, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354, 47 A.L.R. 1044; Various Items of Personal Property v. United States, 282 U.S. 577, 51 S.Ct. 282, 75 L.Ed. 558."

[5] The California courts have approved the doctrine that where one entrusts his car to another he accepts the risk that it may be used contrary to the law, but, so far as we are aware, they have not ruled that a vehicle which has been *taken without the consent or permission of the owner* and has been used by the taker for an unlawful purpose can be forfeited. On the contrary, although the Health and Safety Code does not expressly exempt from forfeiture an automobile taken without the owner's consent it has been held that to permit a forfeiture under those circumstances would amount to an unconstitutional deprivation of property without due process of law. See People v. One 1937 Plymouth 6, 37 Cal.App.2d 65, 98 P.2d 750, wherein a hearing in the Supreme Court was denied.

The registered owner in that case alleged that the taking of the automobile by her son, who used it in violation of the State Narcotic Act, was without her permission or consent. The State appealed from a judgment denying forfeiture. The court said (37 Cal.App.2d at page 70, 98 P.2d at page 753):

"In support of the position we have here taken, namely that property of an owner taken from him without his permission or consent and used by the taker for an unlawful purpose proscribed by the act cannot be declared forfeited to the state, we may rely upon the following cases. In *United States v. One Buick Roadster*, D.C., 280 F. 517, the court said at page 519: 'The fiction that the thing is guilty is but a convenience of procedure, to visit justice by way of forfeiture upon those, perhaps unknown, whose conduct contributed to the thing's unlawful use. Otherwise, outlawry, the superstitions of deodand and trial and punishment of inanimate things, have disappeared, and it is doubtful if any modern law purports to confiscate lawful property because unlawfully used by trespasser or thief. If section 3450 does, how can it be maintained in view of the due process clause of the Constitution? What is it but a mere arbitrary act of government in violation of that fundamental right to own property, for the security of which society is organized and government maintained? What immemorial practice of government justifies this legislative power? Wherein are public welfare, and rights common to all, served by this invasion of individual right of property? What principle of justice permits it? To support the proposition no answer comes to mind, and until successfully answered it must be held that the literal import aforesaid of section 3450 contravenes the due process clause, to avoid which, its general terms permitting, again it will be presumed that Congress intended exceptions of trespasser and thief.' [Citing cases.] The line of demarcation established in these cases is whether or not the owner has consented to the use of his property. If he has not, his property is not subject to forfeiture. If he has, the property may be forfeited regardless of his lack of knowledge of or consent to the unlawful use. * * * We are unable to appreciate how appellant is able to draw any distinction, which he indicates should be drawn, between use by a thief, and use by a person without the consent or permission of the owner. The latter use is unlawful, constituting a trespass or conversion, and the act of driving an automobile without the owner's consent is now a crime. Vehicle Code, § 503 * * *. The difference is one only of degree and is too slight to justify any distinction.

166 P.2d—5¾

"Appellant strongly argues that if the owner may defend against a forfeiture by proof that the vehicle was used without his consent or permission, the way is opened for collusion and perjury in an attempt to defeat forfeiture. Such a consideration is one to be met by the careful scrutiny of the trial judge, who has at the trial an opportunity to view the witnesses and weigh the credibility of the evidence offered. It is not a sufficient consideration to justify an apparent arbitrary invasion by the legislature of property rights protected by both the state and federal Constitutions." Cf. *People v. One Lincoln Eight*, 12 Cal.App. 2d 622, 55 P.2d 925.

[6] On the facts presented by the findings in the instant case, we feel that an innocent owner, in possession of his vehicle, should not be made to suffer the drastic penalty of forfeiture where he has no knowledge, actual or implied, of the unlawful possession of narcotics by one who is riding with him. Although the legislature has not expressly exempted an owner, under such circumstances we feel that a forfeiture should not be permitted for a "contrary determination would amount to an unconstitutional deprivation of property without due process of law." *People v. One 1941 Ford 8 Stake Truck*, supra. The same principle, i.e. deprivation of property without due process, is as truly involved here as in the case of an owner whose car is stolen from him or who has not consented to the taking or use of his automobile. The findings of fact in this case support the conclusions of law and the original judgment. The fact that the court further found that the Kelley Kar Company had not made any investigation relating to the moral responsibility, character and reputation of the registered owner is immaterial and surplusage, for the "interest of an owner who bases his claim upon lien, mortgage, or conditional sales contract, is not subject to forfeiture in the absence of a proper forfeiture of the purchaser's interest." *People v. One 1937 Plymouth 6*, supra, 37 Cal.App.2d 65, 73, 74, 98 P.2d 750, 755.

The order appealed from is reversed and the superior court instructed to enter an order denying the forfeiture claimed by plaintiff and directing that the automobile in question be released to the registered and legal owners thereof.

SHINN and WOOD, JJ., concur.

73 Cal.App.2d 291

In re SMITH'S ESTATE.

Civ. 12968.

District Court of Appeal, First District,
Division 1, California.

Feb. 27, 1946.

Hearing Denied April 25, 1946.

1. Adoption ⇨23

Only child of decedent's adopted son who predeceased decedent was sole "heir at law" of decedent, and was not required to share personalty with decedent's surviving brothers and sisters, and descendants of a predeceased brother, notwithstanding that such child was also related to decedent as a grandniece by blood. Probate Code, §§ 222, 225, 257.

See Words and Phrases, Permanent Edition, for all other definitions of "Heir at Law".

2. Adoption ⇨23

In determining right of child of an adopted child to inherit from decedent, the children of an adopted child whose parent was also related to decedent by blood would not be distinguished from children of an adopted parent who was not related by blood to decedent. Probate Code, §§ 222, 225.

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Emma L. Smith, deceased. From a decree determining that Celeste Hanson is the sole heir at law of the deceased, the five surviving brothers and sisters and four descendants of a predeceased brother appeal.

Affirmed.

Leslie C. Gillen, of San Francisco, for appellants.

Wright & Wright & Larson and William C. Bacon, all of San Francisco, for respondent.

PETERS, Presiding Justice.

This appeal from a decree of the probate court determining that Celeste Hanson is the sole heir at law of the decedent, Emma L. Smith, approaches the frivolous.

[1] The appeal is taken on an agreed statement of facts. It therein appears that Emma L. Smith died intestate in San Fran-

cisco, leaving an estate of personal property appraised at in excess of \$20,000. She left five surviving brothers and sisters and four descendants of a predeceased brother, all of whom are appellants here. Respondent, Celeste Hanson, is the only descendant of a predeceased sister, and so, of course, is related by blood to the decedent as a grandniece. It is agreed that decedent left no surviving spouse, parents, children, or grandchildren, unless respondent inherits as a grandchild as the result of an adoption proceeding. It is agreed that in 1893, in the State of Washington, decedent and her then husband, while residents of that state, adopted respondent's father, Albert McAlpine. Albert was then the only child of Celestine McAlpine, a sister of decedent. Celestine had died prior to the adoption. Albert predeceased the decedent, leaving respondent as his only child. It is the theory of appellants that, under § 225 of the Probate Code, each of the surviving sisters and brothers is entitled to a one-seventh share of the estate; that the four descendants of the deceased brother are entitled to a one-seventh share, and that respondent, as the sole descendant of a predeceased sister, is entitled to a one-seventh share. In other words, appellants urge that, even though respondent is the child of an adopted child, she takes only as a grandniece of decedent and not as a grandchild, or, more accurately, that she does not take through her deceased father, but only through consanguinity as a grandniece. The point is without merit, and is settled adversely to appellants' contentions by both the statutory and case law of this state. Section 222 of the Probate Code provides that if the decedent leaves no surviving spouse, but leaves issue, the entire estate goes to such issue. Section 257 of the Probate Code provides that: "An adopted child succeeds to the estate of one who has adopted him, the same as a natural child. * * *" Both before and after the adoption of the Probate Code it has been held that children of adopted children take as issue or lineal descendants of the adopting parents. In *Re Estate of Winchester*, 140 Cal. 468, 74 P. 10, the question was whether legacies contained in the will of an adopting parent for the benefit of children of the adopted child were subject to the then inheritance tax act. It became necessary to determine whether children of adopted children were heirs of the adopting parent. If so, the tax did not apply. In holding that they

were in fact heirs and lineal descendants of the adopting parent, and were accordingly exempt from the tax, the court held, at page 469 of 140 Cal., at page 10 of 74 P., that "the children of such adopted child take by inheritance as issue of the adopting father [citing cases]. Otherwise the child adopted and the adopting parent would not sustain towards each other the relation of parent and child." This case has been cited with approval on this point in many cases. In *Re Estate of Hunsicker*, 65 Cal.App. 114, 119, 223 P. 411; In *re Estate of Darling*, 173 Cal. 221, 225, 159 P. 606; In *re Estate of Moore*, 7 Cal.App.2d 722, 725, 47 P.2d 533, 48 P.2d 28; In *re Estate of Mercer*, 205 Cal. 506, 510, 271 P. 1067. A case on all fours with the instant one, and decided since the adoption of the Probate Code, is *In re Estate of Hebert*, 42 Cal. App.2d 664, 109 P.2d 729. (Pet. for hearing in Supreme Court denied.) In that case, as in the instant one, the child was adopted while the parties were residents of the State of Washington. As in the instant case, the adopted child predeceased the decedent, leaving issue. The decedent died intestate in California. The contest was between cousins of the decedent, on the one side, and the issue of the adopted child. The specific question involved, which is the exact problem here presented, was stated by the court as "whether the daughters of the adopted son are heirs at law of the party who adopted their father." Page 665 of 42 Cal.App.2d, at page 730 of 109 P.2d. The court held that the status of an adopted child is determined by the laws of the state where the adoption took place, but the rules of inheritance as to personal property are determined by the laws of the state of decedent's domicile. The court then analyzed the cases decided before the adoption of the Probate Code, cited *supra*, and held that such cases clearly established the rule to be that children of an adopted child take by inheritance from the adopting parent as "issue" of such adopting parent. The court then analyzed the provisions of the Probate Code and held that no change was wrought by those sections. The precise point involved in the instant case is discussed at length and decided adversely to the contentions of appellant.

Another recent case involving the same principle is *In re Estate of Tibbetts*, 48 Cal.App.2d 177, 119 P.2d 368. (Hearing denied in Supreme Court.) In that case

Francena Tibbetts, a resident of California, by will, left one-half of her estate to her sister Annie Lawton. Annie Lawton predeceased the testatrix, leaving a son and an adopted daughter. The question was whether the anti-lapse statute, § 92, Probate Code, providing that bequests to kindred of the testator who predecease the testator leaving "lineal descendants" applied to an adopted child. It was held that such adopted child was a lineal descendant of the adopting parent. See, also, *In re Estate of Morris*, 56 Cal.App.2d 715, 133 P.2d 452.

[2] Although the Hebert case is the main case relied upon by respondent, appellants do not even mention the case in their briefs. They satisfy themselves with the bald assertion that, because respondent was related to the decedent as a grandniece, the blood status must dominate the adoptive status. In other words, it is urged that, where the adopted child is also related by blood to the adopting parent, children of such adopted child are in a different legal status than those where the adopted child is not related to the adopting parent. If the adopted child is related to the decedent, under this theory, the children of the adopted child would not be "issue" of their parent, so far as the adopting parents are concerned, but would revert to their blood relationship to the decedent. To state the contention is to refute it. There is no justification at all for thus treating differently the issue of children of an adopted child where their parent was related to the decedent who adopted their parent, from children of an adopted parent who was not related by blood to the decedent.

The case mainly relied upon by appellants is *In re Estate of Darling*, 173 Cal. 221, 159 P. 606, in which an adopted child was allowed to inherit from his grandparents by blood. There is nothing in that case, however, to show that, where a child sustains both blood and adopted relationship to the decedent, he can inherit only under the blood relationship. In fact, in that case, the rule of the Winchester case, *supra*, was expressly recognized, the court stating, at page 225 of 173 Cal., at page 607 of 159 P., "One other consequence in the matter of inheritance may be noted as arising from the same relation, viz., that the children of the *adopted child* take by inheritance *from the adopting parent* as issue of such adopting parent."

There is no merit at all in the position advanced by appellants. The decree determining heirship is affirmed.

WARD, J., and SCHOTTKY, J. pro tem., concur.



73 Cal.App.2d 263

NELSON et al. v. ROBINSON et al.

Civ. 7131, Sac. 5697.

District Court of Appeal, Third District,
California.

Feb. 26, 1946.

1. Quieting title ☞49

In action to quiet title, where defendant claimed prescriptive rights, a judgment which did not quiet plaintiffs' title or adjudicate any prescriptive right and decreed merely that plaintiffs take nothing by reason of their action and that defendants recover their costs, was defective for failure to adjudicate rights of the respective parties.

2. Appeal and error ☞1097(2)

A decision on appeal, whether erroneous or not, that evidence was insufficient to support trial court's finding of a prescriptive right determined the "law of the case" and required a similar conclusion on second appeal, in absence of new evidence adduced on the retrial supplying the deficiencies held fatal on prior appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Mary A. Nelson and others against I. N. Robinson and others to quiet title, to restrain defendants from allowing water to seep upon lands of plaintiff and to recover damages. Judgment for defendants and plaintiffs appeal.

Reversed.

Jos. H. Huberty, of San Andreas, for appellants.

Jones & Quinn, of Stockton, for respondents.

PER CURIAM.

This action was begun in 1937, and in 1938 plaintiffs filed their second amended complaint alleging in the first count that they were the owners of certain described real estate in San Joaquin County, and that defendants claimed some right, title and interest therein adverse to plaintiffs' ownership, which claims were without right. In a second count they alleged that defendants had constructed an irrigation canal on their own land along higher ground lying easterly above plaintiffs' land, and that within three years last past had, without right and against plaintiffs' will, allowed water to percolate from said canal upon the lands of plaintiffs and had thereby injured said lands and the crops growing thereon. Plaintiffs prayed a decree quieting their title against any claims of defendants, that defendants be restrained from asserting any rights in plaintiffs' lands and from allowing waters to seep from their canal upon lands of plaintiffs, and that plaintiffs recover damages. Defendants, in answer to plaintiffs' complaint, admitted they claimed some interest adverse to plaintiffs. They alleged that they had constructed their canal in 1925 and had used it every year since; that by reason of the nature of the lands there had been a certain amount of seepage therefrom onto plaintiffs' land which had become visible as early as 1926, and had been visible and apparent during each and every irrigation season thereafter; that "said seepage and percolation affected the crops growing on lands of the plaintiffs in only that portion of said lands that bordered upon said canal or ditch, and not to exceed a strip fifty (50) feet wide; that said lands and the crops thereon have been visibly affected and the injury thereto apparent commencing in the year 1926, and each and every year thereafter"; that said seepage had remained constant and that they claimed the right to operate the ditch in the future as in the past. They denied any loss of crops by plaintiffs or damages in any sum whatsoever. In a separate defense they pleaded that plaintiffs' causes of action were barred by Code of Civil Procedure section 338, subdivision 2, then alleged the acquisition of a pre-

scriptive right, asserting that for five years last past they had claimed said right, that at all times the seepage onto plaintiffs' lands had been "open, visible, notorious and adverse to the plaintiffs' rights, and was known to be adverse by said plaintiffs."

The action was tried in March, 1939, and resulted in a judgment that plaintiffs were the owners of the lands described in their complaint but that same were subject to the prescriptive right of defendants to permit water to seep from the canal "to the same extent and in the same manner as they have heretofore." Plaintiffs were enjoined from asserting any injury to their lands or crops by reason of seepage from said canal, and were denied damages.

From that judgment appeal was taken to this court, and the judgment was reversed. *Nelson v. Robinson*, 47 Cal.App.2d 520, 118 P.2d 350. The ground for reversal was that the evidence before the trial court was insufficient to sustain a finding of that court that defendants had acquired a right by prescription to flood plaintiffs' lands by seepage and percolation. The opinion stated, 47 Cal.App.2d at pages 526, 527, 118 P.2d at page 354: "One of the essentials of adverse user in this case is the actual infringement of the rights of appellants for a period of time each year, for the statutory period, that is, the saturation and percolation of plaintiffs' land by seepage from defendants' canal must have been known to the former, or at least facts and circumstances must be proven from which it might be reasonably inferred that plaintiffs had such knowledge. The trial court did find that such knowledge was a fact, but the record fails to sustain such finding. The testimony shows that there were three occasions when the seepage water was visible on the surface of appellants' land. One was in the year 1925, one in 1928, and the other in 1935. The finding that the seepage and percolation was visibly apparent each year since 1926, is wholly without support in the record."

The opinion also stated that it could not be assumed that because water seeped in one year, it would continue to do so every year, it being a matter of common knowledge that porous ground is often sealed and rendered impervious to further percolation by particles of sand carried in the water; that the evidence was insufficient to charge plaintiffs with knowledge—an essential element in the acquisition of a right by prescription; also that hostile

ity of use was not proven, the evidence showing that when, in 1926, seepage became visible, and plaintiffs complained to defendants, the latter took steps to correct the condition; that no seepage was thereafter visible until 1935 and when plaintiffs then complained to defendants the latter dug a drainage ditch in an effort to intercept the percolating water; and that when, in 1936, there was a recurrence of visible seepage, defendants again took steps to correct conditions by installing a pump to return the percolating water to the canal.

A petition by respondents for hearing by the Supreme Court was denied.

The action was thereafter retried in May, 1943, and resulted in a judgment for defendants which merely decreed that plaintiffs take nothing by reason of their action and that defendants recover their costs. From that judgment this appeal was taken. Appellants assert that the facts developed on the second trial are identical with those proven on the first trial, that the trial judge refused to apply the law of the case as laid down by the appellate court, that it erred in refusing damages to plaintiffs, and that the judgment is defective in that it failed to quiet plaintiffs' title as prayed.

The trial court filed a memorandum opinion, which is set forth in the record, and made findings of fact. It again found that defendants had acquired a prescriptive right to permit waters to seep and percolate out of their canal to the same extent and in the same manner as they had theretofore; that the seepage first visibly affected certain portions of plaintiffs' lands in 1926, and that "annually thereafter up to 1935, while said ditch was in use for irrigation purposes, seepage continued in diminishing quantities to escape from said ditch and visibly affected portions of Plaintiffs' lands in the same areas as were affected in 1926. That in the years 1935 and thereafter up to the trial of this action the same portions of Plaintiffs' lands were affected by seepage from Defendants' ditch, but were not affected to an extent that caused any damage to the lands or crops thereon. That the said portions of Plaintiffs' land so affected did not, in the aggregate, exceed one half an acre, and that had there been a complete loss of crops thereon the loss therefrom would not have exceeded \$25.00 per year. That said portions of Plaintiffs' lands were three (3) in number, a small low spot in the north-

east corner of Plaintiffs' lands, a small area at what is called the 'elbow', and another small area at the southeast corner of Plaintiffs' land near what is referred to as the 'mail box.' That on numerous occasions between 1928 and 1935, the Plaintiffs complained about said seepage to Defendant I. N. Robinson, Jr., and were advised by him on each of said occasions that there was nothing that he could do about it. That Defendants for more than five (5) years prior to 1935, continuously, openly, notoriously and adversely operated said ditch as aforesaid claiming the right to do so."

It further found that any deterioration to plaintiffs' crops alleged to have occurred in 1935 to 1937, resulted from causes other than seepage from defendants' canal, and were caused by age of crops, methods of farming, high water table caused by percolation from Middle River (which flows along the west side of plaintiffs' lands) and inadequate drainage of irrigation water placed by plaintiffs upon their lands; that seepage from defendants' canal has gradually diminished; that the condition of plaintiffs' lands has not been materially affected by seepage from defendants' canal and will not in the future be so affected while same is being used and operated as it has in the past; that seepage from said canal could only be prevented by sealing or cementing the bottom and sides thereof which would require large amounts of materials not now available, but which, if available, would cost between \$15,000 and \$25,000.

From the foregoing it is apparent that while the trial court has found that defendants have acquired "a prescriptive right to permit waters to seep and percolate from its canal to the same extent and in the same manner as they have heretofore," the judgment fails to so decree. Plaintiffs' title has not been quieted and no prescriptive right has been adjudged.

[1] Our first inquiry, then, is whether the judgment should be reversed for failure to adjudicate the rights of the respective parties.

Lantz v. City of Los Angeles, 185 Cal. 262, 196 P. 481, is a parallel case—an action to quiet title with a claim of easement on the part of defendant acquired by adverse user for the prescriptive period. The trial court made findings to the effect that plaintiff was the owner of the land in

question, but that for more than five years prior to the commencement of the action the city had been the owner of an easement over same for street purposes. The judgment merely provided that plaintiff take nothing and that defendant recover costs. The Supreme Court said, 185 Cal. at page 271, 196 P. at page 484: "This was not in conformity with the findings, nor with the conclusions of law therein declaring the relief to be given to the parties, as it should have been, and it is not just to the plaintiff." The judgment was thereupon reversed. In *Peterson v. Gibbs*, 147 Cal. 1, 81 P. 121, 109 Am.St.Rep. 107, plaintiff sought to quiet title to a tract of land, alleging that defendants claimed an interest adverse to him which claim was without right; and he asked that defendants be required to set forth all adverse claims asserted by them, that said claims be determined and that it be adjudged that defendants have no estate or interest in the property. A motion for a nonsuit was granted and judgment was entered that plaintiff take nothing and that defendants recover their costs. The Supreme Court reversed the judgment, saying, 147 Cal. at page 5, 81 P. at page 122, 109 Am.St. Rep. 107:

"Such an action is brought, as authorized by the statute, 'for the purpose of determining' any adverse claim that may be asserted therein by a defendant to the land in controversy; and this does not mean that the court is simply to ascertain, as against a plaintiff shown to have a legal interest, whether or not such defendant has *some interest*, but also that the court shall declare and define the interest held by the defendant, if any, so that the plaintiff may have a decree finally adjudicating the extent of his own interest in the property in controversy. The object of the action is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to. Of course, if the plaintiff fails to show any legal interest in the property in controversy, and as to which he asserts title, he must fail altogether, and could not complain of a judgment of nonsuit, but where he shows any legal interest he is entitled to have that interest declared by the court." Also see *Williams v. Rush*, 134 Cal.App. 554, 560, 561, 25 P.2d 888; *Goodfellow v. Barritt*, 130 Cal.App. 548, 564, 565. 20 P.2d 740; *Hurt v. Pico Investment Co.*, 127

Cal.App. 106, 113, 15 P.2d 203; Pimentel v. Hall-Baker Co., 32 Cal.App.2d 697, 706, 90 P.2d 588, 593.

In the Pimentel case above cited the court said: "The respective interests of the parties in the land (assuming the evidence will show such an existing interest in defendant) should have been adjudicated after trial and evidence submitted by the parties." That brings us to the next question raised on this appeal, and that is whether there is in the present record sufficient to show an existing interest in defendants, and to support the finding of the trial court that defendants have acquired a prescriptive right.

[2] As we have hereinbefore stated, this court, on the prior appeal, held that in order to acquire the prescriptive right claimed by defendants it was necessary for them to show "the actual infringement of the rights of appellants for a period of time each year, for the statutory period, that is, the saturation and percolation of plaintiffs' land by seepage from defendants' canal must have been known to the former, or at least facts and circumstances must be proven from which it might be reasonably inferred that plaintiff had such knowledge"; that though the trial court so found, the record failed to sustain such finding. Also that the finding that the seepage was visibly apparent each year since 1926, was wholly without support in the record. It was also held that it was incumbent upon defendants to show hostility of user—a claim asserted against the whole world—and that the evidence was insufficient to establish a claim of right against plaintiffs.

On this appeal appellants urge that the facts developed at this trial are the same shown at the former one, and that, under the law of the case as previously laid down, it must be held that the evidence is still insufficient to establish an adverse right in defendants by prescription. Respondents assert, on the other hand, that "the conclusion of the Appellate Court is contrary to the facts now disclosed by the record"; but they entirely fail to point out any new testimony bearing upon the two essentials for the acquisition of an adverse right by prescription which were held lacking in the testimony given at the first trial. Their efforts are mainly directed to an attempt to persuade us that the former decision was erroneous. Whether erroneous or not, it determined the law

of the case, and in the absence of new evidence sufficient to supply that held to be lacking on the former trial, no different conclusion is justified. The recent case of Steelduct Co. v. Henger-Seltzer Co., 26 Cal.2d 634, 643, 644, 160 P.2d 804, is controlling on this point. Also see Wells v. Lloyd, 21 Cal.2d 452, 132 P.2d 471; Penziner v. West American Finance Co., 10 Cal.2d 160, 169, 74 P.2d 252; Allen v. California Mutual B. & L. Ass'n, 22 Cal.2d 474, 139 P.2d 321; Chard v. O'Connell, 48 Cal.App.2d 475, 478, 120 P.2d 125; Cafe Apollo Co. v. Anselm, Cal.App., 161 P.2d 473. Therefore, unless on the retrial there was produced evidence different from that adduced at the first trial, to show that plaintiffs had knowledge and that defendants' use was hostile to plaintiffs, it must be held now that the evidence is insufficient to support the present findings of the trial court in this behalf. We have searched the record diligently and have carefully compared the testimony given in the two trials and are unable to find that respondents have supplied the deficiencies held fatal on the prior appeal.

It is next contended by appellants that the trial court erred in refusing to award damages to them. They rely upon the statement by this court in its former opinion that appellants were "entitled to recover for any injury to their lands which was inflicted within three years prior to the commencement of the action," and that "the evidence as to the extent of the damages was undisputed." The present findings of the trial court are that seepage from defendants' ditch first visibly affected portions of plaintiffs' lands in 1926, and that annually thereafter up to 1935 seepage continued to escape from said ditch and "visibly affected portions of plaintiffs' lands in the same areas," and that in the years after 1935 and up to the trial of this action the same portions were affected by seepage from defendants' ditch, but "they were not affected to an extent that caused any damage to the lands or crops thereon"—that they did not, in the aggregate, exceed one-half an acre, and that had there been a complete loss of crops thereon the loss would not have exceeded \$25 per year. It also found that all deterioration to crops alleged to have occurred in 1935 to 1937, inclusive, resulted from causes other than the seepage from defendants' ditch, such causes being the age of crops, methods of farming, high water table caused by rainfall and percolation from Middle Riv-

er, and inadequate drainage of irrigation waters placed upon their lands by plaintiffs themselves.

While we do not find in the record before us any testimony that contradicts the testimony of plaintiffs as to the *amount* of damage to crops that they suffered, the present record does reveal much new evidence bearing upon the question whether such damage was due to seepage from defendants' canal. Respondents in their reply brief have pointed out testimony which shows that after the first trial they carried on a series of tests by means of borings on plaintiffs' lands for the purpose of showing that the excessive wetness of said lands, which it is contended by appellants resulted in damage to their crops, was not due to percolation from the canal but from the other causes stated in the court's findings. Obviously, if such damage was due to such other causes plaintiffs are not entitled to recover for them from respondents. However, since the judgment must be reversed for the reasons hereinabove stated, it is unnecessary for us to pass upon the question of damages.

The judgment is reversed.



73 Cal.App.2d 194

SORRELL v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Cr. 3995.

District Court of Appeal, Second District,
Division 3, California.
Feb. 21, 1946.

1. Injunction ☞230(2)

Allegations of petition for citation in contempt for violation of order restraining mass picketing were sufficient to charge violations of restraining order on each separate day involved without reference to allegations as to conduct of alleged violator on other days.

2. Conspiracy ☞19

Evidence disclosing that a number of persons assemble with a common intent and purpose to accomplish a single definite ob-

ject, and that they act jointly and in concert for purpose of accomplishing that objective and doing things which are calculated to accomplish it, establishes a conspiracy.

3. Injunction ☞228

Where application for citation in contempt for violating order restraining mass picketing alleged common purpose and intent and concerted action with the same purpose and intent, a participant who joined in the movement and conspiracy and actively participated therein could not evade responsibility by remaining absent for a couple of days.

4. Injunction ☞230(3)

Where application for citation in contempt for violating order restraining mass picketing alleged a common purpose and intent and concerted action with the same purpose and intent, evidence disclosing that participant joined in movement and conspiracy and actively participated therein sustained finding that he was guilty of contempt on the two days in which he was not in the picket line.

5. Injunction ☞230(3)

Where order restrained mass picketing evidence disclosing that alleged violator did not confine himself to merely supervisory activities, but that he actively participated in fighting that took place between striker and nonstriking employees, and that the men who were assembled acted on his leadership, sustained determination that he was guilty of contempt.

6. Injunction ☞213

Process ☞64

Where process, consisting of summons and complaint or a restraining order, is personally handed to and left with a defendant, valid service has been made.

7. Injunction ☞230(3)

Evidence sustained determination that order restraining mass picketing had been served on individual charged with contempt and that he knew the contents of restraining order.

Habeas corpus proceeding by Herbert K. Sorrell against the Superior Court of the State of California, in and for the County of Los Angeles, to procure petitioner's release from confinement under a judgment declaring him guilty of contempt of court.

Writ discharged and petitioner remanded to custody of sheriff.

Pestana & Esterman and Maynard J. Omerberg, all of Los Angeles, for petitioner.

Fred Howser, Dist. Atty., and Jere Sullivan and Robert G. Wheeler, Deputy Dist. Attys., all of Los Angeles, for respondents.

PER CURIAM.

Herbert K. Sorrell applied to this court on February 14, 1946, for a writ of habeas corpus to procure his release from confinement under a judgment which declared him guilty of nine charges of contempt of court, consisting of the violation of a restraining order issued by the Superior Court of Los Angeles County, and ordered that he serve a total of 16 days in the County Jail and pay fines aggregating \$1700. It was alleged in the petition that the affidavits upon which the citation was issued and the commitment itself stated no facts from which it could be ascertained that any contempt had been committed and that there was no evidence at petitioner's trial that the restraining order had been served upon him or that he had any knowledge as to what acts were restrained. Upon the strength of these allegations of the verified petition, we issued a writ returnable on February 20. At the time of the hearing it developed that petitioner had not procured a transcript of the evidence taken upon the trial, which had been commenced December 18, 1945, and had been concluded by rendition of judgment on January 9, 1946. A continuance was requested by petitioner until such time as the testimony at the trial could be transcribed and furnished to the court. No showing was made that a transcript had been ordered by petitioner or his counsel or that an arrangement had been made with the reporter for the payment of his fees. The motion for continuance was denied.

There was on file with this court a petition of Herbert K. Sorrell for a writ of review, by which he challenged the jurisdiction of the trial court in the contempt proceeding upon the same grounds as those urged for his release upon habeas corpus. The petition had been denied. It contained as exhibits a copy of the restraining order which was alleged to have been violated and copies of the verified application for an order to show cause in re contempt, some 20 affidavits charging violations of the restraining order by the petitioner and others

upon nine different days between October 6 and October 17, 1945, an affidavit of the sheriff, by his deputy, showing service of the restraining order, summons, complaint, and affidavits attached thereto, order to show cause and points and authorities on petitioner Sorrell, and also stating that he, the deputy sheriff, had read the order to show cause over a loud speaker at several points upon plaintiff's premises in the presence of the pickets and persons assembled, announcing that he was a deputy sheriff. Also attached to the petition for a writ of review was a copy of the judgment containing a full recital of the facts found and imposing sentence. The affidavits included pictures that were taken of some of the crowds assembled at the studio entrances, marching in such numbers and in such close formation as to prevent persons passing to and from the studio. The affidavits described in detail numerous acts of intimidation, violence, and physical combat, as a result of which within a few days more than one hundred persons, strikers and non-strikers, were required to receive medical and surgical attention by reason of their injuries. It was shown that petitioner Sorrell marched in the picket lines, directed the activities of the pickets, and engaged in fist fights. On each of the days in question pickets were armed with deadly weapons, threw missiles, and engaged in riotous and uncontrollable conduct.

It was stipulated by the petitioner and the District Attorney that the petition for writ of review, including exhibits and points and authorities, should be considered in evidence by this court in the habeas corpus proceeding as having been offered in support of the allegations of the petition and as a traverse to the sheriff's return. The matter was argued, the evidence was duly considered, the court adjourned for deliberation, resumed the bench, and announced its decision orally substantially as hereinafter set out, and the same is hereby adopted as a part of this opinion.

SHINN, Justice.

The labors of the court in this matter have been considerably facilitated by the study which we have heretofore given to the petition for a writ of review. We became familiar with the record which has been presented here in the consideration of that petition. It is now the desire of the court to make a ruling in the present proceeding and to express generally the

reasons for the ruling, to be followed by a written opinion which may amplify the reasons which the court announces for the ruling. Merely as preliminary to a more extended statement, we feel it proper to make a brief general review of the situation which will be the foundation of the written opinion which is to follow. The questions presented for decision are quite simple.

The complaint of the plaintiff here, Warner Bros., was filed on the 6th of October, 1945, against Painters' Local No. 644 and certain other defendants, seeking injunctive relief against mass picketing, and certain acts which were specifically described in the complaint and which consisted of the use of force and threats against the plaintiff, its employees and its customers and which it was alleged, in effect, closed plaintiff's studio and business. On the same day an application was made for a restraining order and an order to show cause why an injunction should not be issued, based upon the verified complaint and certain affidavits filed therewith. A restraining order was issued and it restrained the conduct of the defendants in the following particulars: The number of pickets that were allowed to be stationed at various entrances to the studio ranged from two to four and they were required to be kept at least ten feet apart and at certain distances from the studio entrances, and in comprehensive terms the defendants were restrained from all acts of threats, intimidation, violence, breaches of the peace and other conduct which would be calculated to prevent employees and customers of plaintiff from entering and leaving the place of business. On the 19th of October a verified application was made for a citation in contempt, supported by some 21 additional affidavits. The application was verified by an officer of the plaintiff, one Obringer, and it alleged the assembling of a large number of pickets on the 5th day of October and the commission of acts of violence, breaches of the peace, the use of force, intimidation and fear upon the employees and customers of plaintiff, which if allowed to continue would have effectually closed plaintiff's business. It alleged the filing of the complaint and the issuance of the restraining order on the 6th of October; it alleged that the restraining order was read over a loud speaker by a deputy sheriff to the crowd of pickets that were assembled, and in the hearing and presence of the petitioner Sorrell, at the main entrance to the studio and at other

points on the premises. It was alleged that defendant Sorrell was served by this deputy sheriff with the restraining order, although the allegations with reference to the reading and the service of the restraining order were on information and belief. It then alleged: "That on the 6th day of October, 1945, the said defendants again formed or caused to be formed, and maintained or caused to be maintained, at, in front of, and across said main entrance of said studio a picket line of approximately 300 pickets, which picket line was in all respects the same or similar to that maintained by said defendants at, in front of and across said main entrance to said studio on October 5, 1945, as aforesaid." There was an additional allegation that subsequent to the service of the temporary restraining order upon the petitioner here and subsequent to the public announcement as aforesaid, the defendants "in disobedience and violation of said temporary restraining order maintained and continued to maintain the said picket line or lines, consisting of approximately 300 pickets, at, in front of and across the said main entrance to said studios in the same manner and in all respects the same or similar to the maintenance thereof on said 6th day of October, 1945, prior to the said service upon the said Herbert K. Sorrell of said temporary restraining order and the aforesaid public announcement of said temporary restraining order and the terms thereof." In the succeeding counts there were substantially the same allegations with reference to the assemblage and maintenance of picket lines on the several specified days. Each count was specific in its allegations of conduct which would clearly of itself, and without reference to conduct on other days, constitute a violation of the restraining order.

The order to show cause, or contempt citation, was served upon petitioner and a trial was had, as a result of which he was found guilty of nine charges of contempt of court committed between the 6th and the 17th days of October, 1945, inclusive, including charges of conduct constituting contempt on the 15th and 16th days of October. There were findings that on all these specific days, with the exception of the 15th and 16th, petitioner was personally present and participating in the picketing. There was also a finding that in the maintenance and the conduct of said strike and of said mass picket lines at the entrance of said studios,

the said Herbert K. Sorrell was a leader, acting in concert with other leaders in the conduct of said strike and said picket line.

It is broadly contended by petitioner that the affidavits upon which the contempt citation was issued were insufficient to charge acts which were in violation of the restraining order or to advise him of the nature of the acts with which he was charged, and that the court was therefore without jurisdiction to proceed in the matter. The objection is that matters of substance cannot be alleged by reference to exhibits in an affidavit charging acts of constructive contempt and that therefore the allegations as to one so-called count cannot be aided by reference to allegations with respect to acts upon other occasions, set out in other so-called counts.

[1-4] We shall not at this time discuss the purpose that is served by the affidavits upon which the court acts in issuing a contempt citation. The insufficiency of the allegations of the Obringer application which petitioner assumes, do not exist. Counsel for petitioner has stated that the court excluded all evidence as to what occurred on the 5th day of October, and he argues that there was therefore a failure of proof to sustain the allegations which described the acts of defendants as the same or similar to those committed on the 5th. The Obringer application was verified and it was evidence as to the acts charged to have been committed on that day. The additional affidavits, some 20 in number, were evidence of the petitioner's violation of the restraining order on the days to which they related, namely, the several working days, excluding the 15th and 16th, between October 6th and October 17th. As we have stated, the allegations as to the conduct of the defendants on each separate day were sufficient to charge violation of the restraining order without reference to the allegations as to conduct upon other days. None of the claimed uncertainties were such as to create a doubt as to the acts with which petitioner was charged or to affect the jurisdiction of the court. It is also contended that there was no evidence whatever to justify the conviction of the petitioner of the charges which related to the 15th and 16th days of October; in other words, that there was no evidence before the court that would charge him with any responsibility for what took place on those days. There was no evidence that petitioner was in the picket line or that he was at the studio on

the 15th or 16th, but there was evidence of massed picketing on those days and acts of violence similar to those committed upon other days. The findings of Judge Ashburn are criticized because they designated the conduct of the persons charged as a conspiracy, whereas no conspiracy was charged in the affidavits. But a conspiracy was charged in the affidavits. When a number of persons assemble with a common intent and purpose to accomplish a single definite objective, and when they act jointly and in concert for the purpose of accomplishing that objective and do things which are calculated to accomplish it—when you have proved those things you have produced complete evidence of a conspiracy. Paragraph III of the Obringer affidavit alleges that on the 5th day of October, 1945, the said defendants assembled or caused to be assembled near or in the vicinity of the studio 750 pickets for the purpose and with the intent of blocking off all entrances to and exits from said studio and all traffic of whatsoever nature in the vicinity of said studio and preventing the plaintiffs, its officers, employees, customers and any and all persons from entering or leaving said studio, and compelling the plaintiff to close said studio and cease all operations therein and thereof, etc. There were allegations of a common purpose and intent and there were allegations in each count of concerted action with the same purpose and intent. This petitioner joined in that movement and conspiracy and actively participated therein, and he could not evade responsibility by remaining absent for a couple of days. If there was evidence to sustain the findings as to petitioner's conduct on the days other than the 15th and 16th, there was evidence to sustain the findings as to his responsibility for the acts committed on those days.

[5] It has not been contended that petitioner did not actively participate in the picketing. The court is familiar with the affidavits contained in the petition for a writ of review. It is unnecessary to discuss them or to state the substance of them further than to say that there was an abundance of evidence that this petitioner was not only an active participant in this strike activity, but a leader in it, not because he had been granted any authority by the pickets themselves or otherwise, but because the men who were assembled there recognized and acted upon his leadership. The affidavits show that. It is entirely immaterial whether he was a member of the strat-

egy committee or what his duties were or what those of the strategy committee were. The evidence, and the only evidence, is that he had a responsible leadership and that these strikers looked to him for directions. It was shown by the affidavits that Sorrell did not confine himself to merely supervisory activities, but that he actively engaged and participated in the fighting that took place between the strikers and non-striking employees.

[6, 7] We now come to the question of service. It was stated in the petition for the writ that there was no evidence that petitioner had been served with the restraining order. It is contended that the affidavit of the officer who delivered the process to petitioner failed to state that he identified himself to petitioner or disclosed the fact that he was making service of process, and it is argued that mere delivery of the papers did not constitute valid service. It is also contended that there was no evidence that petitioner had knowledge of the terms of the order. The argument is without merit. When process, consisting of summons and complaint or a restraining order, is personally handed to and left with a defendant, valid service has been made. No doubt there are circumstances in which the act of service would be deceptive, perhaps intentionally so, but we have no such situation here. This petitioner was served as countless other people are served with process every day. It was found that he continued to march in the picket line on October 6th after he was served, but it is argued that he was not shown to have continued to do so after he had read the order. It was his duty to find out immediately whether he had been served with a restraining order. He was in an activity where he should have anticipated some court action to restrain him. The picketing had gone on for a long time without any trouble, but these pickets had no right to believe that when they assembled in such numbers and conducted themselves in such manner as to close the studio and the business of plaintiff there would not be some court action taken against them. The nature of the

activity was such that they should have been anticipating the service of process, and in addition to that, there was the fact that the restraining order was read by the deputy sheriff over the loud speaker, as appeared from his affidavit which was filed with the application for the contempt citation. The trial judge no doubt believed that the petitioner here heard the restraining order read before he was served.

The question here is not whether this man was served, nor whether he knew or did not know the nature of the restraining order that was served upon him, nor whether he committed these acts of contempt of court. As to all of these matters the question is whether there was substantial evidence or an absence of evidence upon the questions of fact that were decided by the trial judge. We have no doubt, however, as to the correctness of the findings as to the sufficiency of the service upon the petitioner and as to petitioner's knowledge of the contents of the restraining order and his participation in the several acts charged in disregard of the restraining order. There was an abundance of evidence upon all of those questions and we are of the opinion that there is not even a close question presented as to any of them.

The allegation of the petition for a writ of habeas corpus that the commitment does not nor do the affidavits of contempt upon which said commitment was based state any facts from which it can be ascertained that any contempt was committed is a false allegation. The allegation that at the hearing there was no evidence that said restraining order was served upon petitioner or that he had any knowledge as to what acts were restrained is a false allegation.

DESMOND, Presiding Justice.

For the reasons stated by Mr. Justice SHINN, my colleague Mr. Justice WOOD and I concur in the decision of the court at this time, and that is that the writ will be discharged and the petitioner remanded to the custody of the sheriff, and his bail exonerated.

27 Cal.2d 687

GATTI et al. v. HIGHLAND PARK BUILDERS, Inc.

Sac. 5727.

Supreme Court of California, in Bank.

Feb. 19, 1946.

1. Contracts ⇐107

Generally, a contract made contrary to terms of law designed for protection of public and prescribing penalty for violation thereof is void, and no action may be brought to enforce it.

2. Licenses ⇐39

Two persons, who were licensed as individual contractors when one of them contracted to perform carpenter work for corporation in constructing houses, completed original undertaking as copartners with corporation's consent, and obtained a joint contractors' license with third party, were entitled to maintain action against corporation for reasonable value of their work, though no contractors' license was issued in names of such persons alone either as partners or joint adventurers. Business and Professions Code, §§ 4000 et seq., 7025, 7028-7031, 7068.

EDMONDS, J., dissenting.

Appeal from a judgment of the Superior Court of San Joaquin County; M. G. Woodward, Judge. Affirmed.

Action by Albert Gatti and another against the Highland Park Builders, Inc., for the value of services rendered in furnishing carpenter labor for construction of certain houses. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Prior opinion, Cal.App., 155 P.2d 656.

Smallpage & Macomber and Forrest Macomber, all of Stockton, for appellants.

Gumpert & Mazzera and J. Calvert Snyder, all of Stockton, for respondents.

SPENCE, Justice.

Defendant corporation appeals from a judgment in favor of plaintiffs for the reasonable value of services rendered in furnishing carpenter labor for the construction of certain houses. The sole point to be determined is whether the legislative enactments regulating the licensing of con-

tractors, Business and Professions Code, ch. 9, arts. 1-6, inc., preclude plaintiffs' recovery. The appeal is presented upon a settled statement of facts.

Prior to March 15, 1943, plaintiffs Albert Gatti and Chas. D. Moore had issued to them individual licenses as contractors under the provisions of the Business and Professions Code. On the mentioned date Gatti and defendant corporation executed a written contract whereby Gatti agreed to perform certain carpenter work for defendant. At that time Moore was foreman for Gatti. On June 1, 1943, plaintiffs discussed conducting the construction work herein involved on a partnership or joint venture basis and agreed, with the consent of defendant, that thereafter the work would be so conducted. On August 23, 1943, a builder's and contractor's license was issued in the names of Albert Gatti, Chas. D. Moore and Delbert Moore. The latter is not a party to this action and has no interest in the proceeds of the venture herein involved. No license was ever issued in the names of Albert Gatti and Chas. D. Moore, either as a partnership or as joint venturers. The work in question was performed by plaintiffs at defendant's special insistence and request under written contract and oral modifications thereof.

Plaintiffs had been paid for all work performed prior to June 1, 1943, and in this action they sought to recover for services rendered subsequent thereto. They alleged in their amended complaint that at all times mentioned therein they, and each of them, were duly licensed building contractors. As the principal basis for denial of plaintiffs' claim, defendant in its answer relied on the defense that plaintiffs' failure to procure a separate partnership license in their two names would prevent their recovery. Upon conclusion of the hearing the trial court ruled adversely on defendant's position, found in favor of plaintiffs and entered judgment accordingly in the sum of \$3,435.50.

The determination of this appeal involves consideration of the following provisions of the Business and Professions Code: Section 7031 provides that no person (defined in section 7025 to include "an individual, a firm, copartnership * * * or other organization") acting in the capacity of a contractor may maintain any action for the collection of compensation for such work without alleging and proving he was a duly licensed contractor at

all times during the performance of the contract. Section 7028 declares that it shall be unlawful for any person to engage in such business without a license, while section 7030 states that any one acting in the capacity of a contractor without a license is guilty of a misdemeanor. Section 7029 provides that it shall be unlawful for two or more licensees holding separate licenses to act jointly in the capacity of a contractor without first having secured an additional or joint license. And finally, section 7068 provides that the [Contractors' State License] Board shall require of an applicant "such general knowledge of the building, safety, health and lien laws of the State and of the rudimentary administrative principles of the contracting business as the board deems necessary for the safety and protection of the public."

[1] Defendant relies upon the general rule in this state that a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract. *Wise v. Radis*, 74 Cal.App. 765, 242 P. 90; *Holm v. Bramwell*, 20 Cal.App.2d 332, 67 P.2d 114. In each of the cited cases the contract constituting the basis of plaintiff's claim for recovery was executed at a time when the "broker" or "contractor" was unlicensed. Likewise in *Phillips v. McIntosh*, 51 Cal.App.2d 340, 124 P.2d 835, 836, also cited by defendant, the evidence established plaintiff to be "a contractor" within the code definition, Business and Professions Code, § 7026, and her failure "to prove that she had a contractor's license" precluded her from maintaining an action to recover "for work performed and materials furnished." But the present case is distinguishable under the stipulated facts in that at the time the contract between Gatti and defendant was made, both plaintiffs possessed contractor's licenses in their own names as individuals. While it is true that during the progress of the work plaintiffs, deeming it advisable and with defendant's approval, entered into a partnership arrangement for the completion of the contract, it does not appear that such association effected any change in the performance of the contract, which proceeded as from its inception under the direction of both plaintiffs. Subsequently, and some time before the institution of this action, a joint contractor's license was issued to

plaintiffs and a third party not here concerned. Thereby any matters which might form the basis of legitimate inquiry by the licensing board as a condition precedent to the issuance of an *additional* partnership or joint venture license to plaintiffs, though involving a third party, were necessarily considered, and favorable action was taken thereon.

[2] A reasonable interpretation of the above code sections, regulating the business of a builder and contractor and enacted "for the safety and protection of the public" by prohibiting inexperienced persons from engaging in such work, compels the conclusion that plaintiffs have substantially complied with the statutory requirements. Defendant approved of the partnership arrangement for the completion of the work, and makes no contention that the labor performed was in any way unsatisfactory or that the monetary demand was excessive. The inequity of defendant's position stands out markedly when we consider that defendant would have plaintiffs—who are licensed individually and are also licensed as copartners with a third person, and who have satisfactorily performed work of the reasonable value of \$3,435.50—go out of court with nothing, on the ground that they did not have a separate partnership license issued to them in consequence of the modified arrangement made with defendant for completion of the work under the admittedly valid contract originally made with Gatti individually. If defendant is allowed to defeat plaintiffs' legitimate claim on this technical ground, resting on an unnecessarily strict construction of the statutory provision for the *additional* joint contractor's license and denying any effect to the combination license in fact issued to plaintiffs and a third person as above recited, the legislative scheme in relation to the licensing of contractors, intended "for the safety and protection of the public," would become an unwarranted shield for the avoidance of a just obligation. Similar considerations were before the court in the case of *Citizens State Bank v. Gentry*, 20 Cal.App.2d 415, 67 P.2d 364, where a contractor's license expired while the work was in progress but was renewed in the name of a corporation, organized by and bearing the contractor's name, and in which he was the dominant and controlling factor; and where the work was completed under the auspices of the corporation. In holding

that these circumstances permitted the trial court's finding that the plaintiff contractor was licensed and justified the denial of defendant's motion for a nonsuit, predicated on a rigid application of the licensing requirement, the court said at page 420 of 20 Cal.App.2d, at page 366 of 67 P.2d: "In our opinion, where a manifestly unjust and inequitable result would follow a holding that plaintiff contractor was without capacity to sue on his contract, the individual plaintiff in whose name the license stood at the time the contract was made and the corporate entity organized by him in whose name the license stood at the time the cause of action accrued, should be considered as one." In like manner the circumstances here—showing plaintiffs to have been duly licensed as individual contractors when the contract was made; their completion of the original undertaking, with defendant's consent, as copartners; and their submission of their partnership qualifications to the licensing board in connection with their application for a joint license with a third party—justify the trial court's conclusion that plaintiffs as licensed contractors were entitled to maintain this action for the reasonable value of their work.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, and SCHAUER, JJ., concurred.

EDMONDS, Justice (dissenting).

I cannot join in a decision which is directly contrary to the plain and positive language of the statutes regulating the contracting business. Justification for a recovery by the plaintiffs is placed upon the ground that each of the individuals had a contractor's license in his own name, and it does not appear that the later association of these persons as partners "effected any change in the performance of the contract, which proceeded as from its inception under the direction of both plaintiffs." Yet this is exactly the conduct which is prohibited by the Business and Professions Code, which makes it unlawful "for any two or more licensees, each of whom has been issued a license to engage separately in the business or to act separately in the capacity of a contractor * * * to * * * act in the capacity of a contractor within this State without first having secured an additional license for acting in the capacity of such a joint venture or

combination in accordance with the provisions of this chapter as provided for an individual, copartnership or corporation." § 7029. Also, the code provides, no person may bring or maintain an action to recover compensation as a contractor "without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract." § 7031.

There can be no substantial compliance with such a statute. Wisely or unwisely, the Legislature has specified that two persons individually licensed may not, as partners, engage in the contracting business without having obtained a license in the name of the partnership. Unquestionably, that requirement is within the scope of legislative action and therefore, beyond the reach of judicial consideration. *Lucas v. City of Los Angeles*, 10 Cal.2d 476, 485, 75 P.2d 599. For almost three months of the time Gatti and Albert Moore were jointly acting as contractors for the building company, they had licenses only as individuals which was in direct contravention of the statute. A license was then obtained in the names of Gatti, Albert Moore and Delbert Moore, the latter of whom has no interest in the contract sued upon and is not a party to the action.

The conclusion reached in *Citizens State Bank v. Gentry*, 20 Cal.App.2d 415, 67 P.2d 364, the case solely relied upon to support the determination in favor of Gatti and Moore, is of no authority, for it was decided before the enactment of section 7028.5 of the Business and Professions Code which specifically prohibits the conduct which was said to satisfy the requirements of the law as it then existed. Factually in point with the present controversy in *Wise v. Radis*, 74 Cal.App. 765, 242 P. 90, in which two persons jointly negotiated the sale of real estate. Only one of them was a broker licensed in accordance with the requirements of the Real Estate Broker's Act. Stats.1919, p. 1252, as amended, Deering's Gen.Laws, 1931, Act 112. Now Business and Professions Code, §§ 10000-10601. In discussing the scope of the statute, the court declared that the failure of partners to secure a license in the name of the partnership in violation of the statutory mandate, rendered their contract "illegal from its inception, for in that case the partnership contract necessarily would involve the performance of illegal acts." 74 Cal.App. at

page 776, 242 P. at page 94. An earlier case concerned the contract by which the two licensed real estate brokers and an unlicensed attorney were employed to purchase certain real property and to procure a loan thereon. Because the services of all of them were the consideration for the contract, and it was void as to the attorney, the court denied any recovery. *Haas v. Greenwald*, 196 Cal. 236, 237 P. 38, 59 A.L.R. 1493.

Assuming that the license issued in the names of Gatti, Albert Moore and Delbert Moore was a sufficient authorization for the contracting business of two of them, this observance of the statute occurred almost three months after the partnership contract was undertaken and did not cure the unlawfulness of the consideration up to that time. As the services of Gatti and Albert Moore as partners were illegally rendered, at least until the partnership license was obtained, a part of the consideration being unlawful, the entire contract was void. Civ.Code, § 1608. The issuance of a license after unlawful acts are performed does not validate a contract. *Holm v. Bramwell*, 20 Cal.App.2d 332, 335, 67 P.2d 114; *Wise v. Radis*, supra, 74 Cal. App. at page 774, 242 P. 90.

For these reasons, in my opinion, the judgment should be reversed.



27 Cal.2d 659

MUNSON v. MUNSON.

Sac. 5687.

Supreme Court of California, in Bank.

Feb. 15, 1946.

1. Evidence ⇨154

In proceeding by husband to modify annulment decree to award custody of child to him, a love letter written by wife to a third person, but left unsealed and unmailed in her room where husband found it while visiting his son, was properly admitted.

2. Evidence ⇨154

Generally, trial courts will not stop to inquire or investigate the source from

whence competent evidence comes or the means by which it was obtained.

3. Marriage ⇨64

In proceeding by husband to modify annulment decree to award custody of child to him, controlling rights were those of minor child and of state in the child's welfare. Civ.Code, §§ 84, 138(1).

4. Appeal and error ⇨1050(1)

In proceeding by husband to modify annulment decree to award custody of child to him, admission of opinion evidence by witnesses who were acquainted with husband that he was a good father and a fit and proper person to have the custody of his son was not prejudicial error.

5. Marriage ⇨64

In proceeding by husband to modify annulment decree to award custody of child to him, admission of testimony regarding observations by witnesses of conduct and character manifestations of the parties was proper.

6. Appeal and error ⇨1047(1)

Where three witnesses were permitted without objection to give their opinions as to husband's fitness to raise his son, examination of fourth witness calling for opinion as to husband's fitness to raise son was not prejudicial error.

7. Parent and child ⇨2(3)

Whether a parent is a fit or proper person to have custody of minor child refers to fitness at time of hearing and is not necessarily controlled by conduct prior thereto.

8. Parent and child ⇨2(4)

In determining whether other things are equal within statute providing that other things being equal, if a child is of tender years, it should be given to the mother, the trial court is allowed a wide latitude in the exercise of its discretion. Civ.Code, § 138.

9. Parent and child ⇨2(4)

An application for modification of an award of custody is addressed to the sound legal discretion of the trial court, and its discretion will not be disturbed on appeal unless the record presents a clear case of abuse.

10. Parent and child ⚭2(4)

Generally, an award of child's custody will not be modified until some change of circumstance arises, but welfare of the child in some cases may justify modification without any such change.

11. Marriage ⚭64

In proceeding by husband for modification of annulment decree to award custody of child to him, modification was proper exercise of discretion under evidence sufficient to support findings both that circumstances had changed and that facts material to welfare of the child were hidden from husband at time original decree was entered.

12. Appeal and error ⚭840(1)

Modification of order awarding custody of minor child to husband, to permit wife to visit the child, was not within province of Supreme Court, where wife's right of visitation was not mentioned at hearing and wife had confined her argument to urging that order be reversed.

CARTER, J., dissenting.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Suit by Rosemary Munson against Walter C. Munson for annulment of marriage. From an order modifying decree of annulment to award custody of minor child of the parties to defendant, plaintiff appeals.

Affirmed.

Prior opinion 159 P.2d 107.

Blaine McGowan, of Eureka, for appellant.

Chester Monette, of Eureka, for respondent.

SCHAUER, Justice.

From an order which modifies a decree of annulment of marriage to award custody of the minor child of the parties to defendant father, plaintiff mother appeals. She urges that the trial court's action in changing custody from the mother to the father was an abuse of discretion. Plaintiff's argument is based upon her view of the sharply conflicting evidence. We have concluded that the order of the trial judge, who saw and heard the witnesses, including the parties, and found upon sufficient

evidence that it was for the best interest of the child that custody be awarded to the defendant, cannot be disturbed.

The parties intermarried on November 6, 1941. On March 31, 1944, the marriage was annulled on the ground that defendant, unknown to plaintiff, had another wife living at the time of his marriage to plaintiff, he apparently having procured an interlocutory, but not a final, decree of divorce. The decree of annulment awarded custody of the minor child of the parties (a boy then 20 months of age) to plaintiff mother and provided that defendant "may visit with said minor child at all reasonable times and places." The terms of the order at the time it was made were in accordance with the provisions of an agreement of the parties dated March 15, 1944, and filed with the decree. Such agreement, however, required the plaintiff, within thirty days, to remove from her then place of residence and enter or establish a suitable and proper home for herself and the minor child. Defendant did not appear and was not represented by counsel in the annulment proceedings.

On May 18, 1944, defendant filed his petition to modify the annulment decree to award custody of the child to him. Plaintiff had not changed her place of residence. The modification was sought on the ground that the best interest and welfare of the child would be subserved by it and the petition was based both on the proposition that plaintiff was maintaining the child in an unfit residence and on the proposition that plaintiff was not a fit or proper person to have control of him. After hearing the conflicting evidence the trial judge (the same judge who made the original decree) filed a memorandum opinion in which he found that the home wherein plaintiff and the minor child resided "is orderly, neat, clean, and well-kept," stated that "The issue in a case such as this is not the condition of the home, but it is the fitness of the parents to supervise the care, custody, and control of the child, and what is for the best interest of the child (see *Prouty v. Prouty* (1940), 16 Cal.2d 190, 195, 105 P.2d 295; Civ.Code, §§ 84, 138, subd. (1)), and found "that the defendant is better fitted to exercise that duty, and it appears that the best interest of the child will be served if he is awarded to the custody of defendant."

Plaintiff and the minor child lived in the five-room home of plaintiff's mother.

The room which plaintiff and the minor child occupied was small ("six by eight" according to defendant's testimony) with two small windows, one of which could not be opened. Also residing in the house were plaintiff's mother, her brother and sister-in-law, and the latter's three-year-old child. Plaintiff received \$30 a month from defendant for the support of the child. On about April 10, 1944, she obtained employment at \$108 a month. Her sister-in-law cared for the child when plaintiff was at work.

Defendant testified that since the annulment he had seen five black and blue marks across his son's body and that on April 17, 1944, plaintiff's mother, in the presence of plaintiff, told defendant "about her—[plaintiff] being out of humor and probably tired and wore out and she had to pull her off from beating the baby." Plaintiff testified that she had never whipped the child "to hurt him or make marks" and had never had to be restrained from beating him. Plaintiff's mother testified that she had never seen the child black and blue from a beating; that "I seen him have marks on him where he tipped a chair on him one day while his father was there. * * * I never had to restrain her [plaintiff] from beating [the baby]. I did interfere when I thought she spanked him too hard * * * with her hand." Introduced in evidence by defendant without objection was a wooden paddle which defendant testified he had seen "used dozens of times" by plaintiff and her sister-in-law to spank the child. Both plaintiff and her sister-in-law testified that they believed in the propriety and effectiveness of such discipline. The paddle was the property of plaintiff's sister-in-law and was taken by defendant without her permission.

Defendant testified that since the granting of the annulment he had seen his wife under the influence of liquor "several times * * * once or twice a week, on an average." Defendant had occasion to observe plaintiff come home after work "pretty well intoxicated" because he was at plaintiff's home five or six evenings each week to visit the baby. Plaintiff's mother and two neighbors testified that they had never seen plaintiff intoxicated. Plaintiff's sister-in-law testified that she had never seen plaintiff intoxicated in the presence of the minor child. Plaintiff was asked, "Have you been intoxicated in the

presence of your minor child?" and answered, "Not that I know of." She was asked whether she drank "so that you become intoxicated at times," and answered, "No, it all depends on what you call drunk. If it is passing out, I have never been that way. I have been feeling good."

Defendant testified that at the time the annulment decree was entered he did not know, but later learned, that plaintiff was having "an affair" with a man called Tippie and "If I had known this at the time [the annulment was granted] I would have naturally fought for the baby"; that defendant knew of his own knowledge that Tippie "has had several cases of trouble with other married women. * * * The man worked for us, I known him—my dad and I bailed him out of jail twice. He has a baby of his own and usually every three or four months gets in jail for non-support." On the evening of the 25th of April, 1944, defendant testified, plaintiff told him that Tippie "was over at the house and would like to see me, if I had guts enough to come over * * * with her, he would like to tell me that he hadn't had unchaste relations with her, and so I did." At 12:45 that night, defendant testified, he saw Tippie crawl through the window into plaintiff's bedroom where, as stated, the minor child also slept. Plaintiff testified that no man had ever crawled through the window of her room. According to the testimony of plaintiff, her mother and sister-in-law, it would be difficult if not impossible for a man to crawl through this window. In evidence, however, was a letter (which defendant found open in and took from plaintiff's home) dated May 6, 1944, to Tippie, written but not mailed by plaintiff, reading in part, "If I really thought there was any chance of you coming down, hon, I'd not only have my window made bigger, but I'd even move out in the yard and pitch a tent, then I'd be sure you'd get in." Plaintiff testified on cross-examination that the reference to the window was "just a gag. * * * He had been kidding about he would come down and crawl in my window." The letter continues, "Well, daddy darling, here it is 10 o'clock and I just got home from work. That is, I left at six but Mrs. Eller picked Ina and I up and we stopped in at her place for just one shot and it didn't end at that. I did feel pretty high for a while, but don't think I'll feel so good tomorrow." Plaintiff tes-

tified on cross-examination that she drank four highballs on this occasion.

[1] Plaintiff properly does not contend in her briefs that the above mentioned letter was erroneously admitted in evidence but nevertheless, since the matter has been suggested in discussions in this court, consideration has been given to it. When the letter was offered plaintiff's counsel objected to it on the ground that it was "incompetent, irrelevant and immaterial. * * * The letter is the property of some person and I think before it can be used in a proceeding of this sort *it at least ought to be explained how and why he [defendant] came into the possession of it.*" (Italics added.) The objection was overruled and on cross-examination defendant explained that while visiting his son he found the letter "laying on the table in the front room in her [plaintiff's] place, residence * * * laying there unsealed, unmailed" and that he took it and several letters of his own without asking permission of anyone. (After such explanation no motion to strike the letter was interposed.) The letter was properly admitted.

[2,3] The general rule in California is that "where competent evidence is produced on a trial the courts will not stop to inquire or investigate the source from whence it comes or the means by which it was obtained." (People v. Mayen (1922), 188 Cal. 237, 243, 205 P. 435, 437, 24 A.L.R. 1383; Herrscher v. State Bar (1935), 4 Cal.2d 399, 412, 49 P.2d 832; People v. Peak (1944), 66 Cal.App.2d 894, 904-905, 153 P.2d 464.) "The question of the admissibility of evidence wrongfully obtained usually arises in criminal cases. * * * But the use of evidence wrongfully or illegally obtained is not confined to criminal cases and no distinction has ever been made in this respect between civil actions and prosecutions for crime." (20 Am.Jur. 354, § 393.) The case of Kohn v. Superior Court (1936), 12 Cal. App.2d 459, 55 P.2d 1186, which has been suggested as recognizing a different rule, was a prohibition proceeding arising out of a replevin action and in making its ruling the court carefully pointed out that page 463 of 12 Cal.App.2d, page 1188 of 55 P.2d) "the very issue before the court was whether the documents in suit had been wrongfully taken from this plaintiff." The ruling and discussion in that case have no pertinence to any question in the

case at bar. Even if, as to the admissibility of such evidence, a distinction between purely private right actions and those in which a public interest is involved were proper, the public interest rule should prevail here. This is not a mere adversary proceeding between plaintiff and defendant. On the contrary the controlling rights are those of the minor child and of the state in the child's welfare, and the trial court properly so held.

[4-6] It has also been suggested that certain opinion evidence, given by witnesses who were acquainted with defendant, to the effect that he was a good father and a fit and proper person to have the custody of his son, was "entitled to no consideration." Regardless of the weight to which such testimony was entitled no prejudicial error in its receipt is shown. Both plaintiff and defendant, severally (without objection from the other except in one instance), adduced such evidence from various witnesses in support of their respective claims to fitness. The testimonies of the witnesses who stated opinions largely concerned observation by the witnesses of the conduct and character manifestations of the parties and to that extent was certainly not improper. As to one question addressed to one witness for defendant, which question called for the witness's opinion as to defendant's fitness to "raise his son," plaintiff objected on the ground that the question was "incompetent, irrelevant and immaterial and no proper foundation has been laid." So far as foundation for the question is concerned the witness had testified that she had known the defendant for fourteen years and that he roomed in the home of her husband and herself. Even if we assume that the opinion asked for was incompetent there was no prejudicial error as three other witnesses were permitted to give testimony to the same effect without objection. Furthermore, it may be noted that plaintiff's mother, who was a witness for plaintiff, on cross-examination testified that defendant was "greatly concerned about the welfare of his child"; that "I guess he is a good father, all right, as far as feeding and loving and things like that go."

Defendant testified that he roomed and boarded with Mr. and Mrs. Granberg (Mrs. Granberg is the witness above mentioned who was permitted over objection to give her opinion as to defendant's fit-

ness to raise his son), who have two daughters, aged about 11 and 15; that if he was awarded custody of his son he intended to take him into the Granberg home; that "Mrs. Granberg is very willing to be a mother to him, when I am not there." Mrs. Granberg testified to the same effect.

[7] The evidence as to defendant's conduct, like that above summarized as to the conduct of plaintiff, is sharply conflicting. Except for the admitted taking of the letter and paddle which defendant introduced in evidence, the testimony as to conduct of defendant which, plaintiff asserts, indicates his unfitness to have custody of the minor child, relates to occasions prior to the annulment. Even if all testimony as to defendant's past misconduct was believed, nevertheless "The question as to whether a parent is a fit or proper person to have the custody of a minor child refers * * * to his or her fitness at the time of the hearing and is not necessarily controlled by conduct * * * prior thereto. [Citations.]" (*Prouty v. Prouty* (1940), *supra*, 16 Cal.2d 190, 194, 105 P.2d 295, 297.)

[8, 9] Plaintiff relies on the proposition that, as between parents adversely claiming custody, "other things being equal, if the child is of tender years, it should be given to the mother." (Civ. Code, § 138, which refers to actions for divorce; the proposition is equally applicable here.) The evidence above recited is clearly sufficient to support the determination of the trial court that "other things" are not equal in this case. "In determining whether other things are equal within the meaning of the above Code section, the trial court is necessarily allowed a wide latitude in the exercise of its discretion. In the first instance it is for the trial court to determine, after considering all the evidence, how the best interests of the child will be preserved. The question is to be determined solely from the standpoint of the child, and the feelings and desires of the contesting parties are not to be considered, except in so far as they affect the best interests of the child." (*Taber v. Taber* (1930), 209 Cal. 755, 756, 290 P. 36, 37.) It is settled that "An application for a modification of an award of custody is addressed to the sound legal discretion of the trial court, and its discretion will not be disturbed on appeal

unless the record presents a clear case of an abuse of that discretion. [Citations.]" (*Foster v. Foster* (1937), 8 Cal.2d 719, 730, 68 P.2d 719, 724.)

[10] This court has recognized (*Foster v. Foster*, *supra* at pages 726, 728 of 8 Cal. 2d, at pages 722, 723 of 68 P.2d) that generally "until some change of circumstance arises which makes a modification of the former order of custody advisable from the point of view of the welfare of the child, the court will give effect to the former order and will refuse to make any modification of such order," but that there may be cases "in which, despite the fact that there was apparently no change of circumstances, nevertheless the welfare of the child might require that the previous order of custody be changed" (citing *Bogardus v. Bogardus* (1929), 102 Cal. App. 503, 506, 283 P. 127), or "in which some fact, secret and hidden at the time of the entry of the former judgment, would in the interest of the welfare of the child justify a court in modifying the former order of custody despite the fact that there had been no actual change of circumstances since the entry of the former order" (citing *Olson v. Olson* (1928), 95 Cal.App. 594, 597, 272 P. 1113; *Titcomb v. Superior Court of Santa Clara* (1934), 220 Cal. 34, 39, 29 P.2d 206).

[11] The above epitomized evidence is clearly sufficient to support findings both that circumstances had changed and that facts material to the welfare of the child were "secret and hidden" from defendant at the time the original decree was entered. Under such circumstances there is no tenable basis for a court of appellate function to hold that the trial court abused its discretion in ordering the change of custody.

[12] The trial court ordered "That the full care, custody and control of the minor child * * * be and he is hereby awarded to defendant." Defendant now suggests that the order be modified to permit "the mother to visit the child at all reasonable times and places, provided that she is not under the influence of intoxicating liquor." The question of plaintiff's right of visitation was not mentioned at the hearing and plaintiff has confined her argument to urging that the order be reversed. Defendant's suggested modification of this present award of custody is there-

fore a matter not within the province of this court on the record before us.

For the reasons above stated the order appealed from is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concurred.

CARTER, Justice (dissenting.)

I dissent. The appeal in this case was first heard by the District Court of Appeal, Third Appellate District, and the majority opinion was prepared by Presiding Justice Adams and Associate Justice Peek concurred therein. This opinion contains a full and fair statement of the facts and correctly applies the rules of law applicable thereto. I therefore adopt the same as my dissenting opinion:

"This is an appeal from an order modifying a decree of annulment of the marriage between plaintiff and defendant, and changing the custody of the child of the parties from the mother to the father.

"The evidence shows that plaintiff and defendant intermarried November 6, 1941; that at that time defendant had another wife living from whom he was not divorced, though this fact was unknown to plaintiff. The latter subsequently filed an action to annul said marriage. Defendant made no appearance, and on March 31, 1944, a decree of annulment was made and entered, said decree also providing that the minor child of the parties, then aged twenty months, be awarded to plaintiff, defendant being granted the right to visit said child at all reasonable times and places, defendant to pay plaintiff the sum of \$30 per month for the support of such child. The provisions regarding the child's custody conformed to an agreement entered into between the parties settling such property rights as they had and providing that plaintiff should have the custody of her child. Less than two months later, on May 18, 1944, defendant filed a petition to modify the annulment decree to provide that the full care, custody and control of the child be awarded to him. The grounds alleged in the petition were that:

"1. Plaintiff is not a fit and proper person to have control of said minor, in that since the granting of said decree she has become intoxicated at least twice a week in the presence of said minor; that she permits a certain man to come through

the window of the house where she maintains said minor to visit her in her bedroom.

"2. That plaintiff is maintaining said minor child in a residence that is not a fit and proper place of residence for the best interests and welfare of said minor in direct violation of her written separation agreement which defendant incorporates and makes a part of this Petition as if fully set out herein."

"Plaintiff answered said petition denying the allegations thereof. The matter came on for hearing on May 24, 1944, and on June 27, 1944, the trial court filed a memorandum of opinion in which it stated:

"There is considerable testimony on the condition of the home in which plaintiff and the child reside; but, from all the evidence and the report of the Probation Officer, the said home is orderly, neat, clean, and well-kept.

"The issue in a case such as this is not the condition of the home, but it is the fitness of the parents to supervise the care, custody, and control of the child, and what is for the best interest of the child. On this subject it appears that the defendant is better fitted to exercise that duty, and it appears that the best interest of the child will be served if he is awarded to the custody of defendant."

"The court made no finding that the mother was unfit, but made an order modifying the prior decree and awarding the 'full care, custody and control' of the child to the father, and made no provision for the mother to even see her infant. From this order the present appeal has been taken, it being contended by appellant that the trial court abused its discretion in awarding the child to the father.

"Before considering the evidence let us consider certain principles of law applicable to such a case. Section 138 of the Civil Code provides that in actions for divorce the court may, during the minority of the children of a marriage, make such order for their custody, care, education, maintenance and support as may seem necessary or proper, and may at any time modify or vacate the same; that in awarding custody the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; but that as between parents claiming custody, neither parent is entitled to it as of right, but

other things being equal, if the child is of tender years, it should be given to the mother.

"Section 84 of the Civil Code also provides that in an annulment proceeding the court may make such order for the custody, care, education, maintenance and support of the children of the marriage, except that it *must* award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent.

"It is well established that the determination as to which parent shall have the custody of a minor child is a matter resting in the sound discretion of the trial court and that its decision will not be reversed on appeal except where there is a clear abuse of such discretion. However, the discretion exercised must be a judicial discretion, and where custody has once been awarded and a change is sought, a change of circumstances must be shown, the burden of showing which is upon the moving party; and all presumptions are in favor of the reasonableness of the original decree. *Prouty v. Prouty*, 16 Cal. 2d 190, 193, 105 P.2d 295; *Foster v. Foster*, 8 Cal.2d 719, 726, 727, 68 P.2d 719; *Olson v. Olson*, 95 Cal.App. 594, 597, 272 P. 1113; *Gavel v. Gavel*, 123 Cal.App. 589, 11 P.2d 654; *Moon v. Moon*, 62 Cal.App. 2d 185, 144 P.2d 596; *Washburn v. Washburn*, 49 Cal.App.2d 581, 587, 122 P.2d 96; *In re Inman*, 32 Cal.App.2d 130, 134, 89 P. 2d 421.

"In *Moon v. Moon*, supra, the court said, 62 Cal.App.2d at pages 186, 187, 144 P.2d at page 598:

"Undoubtedly the trial court had authority to change its order respecting the custody of Charla (Civ.Code, sec. 138). Because of her tender years, "other things being equal" she should be in the custody of the plaintiff, her mother. (Civ.Code, sec. 138.) The court having originally determined that she should be in her mother's custody, some change in conditions or some unusual circumstance had to be shown to justify an alteration of that provision. *Foster v. Foster*, 1937, 8 Cal.2d 719, 726, 68 P.2d 719; *Washburn v. Washburn*, 1942, 49 Cal.App.2d 581, 587, 122 P.2d 96. One who seeks a modification of an existing custody order has the burden of proving that conditions have so changed that a modification is justified. *Prouty v.*

Prouty, 1940, 16 Cal.2d 190, 193, 105 P.2d 295, and the paramount purpose of the whole proceeding is to serve the best interests of the child. *Prouty v. Prouty*, supra, at page 195, 105 P.2d at page 295. The sum of the matter is that the evidentiary support for the order taking three year old Charla from her mother's custody and placing her in that of her father, must be adequate, if the order is to stand.'

"And in that case the order changing custody from mother to father was reversed. In *Washburn v. Washburn*, supra, less than six months after the interlocutory decree of divorce which gave to the mother custody of a boy and girl aged fifteen and nine years, respectively, the father sought a modification, alleging the mother was no longer a fit and proper person to have custody. The trial court awarded custody to the father but the order was reversed on appeal. Defendant introduced the testimony of two detectives who had shadowed plaintiff, one of whom testified that he had seen plaintiff intoxicated on a dozen occasions. These detectives also testified to a visit by plaintiff to a certain doctor's apartment and a meeting between this doctor and plaintiff at Palm Springs. The court said, 49 Cal. App.2d at pages 586, 587, 122 P.2d at page 99:

"'So far as the evidence goes there is not one iota to indicate that the children did not have the best of care from their mother and none to indicate that any of the acts or conduct of the mother of which the father complains was known to the children. The maternal grandmother of the children lives in the mother's home and assists with the housework and the care of the children. The father is active in his business and employs a housekeeper to maintain his home; and so if the children were to reside in his home they would be largely under the immediate care of a housekeeper or of a governess if he employed one, as he stated he would if awarded the custody. Moreover, so far as the record discloses the home surroundings are the same now as when the interlocutory decree was signed.' (Italics ours.)

"Also it said, 49 Cal.App.2d at pages 587, 588, 122 P.2d at page 100:

"In custody cases the underlying principle, paramount to all others, is the welfare and best interests of the child. In no way

in conflict with this rule is another, equally well established, that once a court has decreed it there may be no change in the child's custody except where adequate cause therefor arises out of *changed conditions*. This principle is based on the idea not only that the stability of the home life of the children is an important and vital factor, but also that the turmoil of litigation must somewhere end. Short of a modification based upon adequate grounds, the decree awarding custody is conclusive and settled beyond recall other than by appeal. Moreover, the acts and conduct of one of the parties to the divorce which give offense to the other, or even to the public at large, are not a matter that calls for or permits a change of custody *unless such acts and conduct are shown to effect directly the welfare and best interests of the child*. Where a court has decreed custody to one parent, such parent may not be deprived of the custody for any supposed unfitness unless it be shown that he or she is *so unfit as to endanger the child's welfare*. *A custody proceeding is not one to discipline one parent for such parent's shortcomings as an individual nor to reward the other for any wrong suffered therefrom.* * * * Before a decree awarding custody may be vacated and the child's life unsettled the evidence must be clear and convincing that the child's welfare and best interests will be directly promoted by a change. Generally speaking, there may be no change in the custody provisions of a decree unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change. While each case must be solved on its own facts, there are, of course, elemental factors common to all cases that must not be overlooked. (Italics ours.)

"It is not open to question, and indeed it is universally recognized, that the mother is the natural custodian of her young. This view proceeds on the well known fact that there is no satisfactory substitute for a mother's love. So true is this that in this state the code exacts that she shall have custody of her child, everything else being equal, unless the child has reached the age which necessitates a particular education or preparation for its life work. (Civ.Code, sec. 138.)"

"And the order changing custody was reversed.

"Turning now to the evidence in the case which is relied upon as justifying the order of the trial court, since that court stated that the home in which Mrs. Munson was maintaining the child was orderly, neat, clean and well kept, and petitioner admitted that the child looked healthy and well, the charges in defendant's petition that plaintiff was maintaining said child in an unfit and improper place may be said to have been disproved. In support of his charge that plaintiff had become intoxicated in the presence of the child defendant produced no testimony except his own, and while he made the general allegation that he had seen Mrs. Munson 'under the influence of liquor' several times, that he had 'seen her intoxicated once or twice a week, on an average,' he did not testify that she had been intoxicated in the presence of the child. Petitioner's charges were denied by respondent herself and by her mother and her sister-in-law with whom respondent lives. Plaintiff stated that she did take a drink now and then, but that she was not a drunkard—that she had only been in a bar once, and that was when Mr. Munson took her on the night of his birthday, on April 8th. A neighbor who lived across the street from Mrs. Munson and saw her frequently, and another neighbor who visited in the Munson home about twice a week both testified that they had never seen Mrs. Munson drunk. In *Stafford v. Stafford*, 299 Ill. 438, 132 N.E. 452, 20 A.L.R. 827, the court said:

"This court would not feel warranted in holding that a man is utterly disqualified from having the care, control, and education of his children because of the fact that he has occasionally taken a drink of intoxicating liquor. If we were to adhere to that rule it would disqualify a very large per cent of men in this country in all of the occupations and professions in which men are engaged. Taking a drink of intoxicants in the presence of a child would be setting a bad example for it. So would smoking or chewing tobacco likewise be a bad example. It may be admitted that the occasional taking of a drink of liquor or the smoking or chewing of tobacco is not a special aid to a man or a recommendation, but we apprehend that no court would undertake to hold, as a matter of law, that either or both would absolutely disqualify a man from having the custody of his child, or

be considered sufficient ground for giving the custody of his child to another who has no such habit or any other bad habit.'

"In this day and age that language is equally applicable to a woman.

"As to the allegation that plaintiff 'permits a certain man to come through the window of the house where she maintains said minor and to visit her in her bedroom,' no testimony was given in support of this charge except that of petitioner himself. He testified that he once saw a man referred to as 'Tippie' go through the window of plaintiff's room at 12:45 at night. This was denied by plaintiff and its probability is discredited by the testimony of plaintiff, her mother, her sister-in-law and one of the women neighbors, all of whom testified that the window was a small one five or six feet from the ground, that it was hinged at the bottom and had a chain at the top which prevented its being opened more than a little over a foot, that it was almost connected with a window opening into the adjoining room where the sister-in-law slept. It is even discredited by Munson's own testimony that the baby's crib was directly under the window, and his statement that in the evening before he saw 'Tippie' go through the window, he had been in Mrs. Munson's home and that this man Tippie was there when he left.

"Petitioner relies heavily upon a mushy love letter written by Mrs. Munson to Tippie, but never mailed, which letter Munson purloined from the Munson home, and in which she said 'If I really thought there was any chance of your coming down, hon, I'd not only have my windows made bigger, but I'd even move out in the yard and pitch a tent, then I'd be sure you'd get in.' Whether this letter acquired by Munson in what he stated was a search for notes or information to get the custody of the child inspired his testimony, or whether it tends to corroborate it, were, perhaps, matters for the trial court. However, objection to admission of the letter in evidence was interposed, and, we think, under the circumstances should have been sustained. While there is authority in this state that, at least in criminal cases, evidence otherwise competent is not inadmissible because secured illegally and by an invasion of the constitutional rights secured by article I, section 19, of our state Constitution, on the theory stated in *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A.L.

R. 1383, that the Constitution and laws of the land are not solicitous to aid persons *charged with crime* in their efforts to conceal or sequester evidence of their iniquity, and that from the necessities of the case the law countenances many devious methods of securing evidence in criminal cases, this rule has not always been applied in civil actions. In *Kohn v. Superior Court*, 12 Cal.App.2d 459, 55 P.2d 1186, where stolen documents were attempted to be read in evidence, the court said, in a replevin action, that if, as plaintiff claimed, the documents had been wrongfully taken, 'then it was the duty of the court to order them returned to him with as little inspection as the issues would permit and not to aid, or become a party to, the wrongful taking in any respect whatever.' Also see *Kohn v. Crocker First National Bank*, 22 Cal.App. 2d 246, 248, 70 P.2d 989. But whatever may be the rule in criminal cases and in other cases where the interests of the public are involved, where, as in the case before us, purely private rights are involved, and a party to the action has himself infringed the constitutional rights of the other party and stolen a letter from her for the purpose of using it against her in a civil action, the principle set forth in section 3517 of our Civil Code, that 'No one can take advantage of his own wrong,' becomes applicable; and we are of the opinion that the trial court in a proceeding such as this should not have permitted petitioner to take advantage of his wrong in purloining the letter, and should have refused to become a party to its use.

"Petitioner also relies upon the testimony of four witnesses called by him, who were asked their opinions as to whether he, Munson, was a fit and proper person to have custody of the child. A typical question and answer were: 'Q. In your opinion is he [Munson] a fit and proper person to have the custody of his own son? A. I would say he would be, as far as I know.' Such opinion evidence is entitled to no consideration whatever. Under section 1870, Code of Civil Procedure, opinion evidence may be given only on matters covered by subdivision 9 thereof; and except in the instances therein provided a witness must testify to facts and not opinions. *Moore v. Norwood*, 41 Cal.App.2d 359, 366, 106 P.2d 939. Opinion evidence as to the fitness of a parent to have custody of a child is inadmissible. *Milner v. Gatlin*, 143 Ga. 816, 85 S.E. 1045,

L.R.A.1916B 977; Moore v. Dozier, 128 Ga. 90, 57 S.E. 110, 112; Churchill v. Jackson, 132 Ga. 666, 64 S.E. 691, 692, 49 L.R.A.,N.S., 875, Ann.Cas.1913E 1203; State ex rel. Giroux v. Giroux, 19 Mont. 149, 47 P. 798, 803; Long v. Smith, Tex. Civ.App., 162 S.W. 25, 28, 29.

"Petitioner testified that he was boarding with a Mr. and Mrs. Granberg; and, if awarded the custody of his child, intended to take it to their home to be cared for by Mrs. Granberg. This would mean, in effect, that the physical care and custody of this infant would be entrusted to a stranger. But it has been held in numerous cases that this cannot be done unless the natural parents of a child are found to be unfit to have such custody. This principle was restated in the very recent case of Roche v. Roche, 25 Cal.2d 141, 152 P.2d 999, where joint control of a girl eight years of age was awarded to the parents, but the physical care and control were awarded to the child's paternal grandparents. The Supreme Court quoted from Stever v. Stever, 6 Cal.2d 166, 170, 56 P.2d 1229, to the effect that 'before the court can deprive the mother of her right to the minor's custody and give her into the charge of strangers, there must be a finding that the mother is an unfit person to have the custody of her child.' Other cases so holding were cited, pages 143, 144 of 25 Cal.2d, at pages 999, 1000, of 152 P.2d. In Re Guardianship of Mathews Estate, 169 Cal. 26, 145 P. 503, there cited, the court made a finding that the father of the minor was dead, and that the mother was 'an unfit, incompetent and improper person to have the care, custody or control' of said child. On appeal an order appointing a stranger as guardian was reversed, the court saying that the evidence relied upon as warranting a finding of incompetency 'is pitifully weak, and entirely insufficient in our judgment to warrant a conclusion that the mother is incompetent to act as guardian and should be deprived of the custody of her child.'

"In Re Estate of Lindner, 13 Cal.App. 208, 109 P. 101, in a guardianship proceeding, the court found that the mother of the minor child, a girl aged less than three years, was not a fit and proper person to have the custody of her child. The court said that the prior rights of parents to the custody of their children under fourteen years of age cannot be disregarded

except on the most compelling reasons proven and sustained; that 'as against everyone except the father the mother is by the law of God and man entitled as of right to the custody of her own child, and of this right she cannot be deprived except upon a clear showing of her unfitness for the exercise of such right.' Also that 'A mother who is both capable and anxious to rear her own offspring should not be deprived of the opportunity to thus discharge the duty she owes the child, without a clear showing of unfitness for the trust.' And the judgment and order were reversed. Also see Wand v. Wand, 14 Cal. 512, 517.

"As hereinbefore stated, the order in this case awards the full custody of the child to the father, and contains no provision for the mother to even see her offspring. There is certainly nothing in this case that justifies any such deprivation. In Allison v. Bryan, 26 Okl. 520, 109 P. 934, 138 Am.St.Rep. 988, 30 L.R.A.,N.S., 146, plaintiff, the mother of an illegitimate child which had been legitimized by its father and was in his custody, had been deprived by the latter of any right to see her child. She applied for and was granted an order which provided that the child should be permitted to be with her at certain times and places. On appeal the court quoted from Haley v. Haley, 44 Ark. 429, as follows:

"'The privilege of visiting accorded to the mother is a plain dictate of humanity, in the absence of any reason to suppose that the privilege would be abused to the injury of the boy. There was none in this case. The charges of immorality against the mother were not sustained. She is shown to be an industrious, hard-working woman, and a good woman, by all the witnesses, except the defendant. But had it been otherwise the permission to visit would not be necessarily erroneous. *The courts should regard the maternal instinct in the veriest trull that walks the streets, taking proper care that it do not lead to the corruption of the offspring. It is the strongest and holiest sentiment of humanity; the freest from selfishness or impurity, and often the last hope of redemption for fallen natures.*' (Italics ours.)

"After reviewing other cases dealing with the right of visitation, the court said:

"From the foregoing it will be seen that under practically every and all conditions the parent, in some instances the father and in others the mother, while losing the right of custody of their children, have in every instance received at the hands of the court recognition of their right of visitation * * * the underlying reason for the rule was in each instance that the one accorded the right was a parent, and that it was in accord with humanity and right living and the best interests of the child that it should not forget and be estranged."

"In *Copeland v. Copeland*, 58 Okl. 327, 159 P. 1122, L.R.A.1917B, 287, the court said:

"The child was the legitimate offspring of a lawful marriage between the parties and was of tender years, and, though the mother may have erred, her sin did not dry up the wellsprings of mother love and forfeit all right upon her part to visit with and enjoy the association of her own offspring. Neither does the law so declare, but recognizes this right, so long as the welfare of the child will not be endangered thereby."

"It also cited and quoted from *Allison v. Bryan*, supra, and from *Haley v. Haley*, supra, which was quoted therein.

"We think petitioner failed to furnish evidence which justified the change of custody made by the order of the trial court. As hereinbefore stated, he agreed in a writing dated March 15, 1944, that the custody of the child should be awarded to the mother; and while such agreements are not binding upon the courts, nevertheless, as was said in *Black v. Black*, 149 Cal. 224, 226, 86 P. 505, courts do generally approve and adopt them, because parents, solicitous for the welfare of their offspring, have the greatest interest in determining which of them can best care and provide for them. And in *Sargent v. Sargent*, 106 Cal. 541, 546, 39 P. 931, it was said that 'Parents have a right to contract with each other as to custody and control of their offspring, and to stipulate away their respective parental rights; and such contracts are binding upon them.'

"Petitioner had lived with respondent from the date of their marriage, November 6, 1941, until its dissolution on March 31, 1944, part of the time in the home she now shares with her mother. He must have known when he made his agreement whether Mrs. Munson was a fit and proper mother, and his agreement indicates that he so believed. Even giving his testimony the fullest scope, we think it was inadequate to show that in the space of some seven weeks conditions had so changed and Mrs. Munson had become a person of such dissolute character that she should be deprived of the custody and care of her infant child and same be in effect awarded to a stranger. Petitioner has been free to visit with the baby, and has visited him five or six times a week. While Mrs. Munson is employed in the diet kitchen of a hospital her hours are from 8 a.m. to 1 p.m., and from 4 to 7 p.m., and during her absence from her home the child is well cared for by her sister-in-law who has a child of her own about the same age.

"Also the record contains evidence tending to show that petitioner himself is not above reproach and that his character is not of the best; but it is unnecessary to recite same. We are satisfied for the reasons above stated that other things were not unequal in this case and that this child of tender years should be in the custody of its mother; and we cannot agree that upon the showing made it is for the best interests of this infant to be deprived of its mother's care and affection. We might add that though the Civil Code does not define the degree of fraud which under section 82 thereof will justify the annulment of a marriage, it might well be said that where as here, plaintiff was constrained to secure the annulment of her marriage because, though the fact was unknown to her, Munson married her when he had another wife living from whom he was not divorced, that his conduct constituted such a fraud upon respondent as required the court, under section 84, supra, to award the custody of the child to her."

In my opinion the order should be reversed.

27 Cal.2d 637

In re COWEN.

Cr. 4668.

Supreme Court of California, in Bank.

Feb. 8, 1946.

1. Constitutional law ⇨203

Criminal law ⇨1206(1)

The amendment permitting Adult Authority to redetermine length of time of imprisonment not exceeding maximum penalty provided by law for offense for which prisoner was convicted is not *ex post facto* as applied to prisoner who was convicted on three offenses prior to adoption of amendment, since prisoner had no vested right to have sentences fixed at any period less than maximum provided by statute for the offenses. Pen.Code, §§ 1168, 3020.

2. Criminal law ⇨1216(2)

Where trial court, following prisoner's conviction on three counts, directed that 20-year sentence on robbery conviction run concurrently with 20-year sentence on conviction of rape, and further sentenced defendant to term of five years on charge of attempted robbery, without specifying whether second sentence should run concurrently or consecutively, under mandatory provisions of statute, the sentence for attempted robbery ran consecutively. Pen. Code, §§ 213, 264, 664, 669, 671.

3. Prisons ⇨15

Once a prisoner has been allowed credit and by reason thereof his reduced term has expired, his term is not reduced and may not thereafter be revived by a forfeiture of credits for conduct occurring after expiration of his reduced term. Pen.Code, §§ 1168, 3020.

4. Prisons ⇨15

For purposes of computing and allowing credits, of forfeiting credits and of redetermining length of time of imprisonment, a prisoner confined under consecutive sentences must be regarded as undergoing a single, continuous term of confinement rather than a series of distinct, independent terms. Pen.Code, §§ 1168, 2920 et seq., 2923, 2926, 2942, 3020.

5. Pardon ⇨14

Prisons ⇨15

Where a prisoner serving sentences upon convictions of robbery and rape to run concurrently and a conviction for attempted robbery to run consecutively was

paroled after serving the minimum term under the concurrent sentences and the prisoner violated his parole, the prisoner would be regarded as serving under all sentences a single continuous term of confinement and the Adult Authority in fixing the imprisonment after the parole violation was not limited to the maximum fixed for attempted robbery but could redetermine the term of imprisonment under the concurrent sentences, forfeit the credits earned and impose the maximum term of imprisonment under all sentences. Pen.Code, §§ 1168, 2920 et seq., 3020.

6. Criminal law ⇨1208(9), 1216(2)

The purpose of statute providing that a second consecutive term of imprisonment commences at expiration of first term is to declare power of court to direct, or the rules to govern the serving of multiple sentences only in so far as concerns whether such sentences should operate concurrently or cumulatively, and it should not be given the effect of circumscribing the operation of later enacted indeterminate sentence plan. Pen.Code, §§ 669, 1168, 2920 et seq., 3020.

7. Criminal law ⇨1208(9)

The general purpose of the indeterminate sentence law includes reformation of the offender, protection of society from the offender who has not reformed, and by express declaration uniformity of administration as to all prisoners undergoing confinement. Pen.Code, §§ 2920 et seq., 2926, 3025.

Habeas corpus proceedings to secure the release of Earle Cowen from custody.

Writ discharged and petitioner remanded.

Elizabeth Cassidy, of San Francisco, for petitioner.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Petitioner, who is confined in the State Prison at Folsom, urges that his imprisonment is unlawful in that his term, with credits, has expired, and that the Adult Authority has exceeded its power by purporting to forfeit time credits earned by and allowed to petitioner and by redetermining the length of time of his imprisonment. We have concluded, for reasons hereinafter

delineated, that petitioner is not unlawfully imprisoned and that the authority has not exceeded its power.

On May 19, 1930, petitioner was adjudged guilty, in action number 39224 in the Los Angeles Superior Court, of an attempt to commit robbery on December 21, 1929, and, in action number 39425 (count 1), of rape committed on November 27, 1929, and (count 2) of robbery of the first degree also committed on November 27, 1929. It was ordered that sentence on the robbery conviction run concurrently with sentence on the conviction of rape. It was found that petitioner had been previously convicted of a felony and had served a term of imprisonment therefor. (The minutes of a meeting of the Adult Authority held on June 22 and 23, 1944, mistakenly recite that it was found that petitioner had suffered two prior convictions of felony.)

Petitioner's term of imprisonment started on June 6, 1930. In 1933 the Board of Prison Terms and Paroles fixed the length of time of petitioner's imprisonment at 20 years each on the robbery and rape convictions, to run concurrently, and 5 years on the attempt conviction, to run consecutively. On May 1, 1944, the Adult Authority, successor to the Board of Prison Terms and Paroles, reaffirmed the board's determination. In June, 1944, the Adult Authority granted parole for the last ten months of petitioner's term. Petitioner was released on parole on October 11, 1944. He violated the terms of his parole. The Adult Authority suspended his parole on April 16, 1945. On June 8 or 11, 1945 (the record is uncertain), the Adult Authority ordered that petitioner's parole be revoked and that "the above listed prisoners [including petitioner] who have terms set at less than the maximum shall be considered as serving the maximum (with the exception of those violators whose maximum of an indeterminate sentence is life; and who shall be considered as serving a sentence of 50 years) until further order of the Adult Authority." After hearing on July 16, 1945, the Adult Authority again ordered that petitioner's parole be revoked and further ordered that all credits earned or to be earned by him be forfeited.

Petitioner was notified on July 19, 1945, by the record clerk of respondent warden that his present discharge date is July 22, 2030. Petitioner alleges and respondent does not deny that the Adult Authority has refixed his term of imprisonment at a total

of 70 years; i. e., at the maximum for rape (50 years, Pen.Code, § 264, which, as above noted, is also the period set for the indeterminate life term) plus the maximum for the attempt (20 years, Pen.Code, § 664). Respondent alleges that by the order of the Adult Authority made June 8 or 11, 1945, "petitioner was re-sentenced to serve a term of fifty years"; apparently it is respondent's position that petitioner is presently confined as one "whose maximum of an indeterminate sentence is life [for robbery of the first degree, Pen.Code, §§ 213, 671]; and who shall be considered as serving a sentence of 50 years."

Petitioner contends that his original term of imprisonment, totalling 25 years, could not be changed; that the amendments of the Penal Code which have given the Adult Authority power to redetermine terms of imprisonment are, as to him, *ex post facto*. As will appear from the ensuing discussion and authorities, this contention cannot be sustained.

At the time the offenses here involved were committed section 1168 of the Penal Code (Stats. 1929, p. 1930) provided that "The state board of prison directors shall determine after the expiration of the minimum term of imprisonment provided by law, except that in cases in which the minimum term of imprisonment is more than one year, the state board of prison directors may determine after the expiration of one year from and after the actual commencement of such imprisonment what length of time, if any, such person shall be imprisoned. * * * The term of imprisonment so fixed * * * shall not thereafter be increased or diminished by said board for any reason whatsoever except as in this section provided." The only manner provided by which the board could diminish or increase the term was the allowance or forfeiture of time credits.

In 1931 (before the length of petitioner's term was initially fixed) section 1168 was amended (Stats. 1931, p. 1053) to provide that "In case any convicted person undergoing sentence in any of the state prisons commits any infraction of the rules and regulations of the prison board, * * * the board of prison directors may revoke any order theretofore made determining the length of time such convicted person shall be imprisoned, and make a new order determining such length of time not exceeding the maximum penalty provided by law for the offense for which he was convict-

ed." This provision was made applicable to all prisoners serving sentence. The last quoted language was carried over into section 1168 (Stats. 1933, p. 2156) as it read at the time the prison board first fixed the term of petitioner's imprisonment at a total of 25 years.

Section 3020 of the Penal Code (Stats. 1941, p. 1110) now provides that "In the case of all persons heretofore or hereafter sentenced under the provisions of Section 1168 of this code, the board may determine and redetermine * * * what length of time, if any, such person shall be imprisoned * * *."

[1] The amendments which permit re-determination of the length of time of imprisonment do not make possible the imposition of a longer term than could have been imposed when the offenses were committed. Petitioner at the time he committed the crimes (and at the time the board fixed his term at a total of 25 years) had no vested right to have it fixed at that or any other period less than the maximum sentence provided by statute, i. e., life on the conviction of robbery (Pen.Code, §§ 213, 671), 50 years on the conviction of rape (Pen.Code, § 624), and 20 years on the conviction of attempted robbery (Pen.Code, § 664). (In re Hicks (1938), 28 Cal.App.2d 671, 673, 83 P.2d 73; cf. In re Nachnaber (1928), 89 Cal.App. 530, 533, 265 P. 392, 393, holding that an amendment which provided that a judge granting probation might, as a condition of probation, order the defendant imprisoned, was not ex post facto as applied to offenses committed prior to the date the amendment took effect; the court pointed out that the defendant at no time had a statutory right to be granted probation.) As was said in the Nachnaber case, "The real question to be framed is whether the person accused has been deprived of a substantial right by reason of the change." *People v. Edenburg*, 88 Cal. App. 558, 263 P. 857." Petitioner here has been deprived of no substantial right by the amendment of section 1168 of the Penal Code.

[2] Petitioner contends that the term of imprisonment on the attempted robbery conviction ran concurrently with the terms of imprisonment on the rape and robbery convictions. This contention, too, must be rejected. In 1930, when petitioner was sentenced, section 669 of the Penal Code (Stats. 1927, p. 1056) provided, "When any person is convicted of two or more crimes

the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be; provided, that in exceptional cases the judgment, in the discretion of the court, may direct that such terms of imprisonment, or any of them, shall run concurrently." Under the mandatory provisions of section 669 the sentence for attempted robbery ran consecutively, there having been no contrary direction of the trial court. (See *People v. Ferlin* (1928), 203 Cal. 587, 603, 265 P. 230; *In re Crawford* (1930), 109 Cal.App. 33, 34, 292 P. 520.) In re Radovich (1943), 61 Cal.App.2d 177, 182, 142 P.2d 325, on which petitioner relies, concerns section 669 as amended in 1931 and is not applicable.

Although the order in which petitioner was convicted of the three offenses (sentences on all three of which were pronounced on May 19, 1930) does not appear, all parties assume that if the sentence for attempted robbery is not concurrent, then it follows the concurrent sentences for rape and robbery. This assumption seems to be made in the face of the fact that the attempted robbery charge bears a lower number in the Register of Actions than the other charges.

The action of the prison board in treating the sentence on the attempt conviction as running consecutively to the sentences on the rape and robbery convictions was upheld, against petitioner's contention "that the judgment on the charge of attempted robbery should run concurrently, he claiming that it is a legal absurdity to hold that he should serve such term consecutively to a life term," in *People v. Cowen* (1937), 20 Cal.App.2d 674, 675, 67 P.2d 737.

Petitioner next contends that the Adult Authority has no power to refix his term of imprisonment at any period exceeding 20 years, the maximum for attempted robbery, because before the Adult Authority made its orders forfeiting all credits and refixing the length of time of imprisonment the concurrent sentences for robbery and rape had been finally satisfied. It is petitioner's position that, with credits, he fully served a term of 20 years and started serving another, separate term of 5 years, and only the latter can be refixed.

Under this view, whether we accept petitioner's or respondent's assertions (each

unsupported by the record) as to the amount of good time earned and allowed it appears that the 20-year concurrent terms would have expired on some date in 1942 and that on that date petitioner would have commenced serving his sentence for attempted robbery. But for the reasons hereafter stated we cannot agree with petitioner's contentions that the time of imprisonment for robbery and rape cannot be redetermined and that credits earned and allowed prior to 1942 cannot be forfeited.

[3, 4] If petitioner were confined under a sentence for a single offense, or concurrent sentences, or if the second of his consecutive sentences were void, then the holding of *Ex parte Shull* (1944), 23 Cal.2d 745, 753, 146 P.2d 417, 420, would apply: "once a prisoner has been allowed credits and by reason thereof his reduced term has expired, his term, as not reduced, may not thereafter be revived by a forfeiture of credits for conduct occurring after the expiration of his reduced term." But, respondent contends, for the purposes of computing and allowing credits, of forfeiting credits, and of redetermining the length of time of imprisonment, a prisoner confined under consecutive sentences must be regarded as undergoing a single, continuous term of confinement rather than a series of distinct, independent terms. With this contention we agree.

In *re Albori* (1933), 218 Cal. 34, 37, 21 P.2d 423, holds that under the then wording of section 1168 of the Penal Code time credits on consecutive sentences must be computed upon the total term of confinement rather than upon the separate terms. This holding as to the basis of computation of credits applies to petitioner's situation, for the provision of section 1168 construed in the *Albori* case is found in identical language in present section 2920 of the Penal Code. This conclusion is strengthened by the fact that the Legislature, apparently in recognition of the holding of the *Albori* case, added to section 2920 the limitation that "The phrase 'term of confinement' as used herein shall not in any case be construed to include sentences for crimes committed while under commitment to a State prison but in all such cases the credits shall be computed on the separate sentence resulting from such conviction."

We believe it would be inconsistent to say that a prisoner under consecutive sentences is regarded as undergoing one continuous term of confinement rather than a

series of distinct terms, for the purpose of earning credits, yet the same prisoner, when he commits an offense causing those same credits to be forfeited, is to be regarded as serving a series of distinct terms, the earlier ones of which have been completed and the sentences thereon exiated. The provisions of the Penal Code with reference to allowance and forfeiture of credits originated in a single section (§ 1168) and are now in a single article (Pt. 3, tit. 1, ch. 7, art. 3). The provisions of such article "apply to all prisoners now serving sentence in the State prison, to the end that at all times the same provisions relating to credits shall apply to all the inmates thereof." (Pen.Code, § 2926.) The arrangement of the provisions in the code indicates a legislative desire for uniformity on the subjects of allowance and forfeiture of credits. Section 2923 of the Penal Code provides for the "forfeiture of any or all time credits theretofore earned by or allowed to" a prisoner; there is nothing in that section or elsewhere in the Penal Code provisions concerning credits to indicate that the Legislature meant to exempt from possible forfeiture statutory credits earned during the earlier portion of the "entire term of confinement" of a prisoner serving consecutive sentences.

The federal courts have reached the same conclusion as to forfeiture of credits. In considering a contention similar to that of petitioner, *Aderhold v. Perry* (5 Cir., 1932), 59 F.2d 379, 380, holds, "The credit is not a vested right, but only contingent until a time arrives such that its allowance will end imprisonment. * * * When the imprisonment covers several successive sentences, * * * the prisoner's service and his record of conduct are to be treated as a continuous whole. The number of days to be allowed as a credit is to be increased as though there were but one single sentence, and the chance of winning or losing the increased credit is to be similarly protracted." Likewise under our Penal Code it is only when the allowance of credits "will end imprisonment"—when the time of confinement has extended to the prisoner's discharge date as accelerated by credits allowed (Pen.Code, § 2942)—that the reasoning of *Ex parte Shull* (1944), *supra*, 23 Cal.2d 745, 753, 146 P.2d 417, applies. (In accord are *Ebeling v. Biddle* (8 Cir., 1923), 291 F. 567, 568; *Morgan v. Aderhold* (5 Cir., 1934), 73 F.2d 171, 172; *People v. Brophy*, (1937), 250 App.Div. 831,

294 N.Y.S. 855; *Moulthrop v. Walker* (1942), 129 Conn. 164, 168, 26 A.2d 789 (that the sentences in the Moulthrop case were consecutive, see *Abt v. Walker* (1940), 126 Conn. 218, 220, 10 A.2d 596); *Sweetney v. Johnston* (D.C.N.D.Cal.S.D.1943) 50 F.Supp. 326; *Tippitt v. Squier* (9 Cir., 1944), 145 F.2d 211, 212; see *Douglas v. King*, 8 Cir., 110 F.2d 911, 127 A.L.R. 1203, 1207, 1208, where it is said, "In a very few cases in which unsuccessful attempts have been made, upon the ground of forfeiture for misconduct after incarceration, to take away from prisoners good-time allowances which they had earned, the courts have taken the view that, at least under the particular circumstances, the right to, or privilege of obtaining, the allowances had fully accrued, and accordingly were not subject to withdrawal, modification, or denial, except as clearly authorized by statute. * * * But, in the great majority of cases involving forfeiture of good-time allowances for misconduct prior to termination of the sentence, the view has prevailed that the privilege of obtaining such allowances, being not a vested right, may properly be withdrawn, modified, or denied in the event of specific acts of misconduct, or perhaps misconduct generally depending upon the wording of the statutory provisions in that regard.")

Under our law, as under the federal law, "Any other view would lead to absurd consequences, and nullify the results sought to be accomplished by the statute. This result is intended to be a reward for good behavior, tending to ease of administration, and making for the reform of the prisoner. If these allowances were applied as the several sentences expire, as appellant contends, then he would be entitled to them, provided he had conducted himself well during any term * * *, regardless of behavior during any other term. * * *" (*Ebeling v. Biddle* (8 Cir., 1923), *supra*, 291 F. 567, 568.)

[5] Likewise, we believe, a prisoner serving consecutive sentences must be regarded as undergoing a single, continuous term of confinement thereunder for the purpose of redetermination by the Adult Authority of the length of time of his imprisonment. As in the case of the forfeiture of good time, any other result would nullify at least in part the results sought to be accomplished by the statute. Section 3021 of the Penal Code provides that "When a prisoner has imposed upon him two or

more cumulative or consecutive sentences, the board may determine and redetermine after the expiration of six months of his first sentence, what length of time he shall serve on *all* such cumulative or consecutive sentences" (italics added) without any suggestion that by the passage of time (short of the ultimate end of the entire term) the authority of the board (now the Adult Authority) to redetermine the length of time under some of such cumulative sentences is lost. The word cumulative means "composed of accumulated parts; formed, or becoming larger, by * * * successive additions" (Webster's New Int. Dict., 2d Ed.) and the use of such word by the Legislature in section 3021, apparently as a synonym for consecutive, suggests that the several sentences are to be regarded as a unit in administering the law.

Under petitioner's view there would exist grave possibilities of inequality of treatment of prisoners whose offenses and behavior have been identical. Such possibilities may be shown by an illustration. Defendant A is charged in count 1 of an information with rape (maximum, 50 years), and in count 2 thereof with attempted robbery (maximum, 20 years). He is convicted and sentenced on each count, sentences to run consecutively. In the ordinary course of things the foreman of the jury reads the verdict on count 1 first; the judge pronounces judgment on count 1 first; and the sentence on count 2 runs consecutively to that on count 1. (Pen. Code, § 669; see 24 C.J.S., Criminal Law § 1996, subd. g, p. 1243.) Defendant B is similarly charged, convicted, and sentenced, except that the order of the counts in the information, the reading of the verdicts, and the running of the sentences is reversed. A and B commence their terms of imprisonment; the Adult Authority duly fixes their respective terms at 10 years on the rape convictions and 5 years on the attempt convictions. They earn and are allowed all statutory credits until, after 3 years and 7 months of confinement have passed, each violates a prison rule. The authority refixes their sentences at the maximum—20 years in the case of A, 50 years in the case of B. Obviously the incentive to well doing which it is a purpose of the indeterminate sentence law to afford (*In re Lee* (1918), 177 Cal. 690, 692, 171 P. 958) is quite different in A's case than in the case of B, and the express legislative intent "that at all times the same provisions

[of the indeterminate sentence law] relating to the imprisonment of prisoners shall apply to all the inmates" (Pen.Code, § 3025), is not given effect. In practical effect the construction of the statutes urged by petitioner takes from the Adult Authority and gives to the district attorney a substantial portion of the power to determine a prisoner's discharge date.

We next consider certain objections voiced in the dissenting opinion in *Aderhold v. Perry* (5 Cir., 1932), *supra*, 59 F.2d 379, to the conclusion reached by the Circuit Court of Appeals. Such objections are pertinent to our conclusion that, for the purposes of allowing and forfeiting credits and determining and redetermining the length of time of imprisonment, a prisoner in petitioner's situation is undergoing a single, aggregate term of confinement rather than a series of separate terms. Circuit Judge Hutcheson, dissenting, says page 381 of 59 F.2d, "The view which the majority takes not only runs counter to the words of the statute [18 U.S.C.A. § 710] * * * but, since the section allowing the aggregate of several sentences to be the basis of the good time applies generally to all sentences which the prisoner is serving, whether imposed by one or several courts, it gives the impossible effect to the statute of coalescing into one sentences which have no legal relation to each other. Besides, it introduces into cumulative sentences an element of uncertainty as to when one ends and the other begins which the law neither intends nor countenances."

The objection that the "coalescing into one" of "sentences which have no legal relation to each other," is "impossible," is not persuasive. In the case of a prisoner who is serving concurrent sentences for crimes committed on separate occasions, perhaps in separate counties, the sentences are similarly, and unobjectionably, "coalesced into one." And consecutive sentences, even if regarded as separate and distinct for some purposes, necessarily coalesce into one aggregate term of confinement during which the prisoner is continually restrained of his liberty.

[6] The wording of section 669 of our Penal Code makes necessary a consideration of Judge Hutcheson's charge that treating the term of confinement under consecutive sentences as a whole amounts to rewriting the statute. Section 669 as it read in 1872 when the Penal Code (including such section) was enacted, as it read

when petitioner was sentenced, and as it now reads, provides that a second consecutive term of imprisonment commences at the termination of the first term of imprisonment, and since 1927 (Stats. 1927, p. 1056) the section has referred to "terms of imprisonment," with no indication that there could be a single term, the cumulation of consecutive sentences. But section 669 was enacted prior to the enactment of the indeterminate sentence law (Stats. 1917, p. 665). The purpose of the earlier section, we think, was to declare the power of the court to direct, or the rules to govern, the serving of multiple sentences only insofar as concerns whether such sentences should operate concurrently or cumulatively, not to require that for all purposes, when consecutive sentences are directed, the defendant shall be regarded as imprisoned on only one charge at a time. It should not be given the effect of circumscribing the operation of the later enacted indeterminate sentence plan.

This view is consistent with the holding in *People v. McNabb* (1935), 3 Cal.2d 441, 45 P.2d 334. The essential facts in that case are that a prisoner while on parole under a sentence for a fixed term of years committed two first-degree robberies. He was convicted of such offenses and returned to prison on commitments for such offenses as well as for violation of his parole. Prior to the completion of his original fixed term sentence and prior to action by the prison term authority on his last two sentences, he committed, with malice aforethought, an assault with a deadly weapon. It was held that he was subject to prosecution under section 246 (now § 4500) of the Penal Code. That section provides that "Every person undergoing a life sentence in a State prison of this State, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon * * * is punishable with death." It was necessarily held that the defendant was "undergoing a life sentence" even though he had not yet completed his fixed term sentence. (See, also, *Ex parte Quinn* (1945), 25 Cal.2d 799, 802, 154 P.2d 875; *People v. Jones* (1936), 6 Cal.2d 554, 59 P.2d 89.)

[7] Beginning in 1927 the Legislature has from time to time amended both section 669 of the Penal Code and the indeterminate sentence law. We must, therefore, decide whether the Legislature by such enactments intended that in the case of pris-

oners undergoing consecutive (more accurately, "cumulative") sentences the power of the Adult Authority in the exercise of its discretion to carry out the purposes of the indeterminate sentence law should be limited by a strict, literal application of the words of section 669. The general purposes of the indeterminate sentence law include reformation of the offender, protection of society from the offender who has not reformed, and by express declaration uniformity of administration as to all prisoners undergoing confinement. (Pen.Code, §§ 2926, 3025.) We cannot believe that the Legislature intended that the administration of the law to effectuate these purposes should in the case of one class of prisoners be hindered merely in order that a prisoner of such class can serve "terms of imprisonment" as stated in section 669 rather than one "term of confinement" as stated in section 2920, or that such prisoner can know on any given date that he is spending that day in prison because he committed rape and that if he conducts himself properly during that day he will spend the next day in prison because he attempted to commit robbery.

The writ is discharged and the petitioner remanded.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concurred.



27 Cal.2d 693

PEOPLE v. KANE.

Cr. 4637.

Supreme Court of California, in Bank.
Feb. 19, 1946.

I. Robbery $\S$ 27(1)

In prosecution for armed robbery of a restaurant employee who was taking employer's money to bank, where defendant claimed that robbery was simulated and that he received money with employee's consent so that offense was at most grand theft, refusal of defendant's requested instructions on defendant's theory of case, which instructions, although not grammatically perfect, were correct and simple

statements of law pertinent to defendant's theory and showing its application to evidence introduced, was error. Pen.Code, § 211.

2. Criminal law $\S$ 780(1), 789(3)
Robbery $\S$ 27(1)

In prosecution for armed robbery of a restaurant employee, where defense was that robbery was simulated, that employee was an accomplice so that taking amounted only to grand theft from employer, essential distinction between robbery and grand theft, the definitive attributes of an accomplice and application of doctrine of reasonable doubt should not have been left either wholly unexplained or derivable only from inference. Pen.Code, §§ 31, 211, 1111.

3. Criminal law $\S$ 1173(1)

The broad rule, that a reversal because of refusal of an instruction is justified only when it appears that it was duty of trial judge to give instruction exactly as requested and that if any part of instruction ought not to have been given, whether erroneous as a matter of law or merely misleading, refusal of trial judge to give instruction will be affirmed, cannot be given unlimited application.

4. Criminal law $\S$ 829(3, 18)

In prosecution for armed robbery of a restaurant employee who was taking employer's money to bank, where defense asserted that robbery was simulated and that offense should be no more than grand theft, the giving of statutory definition of robbery and statutory instruction concerning reasonable doubt did not justify refusal of defendant's requested instruction applying such definitions to the evidence and defendant's theory of the case. Pen.Code, §§ 31, 211, 1096, 1111.

5. Criminal law $\S$ 829(18)

A defendant, without infringing upon the Code section declaring that when statutory definition of reasonable doubt is given no other instruction need be given defining reasonable doubt, still has right to direct attention to evidence from a consideration of which a reasonable doubt of his guilt would be engendered. Pen.Code, §§ 1096, 1096a.

6. Criminal law $\S$ 1173(1)

Where court erroneously refused to give jury requested instructions embracing defendant's theory and on the record Su-

preme Court could not hold that such error was not prejudicial, that is, that defendant would have been convicted even if error had not occurred, a reversal was required.

EDMONDS, SHENK and SPENCE, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

George Kane was convicted of robbery with a deadly weapon and from the judgment of conviction and from an order denying a new trial, he appeals.

Reversed.

Prior opinion, 156 P.2d 763.

George Stahlman, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Defendant took from Marie H. Echols approximately \$2,700 which belonged to her employer and which she was carrying to the bank. At the time he committed the offense defendant was armed with a .38 caliber revolver. A jury found him guilty of robbery of the first degree. From the judgment of conviction entered upon this verdict and from an order denying his motion for new trial, defendant appeals. According to defendant's testimony Miss Echols and he agreed to simulate a robbery and each was to receive a share of the proceeds. The trial court refused certain instructions, requested by defendant, as to the specific application of the doctrine of reasonable doubt to the facts as testified to by defendant and corroborated to some extent by prosecution witnesses. In the circumstances shown, hereinafter related in more detail, we cannot say that the failure to instruct the jury as requested did not prejudice defendant.

Miss Echols testified as follows: She was assistant manager of Eaton's Restaurant. For "quite some time * * * getting into months" before the commission of the offense she saw defendant, who was employed by a linen supply company, nearly every day when he delivered linen to the restaurant. She and defendant chatted when he came in the restaurant. They

called each other by their first names; Miss Echols did not know defendant's last name. About three or four weeks before the commission of the offense the defendant left the employ of the linen supply company and Miss Echols did not see him until October 25, 1943. On that day, at about 1 o'clock p. m., as was her custom, she walked toward the bank, carrying about \$2,700 in a money bag. When she was about one and one-half blocks from the restaurant the defendant approached her. Although he wore dark glasses and two strips of adhesive tape across his nose, she recognized him at once. "He reached for the [money] bag and said, 'I will take this.' * * * I knew him so I just said, 'Don't be foolish.' * * * He pulled a gun and said, 'I am not fooling. This is loaded * * * I will shoot you.' * * * I said, 'Don't be foolish. I know you.' With that he struck me over the head with the gun and knocked me down and took the money and left. * * * He got in the car and drove away. * * * The turtleback was up. * * * [T]he head injury was not serious; it was the ligaments in my back; when I was knocked to the sidewalk they were torn."

Ralph Spellman, a friend of defendant, testified that at about 6 o'clock in the evening of October 25, 1943, defendant gave him a loaded .38 revolver and asked Spellman to "keep the gun for him, he didn't want to have it in his car." The gun was identified by Miss Echols and defendant as the one with which defendant struck her.

At about 1:30 o'clock in the afternoon of October 25, 1943, (i. e., one-half hour after the crime was committed) police went to defendant's apartment. No one was there. In a dressing table they found \$2,334 in currency. The police waited for defendant. At about 5:30 p. m. he came to his apartment. Officer Brennan testified that defendant "seemed very much surprised to find someone in his apartment and he says, 'Well, what is the matter?' And I answered, 'Why, you know what is the matter. * * * We are here on that holdup this afternoon that you pulled.'" Defendant denied any knowledge of and connection with the crime. He was searched and \$450 was found in his pocket. At about 6:30 p. m. defendant's half brother, who lived with him, arrived. Defendant continued to deny that he had stolen any money until the officers told him that they had found about \$2,300 in his apartment.

He then admitted that he "pulled the hold-up." Defendant went with the officers to Mr. Spellman's home and Spellman gave the officers the gun that had been left with him.

Defendant was taken to the police station. There he told the officers, "I needed money bad and I knew that they had quite a lot of money on week-ends from Eaton's. * * * I went down there the day before, or two days before * * * and I watched the girl take the money to the bank and I knew about what time she went by, and I went down there on the 25th, today, * * * and I waited until I saw her come out and start to the bank with the money. * * * I walked up to her and I stuck the gun on her and I told her to give me the money. * * * She started to wrestle over the bag of money, so * * * I hit her with the gun. * * * The blow knocked her down to the pavement and I jerked the money bag away from her and ran to my car and got in the car and drove away. * * * I had the turtleback up on my car so nobody could read the license. * * * I brought the money back to the apartment. * * * I took some tens out and put in my pocket and hid the rest of the money in the apartment. * * * I imagine it was kind of foolish to do after I see it all now. * * * I guess I must have been nuts." And several times, before and after they went to the police station, defendant asked the officers, "How did you find it out?"

Officer Wiseman, who was with Officer Brennan at the time of the arrest, was also a witness. He told the jury that, in reply to his question (in a conversation at the Wilshire Station Detective Bureau) "whether he did not think it was foolish to hold up someone who knew him," defendant said, "'Well, I didn't think she would recognize me.' And I asked him if that was why he had put dark glasses on and the adhesive tape on his nose, and he said 'Yes.'"

Defendant's half brother, who lived with defendant, testified that when he came home on the evening of the 25th and learned of the crime, he asked defendant, "Why did you do it, George? If you needed money I had some money and I would have given it to you," and defendant answered, "Well, I didn't want to ask you for it."

Defendant Kane testified that he had known Miss Echols for about two and one-half years while he was a route man for the linen supply company. He talked with her "at least fifteen or twenty minutes every morning" when he delivered linen to the restaurant. He knew that she took money to the bank and three or four months before the crime "the conversation got to that [sic] being some way we could make this easy money." After the making of "easy money" was first mentioned, "it seems there had not been one single day we did not plan." Miss Echols "told me the money was insured and if we could get away with it we could split." They talked over the matter in a small office in the restaurant, within 15 feet of where the cooks and dishwashers were working, but they could not be overheard. Gradually they developed a plan. Defendant left the linen supply company and got a night job. Defendant "would call her on the phone at Eaton's * * * usually on Monday morning" to ascertain the amount of the week-end receipts.

On the morning of October 25 (Monday) he telephoned. She said, "This is a nice week-end." He replied, "O. K. I will meet you at Normandie and Wilshire." They had agreed to "make it look like a real robbery. * * * I had that adhesive tape on my eyes, and I had glasses so if anybody did see me they wouldn't recognize me, and I was willing to take all the blame. * * * I knew the exact time she was coming as we arranged; at one o'clock she came walking down the street and I stepped out and said, 'We will make it look like a real robbery so * * * I will push you down and kind of make it look like I am hitting you, and I will take the money and speed away.' I had my turtleback up in the back [and carried a gun] so as to make it look real."

When defendant was arrested at his apartment, the officers showed him a warrant "either with her name on it or with my car license number." Three or four times he asked the officers how they learned that he had taken the money. At that time he did not know that Miss Echols had designated him as the guilty man. He did not tell the officers that Miss Echols was involved because he wanted to protect her "as arranged" and he could not believe that she had "crossed him up like that." His first statements to the officers, at his

home and at the police station, as related hereinabove, indicate that he did not then disclose that he was acquainted with Miss Echols. Such conduct is consistent with his testimony regarding the asserted plan to protect her.

Miss Echols denied the matters testified to by defendant concerning the plan to simulate a robbery. She testified that two weeks before the crime she had returned to work after a vacation and that she had not seen or spoken to defendant Kane during those two weeks.

The testimony of Miss Echols and of defendant and defendant's statement to the police, are in substantial accord as to the manner in which defendant took the money. The evidence as to whether he took it against her will is sharply conflicting. Miss Echols did not testify directly that she was afraid. According to defendant's version of the taking of the money he (and Miss Echols) were guilty of grand theft; they were accomplices. His testimony, as above stated, is corroborated to some extent by evidence introduced by the prosecution. Miss Echols testified that when defendant approached her with the gun she told him more than once, "Don't be foolish. I know you." Yet Officer Brennan testified that defendant seemed very surprised to find the police in his apartment when he entered it about four and one-half hours after the taking of the money and that defendant asked several times, "How did you find it out?"

The instructions given covered only the offense charged in the information; i. e., robbery of Miss Echols while armed with a deadly weapon. No instructions were given defining grand theft or explaining the difference between theft and robbery or defining an accomplice. A jury of laymen would not necessarily understand without specific instruction the distinction between robbery and theft. Since defendant admittedly used some substantial force in taking the money the record seems to us to afford reasonable support for the defendant's contention that the jury may have been confused and thought he was guilty of robbery whereas in truth they were convinced beyond a reasonable doubt only of such facts as made him guilty of grand theft.

Defendant requested, and the trial judge refused to give, the following instructions:

(1) "Before you can convict the defendant in this case, you must be convinced beyond a reasonable doubt that the property taken was against the will and without the consent of Marie H. Echols."

(2) "If you believe from the evidence that there was an agreement or understanding between the defendant George Kane and the complaining witness Marie H. Echols, or permission upon the part of Marie H. Echols, that the property should be taken by the defendant George Kane, then you must find the defendant not guilty, or if you have a reasonable doubt as to whether or not this consent and permission was given by Marie H. Echols to the defendant George Kane, then you should resolve this doubt in favor of the defendant and acquit him of the charge as contained in the information."

(3) "You are instructed that if the complaining witness, Marie H. Echols, in any manner instigated and encouraged the commission of the offense which amounts to consent to the wrong complained of, then you should find the defendant not guilty."

[1,2] The proposed instructions, although not grammatically perfect, are correct and simple statements of law pertinent and material to defendant's theory of the case and show its application to the evidence introduced. In *People v. Eckert* (1862), 19 Cal. 603, 605, this court said: "The fact pointed out by this instruction it was material for The People to prove, in order to establish the defendant's guilt under the other circumstances of this case, and as the charge given by the Court as to reasonable doubt, though appropriate, was general in its terms, the defendant had a right to ask an instruction that if there was a reasonable doubt as to this essential fact, the defendant should have the benefit of it." Defendant here was entitled to have the jury advised directly and clearly as to the law applicable to the defense to the charge of robbery in order that they should have clearly in mind that the taking, even though it was with a display of force, to constitute robbery, must have been actually against the will of Miss Echols, not with her connivance or abetment, and not merely against the will of the owner of the money. The essential, and to a layman somewhat fine, distinction between robbery and grand theft, the definitive attributes of an accomplice (Pen.Code, §§ 31 and 1111),

and the application of the doctrine of reasonable doubt to the most important and difficult question presented to the jury, should not have been left either wholly unexplained or derivable only from inference.

[3] The People point out the grammatical imperfections in the first and third requested instructions and urge that in the form submitted the instructions were ambiguous, incorrect, and confusing, and that (as stated at p. 630 of 8 Cal.Jur.) "a reversal because of the refusal of an instruction is justified only when it appears that it was the duty [of the trial judge] to give the instruction exactly as requested. If any part of the instruction ought not to have been given, whether erroneous as a matter of law or merely misleading, its action will be affirmed." The statement quoted from California Jurisprudence has not been, and cannot be, given unlimited application by the courts of this state. Extended discussion of this matter is not necessary, however, for it is apparent from mere perusal of the requested instructions that they are neither erroneous as a matter of law nor misleading and that their slight grammatical imperfections do not render them ambiguous or confusing.

[4] The People further urge that, since the statutory definition of robbery (Pen. Code, § 211) and the statutory instruction concerning reasonable doubt (Pen.Code, § 1096) were read to the jury, they were fully informed as to the law relating to defendant's theory and the refusal of the more specific instructions requested was not erroneous or, if it was erroneous, could not have prejudiced defendant.

As to the general statutory definitions of robbery and reasonable doubt, which were given as instructions, a statement from *People v. Cook* (1905), 148 Cal. 334, 347, 83 P. 43, 49, is apt: "It is true that the instruction given stated the law correctly; but it was brief, general, and colorless in comparison with the instruction asked, and had the effect of minimizing the importance of a consideration which could not have been stated with too much emphasis."

The situation is similar to that presented in *People v. Visconti* (1916), 31 Cal.App. 169, 170, 160 P. 410, 411, where the court said, "In view of the testimony offered for the purpose of establishing an alibi, the defendant asked the court to give an instruction by which the jury was to be informed that in making the proof of an alibi the de-

fendant was not obliged to establish that defense by a preponderance of evidence or beyond a reasonable doubt, but that it was sufficient to entitle him to a verdict of not guilty if the proof raised in the minds of the jury a reasonable doubt as to the presence of the defendant at the place where the crime was alleged to have been committed and at the time referred to in the information. The court refused to give this instruction, or any instruction upon the matter of the defense of an alibi. It seems to be conceded, as it must, that the instruction as proposed was pertinent and proper; but the contention is made that, inasmuch as the trial judge did instruct the jury that they must believe beyond a reasonable doubt that defendant committed the crime, no prejudice would arise by reason of the failure to instruct directly upon the matter of the alibi proof. The instruction of the court which was given was general, and stated in substance that before conviction could be had it was incumbent upon the prosecution to prove beyond a reasonable doubt all of the matters alleged in the information. We think that defendant was entitled to have some particular and specific instruction given touching the matter of his defense of an alibi." (In accord are *People v. Garrett* (1928), 93 Cal.App. 77, 78, 79, 268 P. 1071; *People v. Vasquez* (1928), 93 Cal.App. 448, 452, 269 P. 549; *People v. Wilson* (1929), 100 Cal.App. 428, 430, 280 P. 169; *People v. Quinn* (1931), 111 Cal. App. 614, 620, 295 P. 1042; *People v. Parker* (1933), 135 Cal.App. 761, 762, 27 P.2d 921. That such an instruction should be given but its refusal was not prejudicial under the particular circumstances shown in those cases, see *People v. Foster* (1926), 198 Cal. 112, 127, 128, 243 P. 667; *People v. Hovermale* (1925), 76 Cal.App. 91, 99, 243 P. 878; *People v. Gourdin* (1930), 108 Cal.App. 333, 335, 291 P. 701; *People v. McCoy* (1932), 127 Cal.App. 195, 197, 198, 15 P.2d 543.)

The refusal of such an instruction as to alibi was upheld in *People v. Powell* (1927), 83 Cal.App. 62, 65, 66, 256 P. 561, and *People v. Garvey* (1928), 93 Cal.App. 497, 504, 169 P. 702, in part because the court was of the opinion that the instruction was covered and in part because (page 67 of 83 Cal.App., page 563 of 256 P.) "we see no good reason why a trial court should call attention to any particular line of testimony whether offered by the prosecution or the defense." The last quoted statement

has no application to this case where, on the most important question presented to the jury, there were two "lines of testimony" in direct conflict and attention was inevitably directed to the prosecution testimony by the instruction defining robbery. (See, also, *People v. Dillon* (1924), 68 Cal. App. 457, 474, 229 P. 974, and *People v. Bedoy* (1927), 80 Cal.App. 783, 785, 252 P. 1061, holding that the refusal of an instruction specifically applying the doctrine of reasonable doubt to each element of the crime charged was not prejudicial in the circumstances; *People v. Fisher* (1911), 16 Cal.App. 271, 275, 116 P. 688, and *People v. Thal* (1923), 61 Cal.App. 48, 55, 214 P. 296, holding that the refusal of such an instruction was not error in view of the other instructions given; *People v. Spitzer* (1922), 57 Cal.App. 593, 598, 208 P. 181, and *People v. Pineda* (1940), 41 Cal.App.2d 100, 106, 106 P.2d 25, holding that the refusal to instruct as to the application of reasonable doubt to a defense was not error but commenting on the weakness of the defense.)

[5] We are of the view that it may properly be said here, as it was in *People v. Wilson* (1929), *supra*, 100 Cal.App. 428, 432, 280 P. 169, 170, "It is manifest that a vast difference might exist between an instruction by which reasonable doubt would be *defined* [as provided by Pen.Code, § 1096a] and one in which might be stated the law with reference to some fact from which the jury would be authorized to form a conclusion as to whether a reasonable doubt of the guilt of the defendant would follow. * * * In other words, without infringing in any manner on the provision of the statute by attempting to further *define* reasonable doubt, a defendant would still have the right to direct attention to the evidence from a consideration of which a reasonable doubt of his guilt might be engendered."

[6] The considerations which we have reviewed lead us to the conclusions that the refusal to instruct the jury specifically and directly as requested was error and that on the record here we cannot justifiably hold that such error was not prejudicial; i.e., that defendant would have been convicted had the error not occurred. Under such circumstances the judgment cannot be sustained. (*People v. MacPhee* (1914), 26 Cal.App. 218, 226, 146 P. 522; *Freeman v. Adams* (1923), 63 Cal.App. 225, 232, 233, 218 P. 600; *People v. Irby* (1924),

67 Cal.App. 520, 530, 227 P. 920; *People v. Walker* (1924), 69 Cal.App. 475, 499, 231 P. 572; *People v. Degnen* (1925), 70 Cal. App. 567, 606, 234 P. 129; *People v. Curtis* (1939), 36 Cal.App.2d 306, 328, 98 P.2d 228; *People v. Burness* (1942), 53 Cal.App. 2d 214, 222, 127 P.2d 623; *People v. Dail* (1943), 22 Cal.2d 642, 659, 140 P.2d 828; *People v. Thomas* (1945), 25 Cal.2d 880, 902, 156 P.2d 7.)

For the reasons above stated, the judgment and order appealed from are reversed.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., concurred.

EDMONDS, Justice (dissenting).

I cannot agree with the conclusion of my associates that the failure of the trial court to give to the jury three instructions requested by Kane amounted to prejudicial error. Procedural error or misdirection of the jury is not a ground for the reversal of a judgment of conviction "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Const. art. VI, § 4½. Very certainly, as I read the record in this case, there has been no miscarriage of justice.

The entire defense presented by Kane turned upon his story that he took the money from Miss Echols with her consent. That was the point which was stressed in the examination of Kane and Miss Echols and in the argument of the district attorney to the jury. In instructing the jurors as to the legal principles applicable to these facts, the trial judge told them, in the language of section 211 of the Penal Code, that "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." He also declared in the form prescribed by section 1096 of the Penal Code, the law concerning the presumption of innocence and the doctrine of reasonable doubt.

The three instructions refused and now relied upon by Kane merely stated these rules with particular reference to the evidence. The first one pointed out that in order to convict Kane, the jurors "must be convinced beyond a reasonable doubt that the property taken was against the will and without the consent of Marie H. Echols." The next one relates to the same

issue but is worded in greater detail; if "there was an agreement or understanding" between Kane and Miss Echols or permission from her to take the money, it reads, then Kane is not guilty of robbery and he may not be convicted if there is a reasonable doubt as to whether such permission or consent was given. The last of the three is to the same effect, and declares that Kane is not guilty of robbery if Miss Echols "in any manner instigated and encouraged the commission of the offense."

The order of the trial judge refusing each of these instructions "except as covered by other instructions given" was, therefore, correct. It is the duty of a court in instructing a jury to cover the different aspects of the case and to make clear the general principles of law applicable to the facts shown in evidence. *People v. McChesney*, 39 Cal.App.2d 36, 39, 102 P.2d 455. However, when the jurors have been fully informed as to the law relating to an issue, it is not error for the court to refuse to give additional instructions requested by the defendant covering the same subject. *People v. Boggs*, 12 Cal. 2d 27, 34, 82 P.2d 368; *People v. McKenna*, 11 Cal.2d 327, 337, 79 P.2d 1065; *People v. Parchen*, 37 Cal.App.2d 215, 223, 98 P.2d 1045. And where the elements necessary to constitute the crime charged are clearly stated, the jury must be presumed to have understood that, in the absence of sufficient proof of any one of those elements, the defendant was entitled to an acquittal. *People v. Griesheimer*, 176 Cal. 44, 53, 167 P. 521; *People v. Scobey*, 35 Cal.App.2d 211, 213, 95 P.2d 145; *People v. Ortiz*, 63 Cal.App. 662, 669, 219 P. 1024; *People v. Thal*, 61 Cal.App. 48, 55, 214 P. 296; *People v. Fisher*, 16 Cal. App. 271, 275, 116 P. 688.

The majority opinion cites *People v. Cook*, 148 Cal. 334, 83 P. 43, in support of the proposition that Kane was prejudiced by the trial court's refusal to give the instructions requested by him. That case, decided some years before the adoption of the constitutional mandate laying down the rule to be followed by appellate courts in considering procedural errors, is of doubtful authority for still other reasons. In the first place, the instruction which it was held should have been given at the request of Cook, limited the effect of evidence tending to show motive for the homicide to that particular purpose; it

was not one which emphasized an essential element of the crime charged. Moreover, the statement quoted from that case appears in the opinion of the Chief Justice, which was signed by one other member of the court. Two justices concurred in the opinion with further discussion in regard to the admissibility of the evidence upon which the instruction was based. One justice concurred only in the judgment of reversal and two others wrote separate dissenting opinions.

The quotation taken by Mr. Justice Schauer from *People v. Visconti*, 31 Cal. App. 169, 160 P. 410, 411, shows that the instruction which the District Court of Appeal held should have been given related to the defense of alibi, and was not, as is each of those requested by Kane, a statement in more extensive form of the law's requirement that one particular element of the crime be proved beyond a reasonable doubt. Moreover, upon denying a petition for hearing, this court expressly limited the scope of the decision. It should not be understood, the order reads, that the refusal to give the requested instruction "would, in all cases, be deemed by us sufficient cause for reversal. Especially is this true in view of the provisions of section 4½, art. 6 of the Constitution." 31 Cal.App. at page 172, 160 P. at page 411.

The instruction which was considered in *People v. Wilson*, 100 Cal.App. 428, 280 P. 169, also related to the defense of alibi. Wilson, like Kane, was accused of robbery. The presence of the perpetrator of a robbery at the scene of the wrongdoing is, of course, implied, although not expressly referred to, in the statutory definition of the crime. However, the lack of the victim's consent is by statute made an essential element of the crime and there is no sound reason for requiring that the jury's attention particularly be called to each of those elements when the crime is defined by an instruction in the language of the Penal Code.

Throughout the trial of Kane, he insisted that Miss Echols consented to his taking of the money from her. In direct contradiction to her testimony, he declared that she planned the crime with him even to the time and place he was to meet her. Under these circumstances, and with the argument of counsel narrowing the issue to the question as to whether Miss Echols willingly and in furtherance of the common purpose gave him the money, the

record abundantly shows that the case was presented to the jurors upon that one point. To me, it is inconceivable that any juror did not understand the defense relied upon by Kane; certainly any intelligent person who heard the evidence and the court's instructions would know that if Miss Echols consented to Kane's acts he could not be convicted. Accordingly, the verdict expressed the unanimous conclusion of the jurors that Kane took the money against the will of Miss Echols.

For these reasons, and also because the denial of the requested instructions, even if erroneous, did not constitute prejudicial error resulting in a miscarriage of justice, in my opinion the judgment should be affirmed.

SHENK and SPENCE, JJ., concurred.



ROEDDER v. ROWLEY et al.*
Civ. 15050.

District Court of Appeal, Second District,
 Division 2, California.
 Feb. 27, 1946.

Rehearing Denied March 13, 1946.

Hearing Granted April 25, 1946.

- 1. Appeal and error** ⇨1004(1)
Damages ⇨96
New trial ⇨76(1)

Sum to be allowed as damages for personal injuries is left, in first instance, to sound discretion of jury subject to review by trial judge in ruling on motion for new trial and power of appellate court to relieve defendant from judgment for an amount so plainly and outrageously excessive as to indicate that judgment was reached as the result of passion or prejudice.

- 2. Damages** ⇨130(3)

\$9,756.56 for plaintiff's general damages, consisting solely in being incapacitated for work for less than two months, occasional headaches, and at intervals numbness in his leg, was outrageously ex-

cessive and judgment for general damages in excess of \$2,500 could not be permitted to stand.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Alfred Carl Roedder against Clayton Wm. Rowley and others for damages sustained as the result of motor vehicle accident. From an adverse judgment, defendants Howard L. Lindsley and Pacific Tank Lines appeal.

Affirmed on condition of remittitur.

Spray, Davis & Gould, of Los Angeles, for appellants.

Tripp, Callaway, Sampson & Dryden, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff in the sum of \$13,964.83, after trial before a jury in an action to recover damages for injuries received as the result of an automobile accident, defendants appeal.

The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are:

On April 1, 1944, defendant corporation was the owner of a truck and trailer which was being operated by defendant Lindsley. Due to defendants' negligence the truck collided with a dump truck owned and driven by plaintiff. At the time of the accident plaintiff was 41 years of age, six feet four inches tall and weighed more than two hundred pounds. The vertebrae near the top of his spine, despite his size, were no larger than those in a woman of moderate size and the vertebrae in the lower part of his back were no larger than those of a medium sized man. In addition the lower spinous process including the sacrum had failed to fuse, thus predisposing plaintiff to strain injuries to an extent greater than that of an average person who has a structurally normal back. In addition to the incomplete development of the spinal structure there was an excessive growth of bony tissue indicating an arthritic process on the vertebrae of many years standing. Prior to the accident plaintiff had never had any pain or trouble with his back.

At the time of the accident plaintiff was dazed but stated to a police officer that he did not believe he was hurt and refused to

* Subsequent opinion 172 P.2d 353.

go to a hospital. The only appearance of injuries on plaintiff at the time of the accident was a tear in the back of his jacket and an area of broken skin approximately three inches in circumference on his back just above his waistline. After the accident plaintiff stayed at the scene thereof for approximately half an hour. Then he was taken home where he discovered that he had a prickly sensation in his back and a numb feeling in his leg and arm and also his head ached. The following day he went to his family physician who told him he had a contusion on his back and gave him electronic treatments. During the remainder of the day his arm ached, his right leg would go to sleep and his head ached. He remained at home during the month of April and returned to work on May 26, 1944.

The symptoms above mentioned were noticeable after plaintiff would sit for an hour or two and so continued to the time of the trial.

From May 26, 1944, until the time of the trial he drove his truck approximately four hours a day, though during one interval of three and one-half months he drove an average of about twelve hours a day. He absented himself from his work for a week or more each month because of pain and suffering resulting from the collision.

X-rays were taken of plaintiff's back and medical experts gave it as their opinion that he had suffered a back strain, partly muscular and partly to the bony structure of the back as the result of the accident.

Plaintiff's truck was damaged in the sum of \$2314.83. He paid \$60 for having it towed from the scene of the accident, and \$90 for medical bills and x-rays. For eleven months prior to the accident his average earnings were \$565.85 per month. For eight months following the accident his average income was \$347.92 per month which resulted in special damage for loss of income in the sum of \$1,743.44. The total special damages proven amounted to \$4,208.27 leaving general damages awarded plaintiff by the jury in the sum of \$9,756.56.

Defendants concede their negligence and rely for reversal of the judgment solely on this proposition:

The judgment awarding general damages is excessive.

This proposition is tenable. The evidence discloses that plaintiff suffered special damages in the amount of \$4,208.27. The judgment being for \$13,964.83, the difference of \$9,756.56 constitutes an award by the jury of general damages to plaintiff for pain, suffering and permanent disability.

[1] The rule is settled in California that the sum to be allowed as damages for personal injuries is left, in the first instance, to the sound discretion of the jury subject to review by the trial judge in ruling upon a motion for a new trial and the power of an appellate court to relieve a defendant from a judgment for an amount so plainly and outrageously excessive as to indicate that the judgment was reached as the result of passion or prejudice and was not predicated upon a fair and honest consideration of the facts. (Bellman v. San Francisco H. S. District, 11 Cal.2d 576, 586, 81 P.2d 894.)

[2] Applying the foregoing rule to the facts of the instant case, since it appears that plaintiff's general damages consisted solely in being incapacitated for work for less than two months, occasional headaches and at intervals numbness in his leg, the judgment for such general damages in the sum of \$9756.56 is outrageously excessive and indicates that it was reached as a result of passion or prejudice upon the part of the jury.

Our views find support in numerous decisions of appellate courts of this state.

In Bellman v. San Francisco High School District, supra, a high school girl, 17 years of age, suffered a fractured skull as the result of an accident. Thereafter she developed severe headaches and nausea and suffered dizziness, occasional vomiting, loss of weight and was confined to her bed for three weeks. The Supreme Court held that an award of \$15,000 was so grossly excessive as to raise a presumption that it could not have been based upon a fair consideration of the facts relating to the injuries and reduced the judgment to \$5,000.

In O'Donnell v. Excelsior Amusement Co., 110 Cal.App. 685, 294 P. 737, 295 P. 86, plaintiff received injuries which caused him to be hospitalized for forty-two days and kept away from work for fifty-two days, several teeth were loosened, two of which were extracted, and he sustained a compound fracture of the jaw causing him

a slight impairment of the use of his jaws. He also complained of poor eyesight and hearing. The District Court of Appeal reversed a judgment in favor of plaintiff in the sum of \$7,500 upon the ground that it was excessive. The Supreme Court denied a hearing.

In *Gladstone v. Fortier*, 22 Cal.App.2d 1, 70 P.2d 255, the plaintiff suffered a concussion of the brain and from it she experienced headaches for a year and a half. She was also susceptible to fatigue and found difficulty in mental concentration. She suffered a loss of salary in the sum of \$600 and incurred medical expenses in the sum of \$110. A judgment was awarded in favor of plaintiff in the sum of \$6500. The District Court of Appeal reduced the judgment to \$4,000 upon the ground that the award of general damages was excessive.

In *Hoover v. King*, 134 Cal.App. 16, 24 P.2d 871, the plaintiff had a swelling in the right knee, right ankle and left elbow as a result of an accident. She remained in bed and was partially disabled for four weeks. Her medical expenses amounted to less than \$300. The District Court of Appeal reversed the judgment in the sum of \$5000 for the reason that the judgment was excessive. (See also *Steinbrun v. Smith*, 123 Cal.App. 697, 700, 11 P.2d 868; *Epply v. Los Angeles Creamery Co.*, 216 Cal. 194, 195, 13 P.2d 664; *Wiezorek v. Ferris*, 176 Cal. 353, 357 et seq., 167 P. 234; *Hallinan v. Prindle*, 17 Cal.App.2d 656, 673, 62 P.2d 1075; *Wilburn v. United States Gypsum Co.*, 16 Cal.App.2d 111, 112, 60 P.2d 188.)

In view of the evidence in the present case a judgment for general damages in a sum exceeding \$2500 cannot be permitted to stand; therefore defendants are entitled to a new trial upon the sole issue of the amount of general damages, unless within thirty days from the filing of the remittitur in the court below, the plaintiff shall remit from the judgment the sum of \$7,256.56.

It is ordered that if such remission be so made then the judgment shall stand affirmed with neither side to recover costs upon appeal; otherwise it shall stand reversed and the cause be remanded for a trial upon the sole issue of general damages.

MOORE, P. J., and WILSON, J., concur.

ROMA et al. v. ELBERT, LIMITED.

Civ. 15194.

District Court of Appeal, Second District,
Division 2, California.

Feb. 28, 1946.

1. Quieting title ⇨44(4)

Plaintiffs were not entitled to decree quieting their title to realty based on quitclaim deed from trustees of dissolved corporation, where evidence failed to show any title or interest in the realty vested in corporation or its trustees but showed on the contrary that any such interest as may have been vested in corporation or its trustees was acquired by defendant through foreclosure of street improvement bonds before execution of quitclaim deed.

2. Taxation ⇨789(3)

Tax deed from state through which plaintiffs in quiet title action claimed title, was properly excluded from evidence in absence of showing that state had acquired title to the property.

3. Taxation ⇨788(2)

The statute making tax deed conclusive evidence of regularity of proceedings from assessment to acquisition of deed, refers only to regularity of taxing procedure and does not purport to declare that deed received by a purchaser from state is evidence that property had previously been deeded to state. Revenue and Taxation Code, § 3711.

4. Constitutional law ⇨55

The Legislature cannot make a tax deed conclusive evidence of jurisdictional matters that are essential to the exercise of taxing power.

5. Taxation ⇨746

A deed to state is a jurisdictional prerequisite to state's right to execute a deed to a purchaser at tax sale.

6. Taxation ⇨814(1)

Trial court erred in quieting defendant's title to realty acquired through foreclosure of street improvement bonds against claims of plaintiffs based on invalid tax deed from state without requiring defendant to reimburse plaintiffs for taxes which were due and unpaid on property when acquired through foreclosure

and which were paid by plaintiffs in order to obtain tax deed.

7. Taxation ⇨795, 800(1)

Defendant, had he not affirmatively asserted his own title acquired through foreclosure of street improvement bonds and sought to have such title quieted in him, could have defeated quiet title action based on tax deed from state on ground of invalidity of such deed without reimbursing plaintiffs for taxes which were due and unpaid on realty when acquired through foreclosure and which were paid by plaintiffs in order to obtain tax deed.

8. Taxation ⇨748

Payment of taxes, penalties and costs is a condition precedent to receiving a tax deed.

9. Taxation ⇨795, 800(1)

Where property owner, either as plaintiff or defendant, seeking affirmative relief against a tax title, seeks equitable relief against purchaser at a tax sale, he must repay taxes paid by purchaser at the tax sale.

10. Taxation ⇨693, 788(3)

Sale of land for nonpayment of taxes raised a presumption that taxes were due and unpaid and it would be presumed that purchasers at tax sale, having received deed from tax collector, paid all taxes then unpaid. Code Civ.Proc. § 1963, subd. 15.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Charles B. Roma and another against Elbert, Limited, a corporation, to quiet title to realty. From a judgment quieting defendant's title against the claim of plaintiffs, plaintiffs appeal.

Judgment modified and as modified affirmed.

Howland & Prindle, of Los Angeles, for appellants.

John F. Bender and G. Loshoncy, both of Los Angeles, for respondent.

WILSON, Justice.

Plaintiffs, claiming title through a quitclaim deed from the trustees of a dissolved corporation and a tax deed from the State of California, brought this action to quiet title to real property. This appeal is from

a judgment quieting defendant's title against the claims of plaintiffs.

[1] 1. *The effect of the quitclaim deed.* There was no evidence that title to the property, or any interest therein, was vested in the corporation or in its trustees. Over the objection of respondent to the introduction of the quitclaim deed on that ground the court admitted it in evidence dependent on the establishment of the grantor's title. Not only was this evidence not supplied but it was shown that such interest, if any, as may have been vested in the corporation, or its trustees, had been acquired by respondent through a commissioner's deed issued as the result of the foreclosure of a street improvement bond prior to the execution of the quitclaim deed.

[2] 2. *The effect of the tax deed.* The court sustained the objection of respondent to the admission in evidence of the tax deed from the State on the ground that the proper foundation had not been laid in that it had not been shown that the State had acquired title to the property. The court was correct in its ruling. *Swann v. Carson*, 56 Cal.App.2d 502, 132 P.2d 863, and cases there cited.

[3-5] Section 3711 of the Revenue and Taxation Code and the sections of the Political Code from which it is derived, relied on by appellants, provide that the deed is "conclusive evidence of the regularity of all proceedings from the assessment of the assessor to the execution of the deed, both inclusive." That section refers only to the regularity of the taxing procedure and does not purport to declare that the deed received by a purchaser from the State is evidence that the property had previously been deeded to the State. The legislature cannot make a tax deed conclusive evidence of matters that are essential to the exercise of the taxing power, that is, as to the steps that are jurisdictional in their nature. *Ramish v. Hartwell*, 126 Cal. 443, 448, 58 P. 920. See also *Carter v. Baker*, 133 Cal.App. 430, 432, 24 P.2d 539. The State cannot convey title that it does not possess. A deed to the State is a jurisdictional prerequisite to its right to execute a deed to a purchaser at a tax sale. Appellants made no offer of proof that the State had received a deed to the property in question. If such a deed existed it was a matter of public record and could have been

readily produced and offered in evidence. The record does not disclose that any request was made to the court for an opportunity to produce the missing document.

[6] 3. *The failure of the court to require reimbursement to appellants for taxes paid.* Appellants paid taxes on May 15, 1944, in the amount of \$800 and received a receipt therefor which was surrendered to the County Tax Collector when the tax deed was delivered to them. The decree quiets respondent's title against all claims of appellants but does not require that they be reimbursed for the taxes paid by them. In this the court was in error.

[7] Respondent might have rested on the invalidity of appellants' title and defeated the action without the necessity of repaying the taxes. *Moyer v. Wilson*, 166 Cal. 261, 264, 135 P. 1125. It was not content to resist appellants' action but in its answer respondent denied their title and affirmatively alleged its own title as having been acquired by reason of the separate foreclosure of two street improvement bonds. The answer prayed for a decree that respondent was the owner of the property and that appellants had no right, title or interest therein. Evidence was offered in support of said allegations, following which the court made findings in accordance therewith and rendered a judgment quieting respondent's title against all claims of appellants.

[8,9] By the decree as rendered respondent obtained its title free and clear of the taxes that were due and unpaid on the property when it was acquired by foreclosure and which, but for the payment by appellants, respondent would have been required to pay. Payment of the taxes, penalties, and costs is a condition precedent to receiving a tax deed. Where equitable relief is sought by a property owner against a purchaser at a tax sale the party seeking relief must do equity, and the repayment of the amount of the taxes paid by the purchaser at the tax sale does no more than to satisfy the equitable requirement. This rule obtains where the property owner as plaintiff initiates an action seeking relief against the tax deed (*Holland v. Hotchkiss*, 162 Cal. 366, 375, 123 P. 258, L.R.A.1915C, 492; *Campbell v. Canty*, 162 Cal. 382, 384, 123 P. 266), or where the holder of a tax deed is plaintiff and the defendant denies the validity

of the tax title and seeks affirmative relief against the same. *Beck v. Wilson*, 49 Cal.App. 281, 284, 193 P. 158; *Jones v. Sturzenberg*, 59 Cal.App. 350, 359, 210 P. 835.

[10] Respondent claims that it is not liable for repayment of taxes because there is no evidence that any taxes against the property were unpaid. It is presumed that taxes were due and unpaid, otherwise the property would not have been sold for their nonpayment. Appellants could not have received a deed from the Tax Collector without the payment of all taxes then unpaid, and it will be presumed that they paid them. It is presumed "that official duty has been regularly performed." Code Civ.Proc. sec. 1963, subd. 15. Appellant Charles B. Roma testified, in response to questions: "I paid the taxes up to date. * * * I paid taxes on May 15th, 1944. He [the Tax Collector] gave us only a receipt at that time, and later on we went back and surrendered the receipt." He further testified that he paid \$800 to the Tax Collector and received from him the tax deed, to which we have previously referred.

The decree quieting title in favor of respondent and against appellants cannot be disturbed, except to impose the condition hereinafter set forth, but the error in failing to require repayment of the taxes paid by appellants necessitates a modification of the judgment.

It is ordered that the judgment be and it is modified by adding thereto the following: "This judgment is made upon the express condition, anything hereinbefore to the contrary notwithstanding, that the defendant shall pay to plaintiffs, or deposit in court to be paid to plaintiffs on demand, the sum of \$800, with interest thereon from May 15, 1944, the same to be in satisfaction of all claims of plaintiffs by reason of the sum paid by them at the sale of said land to them by the Tax Collector of Los Angeles County for the State of California, and in satisfaction of the taxes for which said land was sold to the State by said Tax Collector preceding said payment by plaintiffs, and until such payment is made this judgment shall have no force in favor of said defendants." As so modified the judgment is affirmed, appellants to recover their costs on appeal.

MOORE, P. J., and McCOMB, J., concur.

73 Cal.App.2d 349

McCARGO v. MATUL.
Civ. 7182.

District Court of Appeal, Third District,
California.

Feb. 28, 1946.

1. Evidence ⇨538, 543½, 544

Where lessor in action in unlawful detainer alleged that lessee negligently managed nursery so that value of the soil was diminished, experienced neighboring nursery men who had observed the condition of the nursery stock and premises during the tenancy were qualified to testify so as to substantiate generally the allegation of waste and damage. Code Civ.Proc. § 1870, subd. 9.

2. Appeal and error ⇨1013

Before court would be warranted in saying that the award of damages was so grossly excessive as to constitute a miscarriage of justice, it is required to determine that the conclusion which the trial court reached in such regard was wholly without support in the record.

3. Landlord and tenant ⇨55(3)

Judgment of \$300 for negligent conduct of lessee in operation of nursery whereby top soil of leased premises was washed away or eroded by improper irrigation, and the fertility and vitality of the land depleted by permitting nursery stock to remain undug and unharvested for period of three years was not excessive.

4. Appeal and error ⇨932(1)

When an attack is made upon a judgment for damages as excessive, an appellate court must treat every conflict in the evidence as resolved in favor of the respondent and must give him the benefit of every inference that reasonably can be drawn in support of his claim.

Appeal from Superior Court, Placer County; Raymond McIntosh, Judge.

Action by John McCargo against Sam A. Matul to recover possession of property and damages for waste thereon. From a judgment for plaintiff, defendant appeals.

Affirmed.

166 P.2d—19½

George I. Lewis, of Sacramento, for appellant.

No counsel for respondent.

PEEK, Justice.

On April 29, 1942, respondent John McCargo leased to one William E. Dart a parcel of land in Placer County comprising approximately three acres, which was part of a tract of fifty acres owned by respondent. The leased portion consisted of virgin soil from which the trees and brush had been removed by the prior lessee. The term of the lease was two years, the consideration being merely nominal due to the fact that Dart's predecessor had paid in advance for the entire term but had been compelled to vacate possession prior to termination thereof. On March 26, 1943, Dart, with the consent of respondent, assigned all his right, title and interest in said lease and premises to appellant Sam A. Matul. Appellant went into possession and undertook to carry on the cultivation of the nursery stock then on the premises.

The lease contained the conventional covenants permitting the landlord to enter the premises at reasonable times for inspection, prohibiting waste or damage to the land, and providing for the termination of the lease and a right to compensation for damages in the event of a breach of any of the covenants or conditions thereof.

Sometime prior to the end of April, 1944, respondent became convinced that appellant was operating the premises in a careless and unworkmanlike manner, which would result in injury to the soil. However, he offered appellant a renewal of the lease at a substantial increase in the rental, and also notified appellant that, unless this were accepted, possession of the premises would be demanded by respondent, together with compensation for any damage caused to the property. Appellant refused to entertain the offer.

On June 15th, and again on July 17, 1944, respondent gave notice of default and made demand for performance of the covenants and conditions of the lease, or possession, in accordance with the applicable provisions of the Code of Civil Procedure and the terms of the lease. Upon appellant's failure to comply with said demands the present action in unlawful detainer was instituted. Respondent by his complaint claimed damages for the alleged negligent conduct in the operation of the nursery whereby the top soil of the leased premises was washed

away or eroded by improper irrigation, and the fertility and vitality of the land was depleted by permitting the nursery stock to remain undug and unharvested for a period of three years. At the conclusion of the hearing the trial court gave judgment for respondent and assessed the damages at \$300. Appellant's motion for a new trial, directed largely to the amount of the award, was denied.

[1] Appellant's first contention, although an attack upon the insufficiency of the evidence to support the judgment, is in effect an attack upon the admission by the court of certain testimony of neighboring farmers and nurserymen, who, appellant argues, were not experts qualified "by special knowledge, experience and skill in the science of analyzing soils and the eroding and diminution thereof." We find no merit in this contention. Sec. 1870, subd. 9, Code Civ. Proc.; 10 Cal. Jur. pp. 978, 1025, §§ 236, 279; Colusa, etc., R. Co. v. Leonard, 176 Cal. 109, 125, 167 P. 878; Thayer v. Tyler, 169 Cal. 671, 674, 675, 147 P. 979. Such witnesses were experienced and practical farmers and nurserymen who had observed the condition of the stock and premises during appellant's tenancy, and who testified generally to the same effect in substantiating the allegations of the complaint charging waste and damage due to neglectful or unskillful husbandry.

[2-4] The next ground on which appellant objects to the judgment, viz., that the damages awarded are excessive, is deserving of closer attention. It is difficult to determine from the record the precise basis on which the trial court predicated the figure of \$300. However, before we would be warranted in saying that the award of damages was so grossly excessive as to constitute a miscarriage of justice, we would be required to determine that the conclusion which the trial court reached in this regard was wholly without support in the record. See 8 Cal. Jur., pp. 834, 837, §§ 88, 90. This we cannot do; for it cannot be denied that the record does disclose testimony from which it can be ascertained that respondent suffered damages in the amount found by the court. When an attack is made upon a judgment as excessive, an appellate court must treat every conflict in the evidence as resolved in favor of the respondent and must give him the benefit of every inference that reasonably can be drawn in support of his claim. 8 Cal. Jur. p. 837, § 90, and cases cited.

This conclusion likewise disposes of appellant's final argument that the findings in this regard are unsupported by the evidence.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON J.,
concur.



73 Cal.App.2d 143

O'MELIA v. ADKINS.

Civ. 15077.

District Court of Appeal, Second District,
Division 2, California.

Feb. 19, 1946.

Rehearing Denied March 7, 1946.

Hearing Denied April 18, 1946.

1. Appeal and error ⇨837(4)
Pleading ⇨252(2)

Complaint amended to conform to the proof supplanted original complaint, and it alone would be considered by reviewing court.

2. Appeal and error ⇨1041(1)
Pleading ⇨251

Finding of a fact which was embraced in general issue, but not specifically set forth in amended pleading, was not prejudicial, though it would have been better practice to present in amended complaint all pertinent issues.

3. Equity ⇨39(1)
Judgment ⇨252(1)

Where an original pleading presents a state of facts appealing to a court of equity which thereupon takes jurisdiction, the court will endeavor to do complete justice and award whatever relief the evidence justifies, if within the issues, though not specifically prayed for.

4. Evidence ⇨441(1)

A written contract cannot be defeated, invalidated, or modified by testimony of a contemporaneous, parol, or contradictory agreement, in absence of an extrinsic ambiguity or of a pleading of invalidity, illegality, fraud, accident, or mistake. Code Civ. Proc. § 1856.

5. Trusts ⇨96

The mere failure of a grantee to perform his oral promise to reconvey does

not create a constructive trust, unless he was guilty of fraud in procuring the grant.

6. Fraud ⇨12

A promise to be fraudulent must be made in bad faith, without any intention of performing it.

7. Trusts ⇨110

Evidence of facts constituting a constructive trust must be explicit, unequivocal, and indisputable, particularly when the only person who could successfully have contradicted uncorroborated testimony is dead.

8. Trusts ⇨109

In action by divorced wife to impress trust on decedent's estate where deed conveying real property to decedent and supplemental agreement were both free from ambiguity, and it was neither pleaded nor proved that alleged oral agreement of decedent to reconvey to wife was made without intention of performance, testimony by wife of contemporaneous oral agreement by decedent to reconvey property or its equivalent to wife on request was improperly admitted. Civ.Code, §§ 1625, 1638; Code Civ.Proc. § 1856; § 1962, subd. 2.

9. Trusts ⇨107

A confidential relationship between divorced wife and husband which would furnish basis for impressing trust on proceeds from sale of real property pursuant to alleged oral agreement would not be presumed from her sentimental friendship for her former mate, nor from her confidence in his earning power, nor from her belief in his promises, since divorce restored her to her former status of an unmarried woman. Civ.Code, §§ 91, 132.

10. Trusts ⇨110

In action by divorced wife to impress trust on decedent's estate, evidence that the parties had been married for six years, that wife executed agreement without reading its contents and relied upon decedent's oral promises to reconvey property, did not establish a confidential relationship, in view of fact that parties were divorced and that wife had remarried. Civ.Code, §§ 91, 132.

11. Trusts ⇨365(5)

In action by divorced wife to impress trust on decedent's estate for amount of proceeds from real property alleged to have been conveyed to decedent under

supplemental written agreement and contemporaneous oral agreement that decedent would reconvey property or its equivalent to wife on request, where six years had elapsed since date of conveyance and alleged oral agreement and in the meantime decedent had sold the property without legal action being instituted, and husband died without wife filing a claim against his estate for moneys owed her, recovery was barred by laches. Prob.Code, § 716.

12. Limitation of actions ⇨66(15)

Where a demand is necessary to perfect a right of action, claimant cannot indefinitely extend the bar of limitations by deferring such demand, but must make it within a reasonable time, nor may he extend the period defined by the statute by making repeated demands. Code Civ.Proc. § 338, subd. 4; § 339, subd. 1.

13. Limitation of actions ⇨102(8)

Limitations begin to run promptly upon doing of acts which create constructive trust under which property is allegedly held. Code Civ.Proc. § 338, subd. 4; § 339, subd. 1.

14. Limitation of actions ⇨103(4)

Where action by divorced wife to impress trust on decedent's estate for amount of proceeds from real property alleged to have been conveyed to decedent under agreement that decedent would reconvey property or its equivalent to wife on request was not brought until more than three years after wife's discovery that decedent allegedly sold the property and fraudulently appropriated the proceeds to his own use, action was barred by limitations. Code Civ.Proc. § 338, subd. 4; § 339, subd. 1.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Juanita E. O'Melia against Gerald S. Adkins, executor of the estate of James E. O'Donnell, deceased, also known as J. E. O'Donnell, deceased, to impress a trust on estate for amount of revenues and profits and proceeds from sale of property alleged to have been held in trust by decedent. Judgment for plaintiff, and defendant appeals.

Reversed with instructions.

Roy P. Dolley and Wm. W. Kaye, both of Los Angeles, for appellant.

Joseph Scott, J. Howard Ziemann, and A. H. Risse, all of Los Angeles (Cuthbert J. Scott, of Los Angeles, of counsel), for respondent.

MOORE, Presiding Justice.

By appropriate pleading plaintiff sued to impress a trust upon the estate of decedent O'Donnell for the amount of the proceeds he had received from the sale of a property alleged to have been held in trust by decedent and for the revenues and profits derived from the same property. After trial the court ordered plaintiff to file an amended pleading to conform to the proof and awarded judgment as prayed. Defendant appeals on the grounds (1) that a cause of action was neither alleged nor proved; (2) that the alleged cause of action was barred by laches and by the statutes of limitation.

Facts Established

Plaintiff was married to James E. O'Donnell at Santa Ana on February 6, 1922. She lived with him for about six years after which they lived on friendly relations until August 29, 1936, when respondent obtained a divorce at Reno, Nevada. Seven months prior to that decree they entered into a property settlement whereby respondent acquired title to an apartment house situate in the city of Seattle, hereinafter referred to as the apartment. Thirty-eight days after her divorce respondent was married to Pat O'Melia with whom she has since lived on terms of cordiality. In December of 1936 at the request of decedent respondent conveyed to him by grant deed the apartment and at the same time they executed a written supplemental agreement in which it was declared that the apartment had been mistakenly included in the original property settlement agreement and that respondent "desires to amend" that instrument "to evidence the correction of such error." She did not read the document. Neither did she have advice of counsel nor receive a consideration. April 13, 1938, decedent made sale of the apartment for \$22,500 after having collected certain rentals therefrom. He departed this life in February, 1944, without having accounted to respondent. The court decreed a lien upon the entire estate of decedent in the sum of \$21,162.16, the net sum of all moneys received by decedent on account of the apartment less expense of sale.

The attack upon the pleading as well as upon the findings and evidence is based upon the fact that respondent pleaded, and was permitted to testify, that contemporaneously with the execution of the grant deed and the supplemental agreement decedent stated to her that it was necessary for him to have the title to the apartment in his name and that if she would convey it to him he would reconvey it or its equivalent to her upon her request; that she demanded a return on three different occasions prior to its sale by decedent but that he had refused to make such reconveyance or to pay its equivalent; that in reply to her requests for such reconveyance or payment decedent reassured her with such statements as the following: "I am no Indian giver; everything is o. k.; you have nothing to worry about; I will see that you are taken care of; I have always taken care of you and always will; I intend to reconvey the property or its equivalent to you." At no time did he state that he would not return the apartment or pay its equivalent, and respondent at all times believed in and relied upon decedent's promises.

The court found that the apartment was not included in the original property settlement by inadvertence or mistake and that its inclusion therein was not contrary to their agreement at the time but that both parties intended that the apartment should become the property of respondent; that the moneys received by decedent on account of the apartment constitute a part of decedent's estate; that at the time of executing the supplemental agreement respondent was ignorant of its contents and that her signature was obtained thereto by fraud and deceit. The court determined also that the action was barred neither by laches nor by any statute of limitation and that appellant has not been prejudiced by respondent's failure to file an action prior to the decease of Mr. O'Donnell, but that "in the middle of 1938" respondent learned that decedent had sold the apartment. She testified that she neither informed him of her new knowledge nor instituted an action to recover the equivalent because of his repeated reassurances of good faith.

Amended Pleading Supplants the Original Complaint

[1-3] A generous portion of appellant's briefs is devoted to arguments for the purpose of demonstrating variances between

the original complaint and the complaint as amended to conform to the proof. Those arguments are vain. Such amended pleading supplants all prior complaints. It alone will be considered by the reviewing court. *Dieckmann v. Merkh*, 20 Cal.App. 655, 658, 130 P. 27; *Bonney v. Petty*, 125 Cal. App. 527, 529, 13 P.2d 969. Other arguments of appellant criticize the findings and decision for including matters not specifically mentioned in the amended complaint. While it would have been better practice to present in the amended complaint all pertinent issues, yet no prejudice resulted from the finding of a fact which was embraced in the general issue, although not specifically set forth in the pleading. When an original pleading presents a state of facts appealing to a court of equity and the latter takes jurisdiction thereof, it will endeavor to do complete justice and award whatever relief the evidence justifies, if within the issues, even though not specifically prayed for. *Zellerbach v. Allenberg*, 99 Cal. 57, 68, 33 P. 786; *Hurlbutt v. N. W. Spaulding Saw Co.*, 93 Cal. 55, 57, 28 P. 795.

Paramountcy of Written Contract

Despite the clear and explicit language of the grant deed and supplemental agreement and over appellant's objections the court permitted respondent to testify concerning (1) her separation and property settlement in January, 1936; (2) her conversations with decedent at that time in which he said that he wanted her to have the Seattle apartment; (3) her conversations with him in December, 1936, prior to her conveyance in which he requested her "to lend it back to him" and she told him that she thought she should not, that it was hers and she should keep it; (4) his oral promise that he would "return the apartment house or the equivalent" at her request.

[4] It is a rule of substantive law that in the absence of an extrinsic ambiguity or of a pleading of invalidity, illegality, fraud, accident or mistake (Code Civ.Proc. § 1856), a written contract cannot be defeated, invalidated or modified by testimony of a contemporaneous, parol, contradictory agreement. *Estate of Gaines*, 15 Cal.2d 255, 264, 100 P.2d 1055; *McArthur v. Johnson*, 216 Cal. 580, 582, 15 P.2d 151; *Pacific States Securities Co. v. Steiner*, 192 Cal. 376, 220 P. 304; *Harding v. Robinson*, 175 Cal. 534, 540, 166 P. 808; *Hanrahan-Wilcox Corp. v. Jenison Mach. Co.*,

23 Cal.App.2d 642, 645, 73 P.2d 1241. A written contract supersedes all negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. Civil Code, sec. 1625. It is deemed to contain all terms agreed upon. If its language is clear and explicit and does not involve an absurdity (Civil Code, § 1638), and no issue of mistake, imperfection or validity of the agreement is in dispute, no evidence thereof other than its own contents is admissible. Code Civ. Proc. § 1856. It is a conclusive presumption that, with the exception of the specified consideration, the facts recited in a written instrument are true in any controversy between the parties thereto or their successors in interest. Code Civil Procedure, Sec. 1962, subd. 2.

The authorities cited by respondent in support of her contention that a valid trust was created (*Kobida v. Hinkelmann*, 53 Cal.App.2d 186, 127 P.2d 657; *Airola v. Gorham*, 56 Cal.App.2d 42, 46, 133 P.2d 78) are not in point. The *Kobida* action was one to enforce an "express oral trust involving personal property." [53 Cal. App.2d 186, 127 P.2d 658] The *Airola* case [56 Cal.App.2d 42, 133 P.2d 79] involved a "voluntary constructive trust" arising by virtue of the fraud of two sons who induced their mother to convey her interest in lands to them to be held "in trust for her and to be reconveyed as soon as pending business transactions involving said property * * * were completed." In violation of the confidence the mother had reposed in her sons, one son executed a deed conveying the lands to his wife and placed it in escrow to be delivered upon his decease.

There Was No Fraud

[5-7] It is contended by respondent that decedent's repudiation of his promise to hold the apartment or its equivalent in trust for her constituted a constructive fraud. So to hold would make every breach of contract a fraud. The mere failure of a grantee to perform his oral promise does not create a constructive trust unless he was guilty of fraud in procuring the grant. *All v. Prillaman*, 200 S. C. 279, 20 S.E.2d 741, 159 A.L.R. 981. In order for a promise to be fraudulent it must be made in bad faith, without any intention of performing it. It is held that even though a husband by deed conveys lands to his wife as an inducement for a reconciliation he cannot in the absence of

an allegation of fraud recover the property because of her failure to fulfill her agreement to live with him. *Bragg v. Bragg*, 219 Cal. 715, 721, 28 P.2d 1046. He cannot avoid the "legal consequences" of his solemn writing by parol evidence contradictory thereof. *Miller v. Brode*, 186 Cal. 409, 412, 199 P. 531. In the recent case of *Ampuero v. Luce*, 68 Cal.App.2d 811, 157 P.2d 899, the contention was made that at the time of the deed to her defendant had made a promise to provide Mr. Ampuero with medical care and that her repudiation of that promise operated as a constructive fraud. But the court held that in the absence of confidential relations a promise is fraudulent only when it is made without intention of performance. Moreover, evidence of facts constituting a constructive trust must be something more than that modicum of evidence ordinarily deemed sufficient to support a finding "where the matter is not so serious as the overthrow of a clearly expressed deed, solemnly executed and delivered." It must be explicit, unequivocal and indisputable. *Wehle v. Price*, 202 Cal. 394, 397, 260 P. 878, 879. Especially is this true when the only person who could successfully have contradicted the uncorroborated testimony is dead. *Olson v. Olson*, 4 Cal. 2d 434, 49 P.2d 827.

[8] The grant deed and the supplemental agreement are both free from ambiguity. It is not pleaded or suggested that they are void by reason of a statute or that in any respect they violate public policy. In definite and distinct language the agreement sets forth its purpose, recites a valuable consideration and "other valuable considerations" and respondent agrees to convey the apartment to decedent. It was neither pleaded nor proved that the promise of decedent was made without intention of performance but on the contrary continuously thereafter respondent relied upon it and took no action to enforce it until decedent lay in "the tongueless silence of the dreamless dust." It follows that the testimony of respondent was erroneously received and that appellant suffered material prejudice thereby.

No Confidential Relationship

[9,10] But respondent earnestly contends that the evidence established a confidential relationship between the decedent and respondent. It is true their relations had been close for 14 years, during six

of which they were husband and wife, and respondent testified that at the time of entering into the supplemental agreement she believed and relied upon O'Donnell's promise. But her marriage to O'Melia made a change in her status. That event had occurred less than three months before her negotiations with decedent for her conveyance of the apartment. During the period of her conversations with decedent prior to executing the two documents she frequently consulted her new husband as to the advisability of acceding to decedent's request. He never advised otherwise than against decedent's wishes and she concurred in his judgment. Moreover, the very fact of their divorce restored her to the status of an unmarried person (Civil Code, §§ 91, 132) and she was thereby completely discharged from the obligations of fidelity and fealty of a wife. *Barber v. Barber*, 16 Cal. 378; *Bacon v. Soule*, 19 Cal.App. 428, 433, 126 P. 384; *Ampuero v. Luce*, 68 Cal. App.2d 811, 157 P.2d 899, 902. Bearing no allegiance to decedent but owing her moral and material support as well as her loyalty to her husband, it cannot be said upon the basis of authority or philosophy that a relation of confidence existed between them. A confidential relationship will not be presumed from her sentimental friendship for her former mate, nor from her confidence in his earning power, nor from her belief in his promises. Their estrangement "for eight years" and their subsequent divorce upon her application swept away all private and secret relations. He was no longer her trusted and intimate partner. The fact that he had put her away as he had done with two former spouses necessarily created a gulf between them which could not have been bridged by his request of her by formal writing to place in his hands a valuable property without more security for its return than his oral promise. Neither was such confidential relationship proved by the testimony of respondent that he had asked her to obtain a divorce; that in the eight years of their estrangement she accompanied him only three or four times on social occasions; that after her marriage to Mr. O'Melia decedent was always friendly with her; that he regarded her like a daughter; that he said he was in sore need of the apartment, without stating a reason; that at the time of signing the supplemental agreement she knew the property would be returned to her; that she did

not read the document before signing it; that he always "virtually" said he would leave her something in his will "so that the equivalent would be that of the Seattle property"; that he did not say he would leave her something in his will "but I just assumed he would"; that when she signed the documents she left them on his desk; that after learning of the sale of the apartment she never asked decedent about the sale; that she relied on him at all times until he died. There is positively nothing in her testimony to indicate a confidential relationship other than her self-serving declarations that she executed the agreement without reading its contents and relied upon decedent's promises. However, granting that in contracting with decedent she was moved by the alleged confidential relationship, it does not necessarily follow that respondent may disprove the written agreement by parol.

The Action is Barred

[11] But even though a confidential relationship had obtained at the time of the contract, can it be conceived that such confidence persisted through the year 1937 when respondent made repeated demand for the return of the apartment, through 1938 when she learned that decedent had sold the property, to be followed by demands for the fulfillment of his promise, and through 1939 when her request was repeated in February? Did it continue through the succeeding four years and nine months to the end of Mr. O'Donnell's life—a period within which she never even suggested to him that he pay her the equivalent of the apartment? If such attitude of indulging one so generous with promise and so niggard in performance may be the concomitant of a confidential relationship, should equity indulge its jurisdiction to restore to a complainant what she has so eagerly entrusted to one to whom she owed no obligation save respect? For respondent to have delayed the enforcement of her demands in 1937, 1938, 1939, 1940, 1941, and 1942, can be ascribed to nothing but her own neglect. That she further delayed after her demand in 1943 spells nothing but laches. She knew or must have suspected that decedent's financial condition was not as sound as in other days. She knew that by virtue of the certainty of death he would at no distant day "shuffle off this mortal coil," and that when such event of nature should occur he would not be present to

extend to her the keys to his estate in satisfaction of his oral promises. No good reason appears, no excuse is offered, for her failure to institute legal action for over six years and until his death. Such a delay under the circumstances is a distinct badge of laches. *Archer v. Freeman*, 124 Cal. 528, 532, 57 P. 474. At a trial she could tell of oral promises; he would not be present to deny or explain. And, as if in recognition of her folly, when decedent had passed she did not file a claim against his estate for moneys he owed her, as the law provides. Probate Code, sec. 716. It follows that in view of her unreasonable delay, combined with the prejudice to the estate, her laches bars her right of recovery.

[12] Finally, appellant invokes the statutes of limitation. From this plea no escape appears reasonable. Section 338, subdivision 4, Code Civil Procedure, bars an action for relief from fraud or mistake three years after its discovery by plaintiff. Section 339, subdivision 1, bars recovery upon a contract not founded upon an instrument in writing. By virtue of her several demands upon decedent a cause of action arose in 1937, 1938, or in 1939. If she relied upon her claim of fraud she was required to file within three years. In 1938 decedent not only refused to reconvey the apartment but also he sold it and deposited all of the proceeds in his own bank account. Surely her action based on fraud was barred in 1941. If she relied upon the oral promise to reconvey, her suit was barred in two years. In any event she could maintain no action filed after 1942. If a demand is necessary to perfect a right of action the claimant "cannot indefinitely and unnecessarily extend the bar of the statute by referring such demand * * * but must make it within a reasonable time." *Bogart v. George Porter Co.*, 193 Cal. 197, 209, 223 P. 959, 964, 31 A.L.R. 1045. Neither may one extend the period defined by the statute by making repeated demands.

[13, 14] It is alleged that decedent "willfully, knowingly and fraudulently appropriated all of said money which he received from the sale of said property to his own use and benefit." In view of such claim neither demand nor repudiation was necessary to start the statute's running. She learned of the sale in 1938 and her right of action if any, arose at that time. Where the defendant is alleged to hold property

under a constructive trust the statute begins to run promptly upon his doing the acts which created the trust. *Lezinsky v. Mason Malt Whiskey Distilling Co.*, 185 Cal. 240, 244, 196 P. 884. Having failed to sue within three years after such discovery respondent may not maintain this action commenced six years thereafter.

The judgment is reversed with instructions to the court below to enter a dismissal.

McCOMB and WILSON, JJ., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.



73 Cal.App.2d 345

PEOPLE v. SLAYDEN.

Cr. 3955.

District Court of Appeal, Second District,
Division 2, California.

Feb. 28, 1946.

1. Criminal law ⇨1144(13)

On appeal by defendant, the evidence is to be viewed in light most favorable to the people.

2. Criminal law ⇨829(3)

Where court gave a proper instruction pertaining to the specific intent required to constitute unlawful taking of motor vehicle, court did not err in refusing instruction which would have excluded application of rule of law that an act if knowingly done is done with criminal intent and which would have charged that specific intent must be proved to a moral certainty and beyond a reasonable doubt. Vehicle Code, § 503.

3. Automobiles ⇨357

Criminal law ⇨808½

In prosecution for the taking or driving a vehicle without owner's consent, instruction as to the substance of the offense in language of Vehicle Code, and further instruction that consent could not be presumed because of owner's consent on a previous occasion to the driving of such vehicle was proper under evidence that owner had left automobile with defendant to be washed, that automobile disappeared

from defendant's lot, and that subsequently police found defendant driving automobile. Vehicle Code, § 503.

4. Automobiles ⇨355(10)

Evidence authorized conviction of offense of driving an automobile without owner's consent in owner's absence and with intent to temporarily deprive owner of his possession of such automobile. Vehicle Code, § 503.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Daniel Buddy Slayden was convicted of the unlawful driving or taking of a vehicle without owner's consent, and he appeals.

Affirmed.

Robert W. Kenny, of San Francisco, and Carl S. Kegley, of Los Angeles, for respondent.

William G. Kenney and William Mayhew, both of Los Angeles, for appellant.

McCOMB, Justice.

From a judgment of guilty of violating section 503 of the Vehicle Code (unlawful driving or taking a vehicle), after trial before a jury, defendant appeals.

[1] The evidence being viewed in the light most favorable to the People (respondent), and pursuant to the rules set forth in *People v. Pianezzi*, 42 Cal.App.2d 265, 269 et seq., 108 P.2d 732, the essential facts are:

On the 19th of April, 1945, Reverend Gesing, the complaining witness, left his car to be washed and parked in a parking lot at Eleventh and Los Angeles streets operated by defendant and his brother. The car was a Ford and bore a West Virginia license No. 176184. Defendant informed the complaining witness the parking lot would be closed at 6 p. m. At about 7 p. m. Reverend Gesing returned to the parking lot but was unable to find his car. The following day he returned to the parking lot and discussed with the defendant the loss of his car and at defendant's request, Reverend Gesing left with him his name and telephone number, written on a card, so that if defendant saw the automobile, he could call the complaining witness. The car not having been located on May 11, 1945, Reverend Gesing reported the loss to the Wilmington Police Station. On May

10, 1945, about 3 in the morning, Officer Graham observed defendant driving a car west on Anaheim Boulevard bearing a California license plate No. 3 H 1318. The officer stopped the car and found in the glove compartment the registration certificate of the car which had been on the steering wheel when the car was left in defendant's parking lot. The certificate showed the car was registered to "Reverend H. A. Gesing, Cleveland, Ohio." The police officer asked defendant to whom the car belonged and he stated it was his. Defendant was then arrested and at the police station said that the car had been stolen from the washrack in a parking lot where he had worked three weeks previous and that he had been searching for the car since then. He also stated that the California license plate on the car had been stolen from another car in the parking lot. He admitted that when he received the car he had no permission from the owner to do anything to it but wash the car.

Defendant relies for reversal of the judgment on three propositions which will be stated and answered hereunder seriatim.

First. *The court committed prejudicial error in refusing to give this instruction:*

"The rule of law that an act, if knowingly done, is done with criminal intent, has no application to cases where a specific intent is required. Such specific intent is a necessary ingredient or element of the offense and it must be proved to a moral certainty and beyond a reasonable doubt."

[2] This proposition is untenable. The court in fact gave a proper instruction to the jury pertaining to the specific intent required to constitute a violation of section 503 of the Vehicle Code. Such instruction read as follows:

"It is the law of this state that any person who shall take or drive a vehicle not his own without the consent of the owner thereof, and in absence of the owner, and with intent to either permanently or temporarily deprive the owner thereof of his title to, or possession of, such vehicle, whether with or without the intent to steal the same, shall be deemed guilty of a felony."

"It is also the law of this state that 'the consent of the owner of such vehicle to its taking or driving shall not, in any case, be presumed or implied because of such owner's consent on a previous occasion to

the taking or driving of such vehicle by the same, or a different person, and any person who assists in, or is a party or an accessory to, or an accomplice in, any such stealing or unauthorized taking or driving, shall also be deemed guilty of a felony." (See *People v. Neal*, 40 Cal.App.2d 115, 117, 104 P.2d 555.)

Second: *The court committed prejudicial error in instructing the jury as follows:*

"It is the law of this state that any person who shall take or drive a vehicle not his own without the consent of the owner thereof, and in the absence of the owner, and with intent to either permanently or temporarily deprive the owner thereof of his title to, or possession of, such vehicle, whether with or without the intent to steal the same, shall be deemed guilty of a felony."

"It is also the law of this state that the consent of the owner of such vehicle to its taking or driving shall not, in any case, be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same, or a different person, and any person who assists in, or is a party or an accessory to, or an accomplice in, any such stealing or unauthorized taking or driving, shall also be deemed guilty of a felony."

[3] This proposition is likewise untenable. The foregoing instruction was a correct statement of the principles of law embodied therein. (Section 503 of the Vehicle Code.) Such instruction was clearly applicable to the evidence before the jury and cannot accurately be said to have tended to confuse the jury.

Third: *The evidence is insufficient to sustain the judgment of guilty.*

[4] This proposition is also untenable. From the facts recited, supra, the jury was justified in inferring that defendant drove the complaining witness's car without the consent of the owner, in his absence and with the intent to temporarily deprive the owner of his possession of such vehicle. (*People v. White*, Cal.App., 162 P.2d 862; *People v. Jeffries*, 47 Cal. App.2d 801, 807, 119 P.2d 190.)

Since the record appears to be free from error and for the reasons stated above, the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

73 Cal.App.2d 177

KASHEVAROFF v. WEBB et al.

Civ. 12962.

District Court of Appeal, First District,
Division 2, California.

Feb. 21, 1946.

Rehearing Denied March 23, 1946.

Hearing Denied April 18, 1946.

1. Automobiles *↪*162(5)

Rectangular shaped open area at the confluence of five streets, which included an area which was not included within any of the boundaries of the streets extended and a still larger area not included within intersection of any two or more of such streets, was a "highway" and "roadway" within statutory definitions. Vehicle Code, §§ 81, 83.

See Words and Phrases, Permanent Edition, for all other definitions of "Highway" and "Roadway".

2. Automobiles *↪*162(5)

Where rectangular shaped open area at confluence of five streets was treated as a roadway, and pedestrian was crossing in a northerly direction street which entered areaway from the east and at right angles toward a curved sidewalk at the juncture of such street and street entering areaway from the northeast, pedestrian was crossing street in an "unmarked crosswalk" and had immediate use of highway therein over an automobile. Vehicle Code, §§ 81, 83, 85(a), 560(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Unmarked Crosswalk".

3. Statutes *↪*181(2)

That construction of a statute which appears to be reasonable is to be preferred. Civ.Code, § 3542.

4. Appeal and error *↪*1033(5)

Where court should have instructed jury as a matter of law that plaintiff was in an unmarked crosswalk when struck by defendant's automobile, error in leaving question to jury was favorable to defendant and defendant suffered no prejudice therefrom. Vehicle Code, § 85(a).

5. Appeal and error *↪*933(5)

Reviewing court would assume in support of order denying a new trial the truth

of affidavit in support of judgment that trial judge, in instructing with reference to existence of an unmarked crosswalk and in indicating on diagram, pointed only to portions of area which reviewing court decided constituted an unmarked crosswalk notwithstanding that trial judge used the words "marked or unmarked crosswalk." Vehicle Code, § 85(a).

6. Appeal and error *↪*1064(1)

Where issue was whether a particular area constituted an unmarked crosswalk and map disclosed no marked crosswalk where plaintiff was crossing, although there was a marked crosswalk some distance away, no prejudice resulted to defendant from trial judge's use of the words "marked or unmarked crosswalk." Vehicle Code, § 85(a).

7. Automobiles *↪*245(72)

Where plaintiff was crossing street in an unmarked crosswalk when struck by defendant's automobile, question of plaintiff's contributory negligence was for jury. Vehicle Code, §§ 85(a), 560(a).

Appeal from Superior Court, San Francisco County; Frank T. Deasy, Judge.

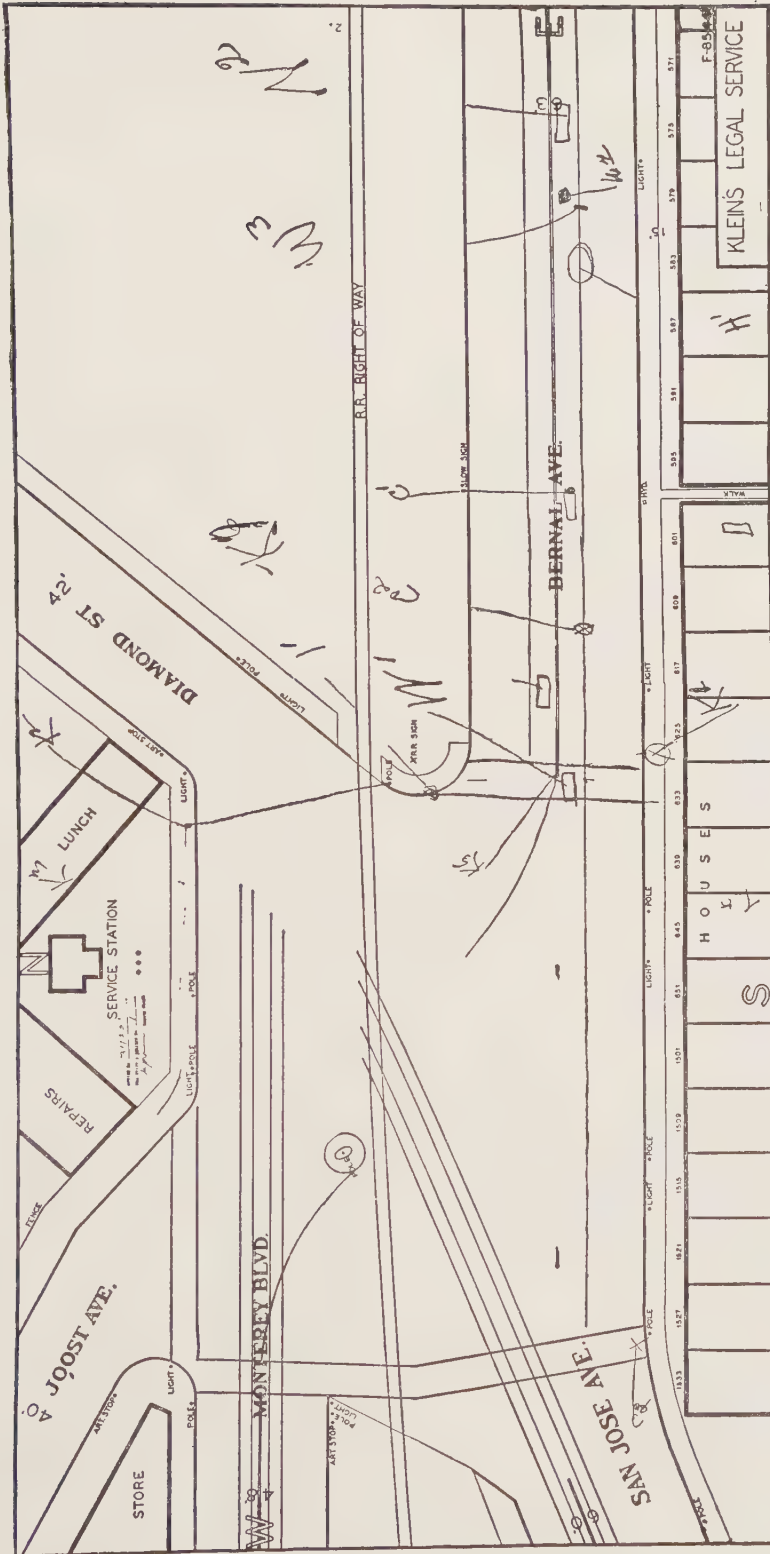
Action by Cyril A. Kashevaroff against Herbert R. Webb and others, to recover for injuries sustained when plaintiff was struck by defendant's automobile. Judgment for plaintiff and defendants appeal. Affirmed.

Bronson, Bronson & McKinnon, of San Francisco, for appellants.

H. O. Mundhenk, of San Francisco, and Jesse E. Nichols, of Oakland, for respondent.

DOOLING, Justice.

Defendants appeal from a judgment for plaintiff entered on a jury verdict. Respondent was struck and injured by an automobile operated by appellant Webb. The scene of the accident is difficult to describe in words and may best be visualized by a diagram thereof which is in evidence as plaintiff's exhibit No. 1, and is here reproduced, considerably reduced in size:



While there was a sharp conflict in the testimony we will follow the accepted procedure on appeal and state the substance of the evidence most favorable to the respondent. Shortly before midnight respondent was crossing from the southerly side of Bernal Avenue to the curved segment of sidewalk that lies between Bernal Avenue and Diamond Street. The course that he was taking lay between the two parallel lines which are shown on the diagram extending between the two sidewalks. (These parallel lines are not a part of the original diagram and do not represent marks on the street, but were placed on the diagram during the course of the trial.) Before leaving the curb respondent looked to his left toward San Jose Avenue and observed nothing approaching from that direction. He proceeded across Bernal Avenue to a point near its center line without again looking to his left. A motor car approached him traveling westerly on Bernal Avenue and he was dazzled by its, or some other, lights and just about that time appellants' automobile, which had come easterly along San Jose Avenue and was proceeding into Bernal Avenue, struck him.

The questions argued on appeal depend upon whether or not the respondent was walking in an unmarked crosswalk at the time that he was struck. The only marked crosswalks in the area are those shown on the diagram as solid parallel lines running northerly from the southerly sidewalk shown on the diagram to the curved sidewalk between Monterey Boulevard and Joost Avenue and thence at a right angle across the mouth of Joost Avenue.

It was stipulated that Diamond Street intersects Bernal Avenue at an angle of 49 degrees, and appellants argue that since this is so there can be no unmarked crosswalk between the southerly side of Bernal Avenue and the curved sidewalk lying between it and Diamond Street, under the definition of section 85(a) of the Vehicle Code which reads:

"'Crosswalk' is either:

"(a) That portion of a roadway ordinarily included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles * * *."

Respondent argues on the contrary that the open area into which Bernal Avenue and the other four streets enter is itself a highway within the definition of section 81

of the Vehicle Code and since this open area is intersected by Bernal Avenue at approximately right angles the crossing in question is an unmarked crosswalk under sec. 85(a).

The trial court took a middle ground and instructed the jury as follows:

"And now I am going to try to be brief, but I want to bring clearly to your attention one point (referring to diagram). First of all, in this case, there is a square of roadway, which is an open roadway space. The French call it a 'Place,' meaning an open space to which streets lead, or at which they commence. There is a square space at which San Jose Avenue either commences or ends; at which Monterey Boulevard either commences or ends, at which Joost Avenue either commences or ends, and at which Diamond Street either commences or ends, and at which Bernal Avenue either commences or ends. In other words, neither street carries right on through. It is called a 'Place' in that it is an open zone in a city at which streets lead to or from.

"Now as to whether this is a marked or unmarked crosswalk, this is the one to which your attention has been directed, on the east side, or at the end of Bernal into this Place. Now, remembering that in a marked or unmarked crosswalk under the Vehicle Code, the pedestrian has the privilege of immediate use of the highway, and remembering if it is not a marked or unmarked crosswalk, the vehicle has the privilege of the immediate use of the highway, so in your determination of the conflict of the evidence, that is, as to whether the crosswalk was here (indicating) or there (indicating) and having in mind there was a sidewalk on the south side of Bernal as it comes to its terminus or end at this place, and having in mind that there was a sidewalk down Diamond, as the pictures of the diagram show, on the north side, I will leave the question for you to determine whether this is a marked or unmarked crosswalk."

This instruction is attacked by appellants who claim that the jury should have been instructed as a matter of law that there was no crosswalk at this intersection.

It is apparent from an examination of the diagram that what the trial judge described as a "place" in the criticized instruction is an open area into which five streets debouch. This open area is almost a perfect rectangle which is intersected by Bernal Avenue and Monterey Boulevard

at approximately right angles, and by the other three streets at more acute angles.

That this open area is something more than an intersection formed by the five streets opening into it is not only apparent from an inspection of the diagram itself, but may be readily demonstrated by extending the boundary lines of the five streets across it. A considerable portion of the open area is not included within any of the boundaries of the five streets so extended and a still larger area is not included within the intersection of any two or more of them.

[1] This open area is itself a highway within the definition of section 81 of the Vehicle Code, viz.: "'Street' or 'highway' is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." It is also a roadway within the definition of section 83, Vehicle Code: "'Roadway' is that portion of a highway improved, designed or ordinarily used for vehicular travel."

On the easterly side of this open area is the small segment of curved sidewalk to which the respondent testified that he was crossing at the time of his injury. A tangent may be drawn from a point on the curb of this curved sidewalk which is perpendicular to the southerly line of Bernal Avenue and such tangent delimits the easterly line of the open area where it is intersected by Bernal Avenue. This tangent approximately coincides with the more westerly of the two lines which were actually drawn upon the diagram from the curved segment of sidewalk to the southerly line of Bernal Avenue.

[2] Treating the open area as a separate roadway, as we must under the physical facts having in mind the definitions of sections 81 and 83, Vehicle Code, the route by which respondent testified that he was crossing falls within the definition of an unmarked crosswalk as defined in section 85(a) of the Vehicle Code, viz.: "That portion of a roadway ordinarily included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles."

This is true because the open area and Bernal Avenue, both of which are roadways, intersect at that point and "meet at approximately right angles." That Diamond Street intersects both the open area

and Bernal Avenue at angles which are not approximately right angles is immaterial, since the intersection of the open area and Bernal Avenue is at right angles and it was across that intersection that respondent was traveling at the time that his injuries were received. The case is thus distinguishable from *Weissman v. Seehusen*, 55 Cal.App.2d 391, 131 P.2d 10, and *Vitali v. Straight*, 21 Cal.App.2d 253, 68 P.2d 746, where the only intersections involved were at acute angles.

[3] This conclusion is not only justified by the application of the relevant sections of the Vehicle Code to the physical facts, but it is strengthened, if need be, by the fact, which is obvious from an inspection of the diagram, that this route would appear to the average pedestrian to be the proper one to use in making the crossing which respondent was engaged in. Laws are made for the practical governance of men and it is axiomatic that the construction of a statute which appears to be reasonable is to be preferred. 23 Cal.Jur. 722; sec. 3542, Civil Code.

[4] It follows that the trial court should have instructed the jury as a matter of law that there was an unmarked crosswalk at this intersection. In leaving this question to the jury the instruction was more favorable to appellants than the law justified and appellants suffered no prejudice therefrom.

[5,6] There was a dispute between the parties, as evidenced by conflicting affidavits submitted on motion for new trial, as to the points indicated on the diagram by the judge in giving this instruction. We must assume in support of the court's order denying a new trial the truth of the affidavit in support of the judgment that the trial judge pointed only to portions of the area which we have decided was an unmarked crosswalk. That the trial judge used the words "marked or unmarked crosswalk" did not constitute prejudicial error although it was an admitted fact that there was no marked crosswalk at the place in question, since there was an unmarked crosswalk there as a matter of law.

[7] The other points argued by appellants depend upon their claim that there was no unmarked crosswalk at the point in question. Since we have decided that there was an unmarked crosswalk at that point respondent had the right of way and appellants' automobile was bound to yield to him.

Sec. 560(a), Vehicle Code. The question of respondent's contributory negligence was, under the circumstances, a question of fact for the jury.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J.,
concur.



73 Cal.App.2d 248

**STATE COMPENSATION INSURANCE
FUND v. INDUSTRIAL ACCIDENT
COMMISSION et al.**
Civ. 15155.

District Court of Appeal, Second District,
Division 2, California.

Feb. 25, 1946.

1. Workmen's compensation ☞1209

The limitation period in the Workmen's Compensation Act runs from the last payment of any compensation, and not from the last payment by the party sought to be joined in the proceeding. Labor Code, § 5405(a).

2. Workmen's compensation ☞1209

Where employee was injured while engaged by special employer and compensation insurance carrier for general employer paid temporary disability indemnity and thereafter, on employee's application for adjustment of his claim, commission joined special employer's insurance carrier, defense of statute of limitations was not available to special employer or its carrier, even though neither of them had made any payment of compensation or an agreement therefor within six months from date of injury. Labor Code, § 5405 (a).

3. Workmen's compensation ☞1790

In view of the statutory power given Industrial Accident Commission to alter or amend an order within 245 weeks from date of injury, an order is not final until that period has expired. Labor Code, §§ 5803, 5804.

4. Workmen's compensation ☞1794

Industrial Accident Commission did not act beyond its jurisdiction in granting a re-

hearing on application of insurance carrier for general employer within 245 weeks from date of injury, and in making award jointly and severally against carrier for general employer and carrier for special employer, in lieu of previous award against carrier for general employer alone. Labor Code, §§ 5803-5805.

5. Workmen's compensation ☞1778

The power of the Industrial Accident Commission to alter an award may not be predicated upon a mere change of opinion by the commission as to the correctness of its original decision. Labor Code, § 5803.

6. Workmen's compensation ☞1778

The fact that amount of original award to injured employee is not claimed to have been inequitable does not preclude the existence of good cause for Industrial Accident Commission to amend award by making award originally against insurance carrier of general employer joint and several against such carrier and insurance carrier of special employer. Labor Code, § 5803.

7. Workmen's compensation ☞1778, 1782

The Labor Code section requiring that Industrial Accident Commission have "good cause" to rescind, alter, or amend an award or order does not contemplate that the equity must exist only in favor of the employee or that equities in favor of employer and its insurance carrier should be ignored. Labor Code, § 5803.

8. Workmen's compensation ☞52, 1072

The Workmen's Compensation Act is for the benefit of employees and should be liberally construed to the end that they be given all the security afforded by the act for their indemnity, and equities between employers and their insurance carriers should not be permitted to diminish remedy of employee. Labor Code, § 3201 et seq.

9. Workmen's compensation ☞1778, 1782

Where both general and special employers are brought before Industrial Accident Commission, and the award discharges one instead of making a joint and several award against both, "good cause" exists for employer or insurance carrier against which award was made to raise the issue and object to discharge of other insurance carrier by petition for review. Labor Code, § 5803.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Cause".

10. Constitutional law ⇨301

Where Industrial Accident Commission, on petition for rehearing, notified parties that a rehearing would be granted unless good cause to the contrary were shown, and thereafter notified parties that unless good cause was shown to the contrary matter would be submitted upon the record "as it now stands", and no new factual matters were involved and only a question of law was to be determined, the method adopted afforded parties the opportunity to be heard contemplated by the due process provisions of the Constitution even though commission did not conduct a formal hearing upon petition to reopen and answer thereto. Labor Code, § 5803; Const. Cal. art. 1, § 13; U.S.C.A. Const. Amend. 14.

11. Workmen's compensation ⇨1075

The Industrial Accident Commission is a tribunal of limited jurisdiction, its powers being only those conferred on it by the Constitution and the Labor Code, and it cannot adjudicate a supplementary controversy involving rights of contribution and reimbursement between two insurance carriers jointly and severally responsible for the payment of a compensation award. Labor Code, § 3201 et seq.; Const. art. 20, § 21.

12. Workmen's compensation ⇨1075

Where order of Industrial Accident Commission went no further than to grant compensation to injured employee against two insurance carriers jointly and severally, commission acted within its jurisdiction, and finding of commission was not erroneous as an attempt to adjust the final liability of either of the insurance carriers. Labor Code, § 3201 et seq.; Const. art. 20, § 21.

Original proceeding on the petition of the State Compensation Insurance Fund to review an award of the Industrial Accident Commission of the State of California awarding compensation for personal injuries against petitioner jointly and severally with Industrial Indemnity Exchange, after original award had been made against Industrial Indemnity Exchange alone.

Award affirmed.

Donald Gallagher, of San Francisco, Richard Barry, of Placerville, and Ira Ratner, of Hollywood, for petitioner.

R. C. McKellips and Fred G. Goldsworthy, both of San Francisco, for respondent Industrial Accident Commission.

Charles W. Bowers, of Los Angeles, for respondent Industrial Indemnity Exchange.

WILSON, Justice.

Estall Neil Dean was in the employ of Signal Oil and Gas Company, hereinafter referred to as Signal. An oil well owned by Capital Company became obstructed and said company contracted with Signal to clear the obstruction and Signal sent a crew in charge of Dean to work on the well. He was injured on January 23, 1943, while engaged in the work. Respondent Industrial Indemnity Exchange, hereinafter referred to as Exchange, was the insurance carrier for Signal and petitioner was the insurance carrier for Capital Company. Dean filed an application for adjustment of his claim with respondent Commission on January 20, 1944. The Commission issued an order on March 20, 1944, joining petitioner in the proceedings. At the hearing before the Commission petitioner and Capital Company raised the defense of the statute of limitations based upon the fact that Dean's application was filed 11 months and 28 days after the date of his injury, and that neither petitioner nor Capital Company had furnished or agreed to furnish medical treatment or compensation. It was stipulated between Dean and Exchange that the latter, as insurance carrier for Signal, had paid Dean temporary disability indemnity and had furnished all medical treatment. Dean testified that neither petitioner nor Capital Company had furnished or agreed to furnish medical treatment or had paid or agreed to pay him any compensation.

On July 18, 1944, the Commission issued its findings and award wherein it was found that Dean, while generally employed by Signal and specially employed by Capital Company, sustained injury causing temporary total disability during several intermittent periods between the date of injury and February 1, 1944. It was further found that Dean's claim as to Capital Company and petitioner, its insurance carrier, was barred by the statute of limitations and that there was no liability on behalf of petitioner for medical treatment. The Commission made an award in favor of Dean against Exchange for the periods during which he was unable to work between the date of his injury and February

1, 1944, and dismissed the proceedings as to Capital Company and petitioner.

Exchange filed a petition for rehearing which was granted by the Commission, and on January 5, 1945, the decision on rehearing was issued affirming the findings and award made on July 18, 1944. No petition having been filed by Signal or Exchange for a review by the court of the Commission's decision, its last order became final on January 25, 1945.

On April 20, 1945, the Supreme Court rendered a decision in *State Compensation Insurance Fund v. Industrial Accident Commission*, Cal.Sup., 158 P.2d 195, holding that in the circumstances there existing a contractor was a general employer of an injured workman, although the crew in which he had been placed was working for a subcontractor at the time of the injury and the employee worked alternately for each employer and there was no exercise of joint control at any time. The decision further held that the fact that the injured employee made a claim against a special employer and its insurer did not bar a claim against the insurer of the general employer, where it was brought into the proceedings as a party defendant within six months after the last compensation payment had been made by the special employer's insurance carrier. Based on the interpretation of the law in said decision, Exchange filed a petition with the Commission on June 1, 1945, to reopen the proceedings, claiming that the decision of the Commission was contrary to law in that the Commission had found that Dean's claim against Capital Company and petitioner was barred by the statute of limitations.

The Commission issued a notice of intention to amend its findings of July 18, 1944, in response to which petitioner filed an answer alleging that the Commission was without jurisdiction to reopen the case or to reverse the previous decision that had already become final, or to enter an award against petitioner. On July 6, 1945, the Commission issued an order granting the petition to reopen and amend its findings by declaring that Dean's claim as to Capital Company and its insurance carrier, petitioner herein, was not barred by the statute of limitations, and thereupon entered an award for indemnity in favor of Dean against Exchange and petitioner, jointly and severally, for the same amounts previously awarded against Exchange alone,

but held that petitioner was not liable for medical treatment.

Signal and Exchange filed a petition for rehearing complaining that the amended findings and award were incorrect in holding that no liability rested on petitioner for medical treatment to Dean. Petitioner also filed a petition for rehearing on the ground that the Commission acted in excess of its powers for the reason that the findings and award of July 18, 1944, was a final adjudication that Dean's claim as to Capital Company and petitioner was barred by the statute of limitations, and that its award of said date dismissing petitioner was a final determination of its nonliability. The Commission granted both petitions for rehearing, and on August 14, 1945, issued its notice of intention to submit the pending matters unless within seven days good cause to the contrary should be shown.

On September 19, 1945, the Commission issued its decision on rehearing, in which it made the same findings as in its order of July 6, 1945, except that it found that there was a joint and several liability of petitioner and Exchange for medical treatment and made an award in favor of Dean against Exchange and petitioner, jointly and severally, for medical treatment as well as for compensation. This proceeding is to review the last mentioned order of the Commission.

[1,2] 1. *The statute of limitations.* The order of the Commission of July 18, 1944, holding that Dean's claim as to petitioner and Capital Company was barred by the statute of limitations, was based upon the fact that neither of them had made any payment of compensation, or an agreement therefor, within six months from the date of the injury, Labor Code, sec. 5405 (a), and that Dean's application for adjustment of his claim was not filed until 11 months and 28 days after the date of his injury. In so holding the Commission relied on *Ingram v. Department of Industrial Relations*, 208 Cal. 633, 641, 284 P. 212, in which it was held that where the injured employee, employed by two persons, filed his claim for compensation against one employer within the period provided by law and did not join the other party in the proceeding until after the expiration of the period, his claim as to the latter was barred and the filing of his claim against one employer did not toll the statute of limitations as to the other. See also *Fahey v. Industrial Acc. Comm.*, 29 Cal.App.2d 570, 572,

84 P.2d 1075. In *State Compensation Ins. Fund v. Industrial Acc. Comm.*, Cal.Sup., 158 P.2d 195, 198, the court discusses and distinguishes the *Ingram* and *Fahey* cases and holds that the statute of limitations runs from the last payment of *any* compensation and not from the last payment by the party sought to be joined in the proceedings. Payment of compensation having been made by Exchange to Dean, the defense of the statute of limitations is not available to petitioner and Capital Company.

[3] 2. *The power of the Commission to grant a rehearing and to reopen the proceeding.* Section 5803 of the Labor Code provides that the Commission has continuing jurisdiction over *all* its orders, decisions, and awards, and at any time, good cause appearing therefor, upon notice and after an opportunity to be heard is given to the parties in interest, the Commission may rescind, alter, or amend any such order, decision, or award; also that "Such power includes the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this division, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished, or terminated." Section 5804 provides that no award of compensation shall be rescinded, altered, or amended after 245 weeks from the date of the injury, and section 5805 that any order, decision, or award rescinding, altering or amending a prior order, decision, or award shall have the effect of the original order, decision, or award. The order made by the Commission on September 19, 1945, of which petitioner complains, was made within 245 weeks from the date of the injury. Petitioner contends that the decision on rehearing issued on January 5, 1945, was a final adjudication that Dean's claim as to Capital Company and petitioner was barred by the statute of limitations and that the Commission was without power to reopen the proceedings in June, 1945, or to make its order of September 19, 1945, reversing its former decision and making an award against petitioner. In view of the statutory power given to the Commission to alter or amend an order within 245 weeks from the date of the injury, an order cannot be said to be final until that period shall have expired. It has continuing jurisdiction over its decisions within said period and power

to alter or amend an award if good cause appears therefor.

In *Georgia Casualty Co. v. Industrial Acc. Comm.*, 177 Cal. 289, 293, 170 P. 625, it was held that by reason of the provisions of the Workmen's Compensation Act, as the same existed at that time, the power of the Commission to amend or alter its orders and awards was limited to cases in which the injured employee's disability had either increased, diminished, or terminated, and that in altering or amending its order the Commission was permitted to consider only such facts as arose subsequently to the making of such award. After the decision in the *Georgia Casualty* case the Workmen's Compensation Act was amended by including the language now found in sections 5803, 5804, and 5805 of the Labor Code.

In *Bartlett Hayward Co. v. Industrial Acc. Comm.*, 203 Cal. 522, 265 P. 195, the question was whether the Commission had power to reopen a proceeding after the award had become final by reason of failure to petition the court for a review. An employee had lost the sight of one eye but was thereby rendered totally blind due to the fact that he had previously lost the other eye. The Commission made its award upon the basis of a twenty-five per cent permanent disability rating by reason of his loss of only one eye in the accident. No petition for a rehearing was filed and no application was made for a review by the court. Thereafter, in *Liptak v. Industrial Acc. Comm.*, 200 Cal. 39, 251 P. 635, where the facts were identical with those above stated, the court held that the employee was entitled to a total disability rating, and directed the Commission to make an award to him on that basis. Thereafter the injured employee whose rights were the subject of inquiry in the *Bartlett Hayward* case filed a petition with the Commission for an amendment of its findings and award to conform to the holding in the *Liptak* case and to allow him a rating of one hundred per cent disability. The Commission found that good cause appeared therefor and amended its former finding in accord with the applicant's petition. The *Bartlett Hayward Company* and its insurance carrier, asserting that the previous order of the Commission (no petition for a rehearing or for review having been filed) had become final and constituted a final adjudication of the rights of the parties, and no new or further disabilities having been shown,

contended that the Commission was without power to increase the original award. Section 20(d) of the Workmen's Compensation Act then in force contained the same provisions as those now found in section 5803 of the Labor Code. The court held in the Bartlett Hayward case at page 531 of 203 Cal. at page 198 of 265 P., that the word "including" is not one of limitation but rather of enlargement and that the clause beginning "including the right" in the Workmen's Compensation Act (the same phraseology is found in section 5803 of the Labor Code) was not a limitation upon the larger and more general power granted by that portion of the statute which conferred "continuing jurisdiction" upon the Commission to alter or amend an award; that such jurisdiction was not limited to the consideration of changes in the physical condition of the injured employee but extended to the right to alter or amend its award upon good cause appearing therefor; and that the mistake or inadvertence of the Commission in making its first award on a basis lower than that to which the injured employee was entitled constituted good cause.

[4] By reason of the law as declared in the Bartlett Hayward case, *supra*, and in *State Compensation Insurance Fund v. Industrial Acc. Comm.*, Cal.Sup., 158 P.2d 195, *supra*, we conclude that the Commission was not acting beyond its jurisdiction in granting the rehearing and in making the award jointly and severally against petitioner and Exchange in lieu of the previous award against the latter alone.

The rule in the Bartlett Hayward case has not been, as asserted by petitioner, overruled or limited. In *United Dredging Co. v. Industrial Acc. Comm.*, 208 Cal. 705, 284 P. 922, the facts were these: An award of a death benefit had been made to the widow of the employee who had been drowned in the navigable waters of San Francisco Bay while in the employ of the dredging company. The employer and its insurance carrier claimed that because the employee had been drowned in navigable waters the Industrial Accident Commission was without jurisdiction, and that the widow's claim for indemnity should have been asserted under the federal maritime law. The award was affirmed by the District Court of Appeal. *United Dredging Co. v. Industrial Acc. Comm.*, 92 Cal.App. 110, 267 P. 763. The court relied upon previous decisions of the Supreme Court,

among them *London Guarantee & Acc. Co. v. Industrial Acc. Comm.*, 203 Cal. 676, 265 P. 825. Thereafter that case was reversed by the United States Supreme Court. *London Guarantee & Acc. Co. v. Industrial Acc. Comm.*, 279 U.S. 109, 49 S.Ct. 296, 73 L.Ed. 632. After the latter decision had been rendered *United Dredging Company* and its insurance carrier petitioned the Industrial Accident Commission to reopen the proceeding and to annul its award on the grounds that the Commission had been in error in making the award and that the decision of the United States Supreme Court confirmed the claim originally made before the Commission that the latter was without jurisdiction of accidents occurring in navigable waters. The petition to reopen was denied by the Commission. Upon review of said order the Supreme Court said that principles of law necessarily involved and decided by appellate courts are binding upon the lower courts in future proceedings in the same case, and, upon a later appeal, the appellate court will regard the prior decision as the law of the case and will not inquire into its correctness. The previous affirmance of the award by the District Court of Appeal was declared to be the law of the case, binding on the Commission, and for that reason the order refusing to reopen the proceeding was affirmed. *United Dredging Co. v. Industrial Acc. Comm.*, 208 Cal. 705, 712, 284 P. 922.

Petitioner also relies on *Mantyla v. Industrial Acc. Comm.*, 130 Cal.App. 139, 19 P.2d 799. In that case the applicants, whose claim had been rejected by the Commission on the ground that the evidence did not show that the applicants had been injured in the course of employment, applied for a rehearing upon the grounds: (1) That the evidence before the Commission did not justify the findings, and (2) that applicants had discovered new and further evidence which, with reasonable diligence, could not have been produced at the hearing. As to the first ground the court held that it was one which might have been considered on a review of the original award by the court, which had not been sought by the applicants, and, as to the second, that there was no showing that the alleged newly discovered evidence could not, with reasonable diligence, have been produced at the hearing. In *Merritt-Chapman & Scott Corp. v. Industrial Acc. Comm.*, 6 Cal.2d 314, 57 P.2d 501, the court annulled an order of the Commission set-

ting aside its previous order and granting the injured employee an increased award for permanent disability. In that case the court, after a review of the proceedings before the Commission, held that "good cause" means that some good ground must exist that was not within the knowledge of the Commission at the time of making the former award, which renders the original award inequitable, that a mere change of opinion by the Commission was not sufficient justification for amending the award, and that the so-called newly discovered evidence was not shown to have been unavailable to the applicants at the first hearing. The court further pointed out that "good cause" upon which the award was amended in the Bartlett Hayward case consisted of a decision of an appellate court which disclosed the error of a ruling for disability rating that had previously been applied by the Commission. The Merritt-Chapman case does not overrule the Bartlett Hayward case, but refers to it as "the leading case" defining the power of the Commission to reopen proceedings and to alter or amend its awards. There is no implication in *Young v. Industrial Acc. Comm.*, 63 Cal.App.2d 286, 146 P.2d 693, that the Bartlett Hayward case was overruled by the Merritt-Chapman case. The opinion in the *Young* case goes no further than to suggest an inference that the Merritt-Chapman case may be understood as applying only in cases where the Commission is asked to change its opinion as to a finding of fact.

Bartlett Hayward Co. v. Industrial Acc. Comm., 203 Cal. 522, 265 P. 195, *supra*, not having been overruled or modified, the rules of law laid down therein and in *State Compensation Insurance Fund v. Industrial Acc. Comm.*, Cal.Sup. 158 P.2d 195, *supra*, that it was within the jurisdiction of the Commission to reopen a proceeding and to make an award different from that which it had previously made, are controlling here.

[5] 3. Did "good cause" exist for the reopening of the proceeding? By section 5803 of the Labor Code the Commission has continuing jurisdiction over its orders and awards and may rescind, alter, or amend the same, "good cause appearing therefor." The power of the Commission to alter an award "may not be predicated upon a mere change of opinion by the commission as to the correctness of its original

decision." *Merritt-Chapman & Scott Corp. v. Industrial Acc. Comm.*, 6 Cal.2d 314, 316, 57 P.2d 501, 502. The jurisdiction of the Commission to act in the instant proceeding is not restricted by any of the cases cited in this opinion. The Commission did not change its opinion. In its previous order it construed the law according to the views of its members, but its construction was erroneous, as shown by a subsequent decision of the court. Its amended order and award were made to accord with the views of the court whose construction of the law superseded that of the Commission. Nor was the law changed by the decision of the court. The rule announced was already the law but had not been declared by the court, occasion therefore not having previously arisen.

[6] Petitioner asserts that good cause is not shown in the instant proceeding for the reason that the amount of the original award is not claimed to have been inequitable as to Dean, the injured employee, and that the Commission acted outside its jurisdiction in granting the petition of the insurance carrier of the general employer, against which the original award was made, and in making a joint and several award against said carrier and the insurance carrier of the special employer.

There is nothing in the statute that so limits the power of the Commission. The instant proceeding is one of those contemplated in *Bartlett Hayward Co. v. Industrial Acc. Comm.*, 203 Cal. 522, 540, 265 P. 195, wherein it was prophesied that the Commission would be called upon in many cases by the employer and the insurance carrier as well as by the employee to alter, amend, or rescind an award by reason of a mistake or on other grounds recognized by law, as the justice of the case might require. The court further said that the recognition of the continuing jurisdiction of the Commission for the full period provided by law would make for the final adjustment of controversies by the tribunal established by the people of the state for that particular purpose, in harmony with the spirit and purpose of the Workmen's Compensation Act.

The other cases relied on by petitioner are not in point. One case holds that a proceeding cannot be reopened on the petition of the injured employee where he had failed to apply for a rehearing within the period allowed by law and where he raised

no issue that could not have been presented on a rehearing of the award, *Young v. Industrial Acc. Comm.*, 63 Cal.App.2d 286, 290, 146 P.2d 693; in another it is declared that where an alleged error of the Commission in construing the evidence could be corrected on a review of the proceedings by the court and timely application is not made therefor a petition to reopen the proceedings before the Commission should be denied. *Mantyla v. Industrial Acc. Comm.*, 130 Cal.App. 139, 140, 19 P.2d 799.

[7] The statute does not contemplate that "good cause" or the equities must exist only in favor of the employee. There is nothing in the statute or in the cases that have been called to our attention indicating an intention that equities in favor of the employer and its insurance carrier should be ignored by the Commission. In *Ocean Acc. & Guar. Corp. v. Industrial Acc. Comm.*, 12 Cal.2d 116, 82 P.2d 603, the injured employee filed his application for compensation against his employer and did not name the insurance carrier. The employer did not file an answer and after a hearing the Commission made an award against him. Judgment was rendered against the employer and an execution thereon was levied on his bank account. Thereafter, upon petition of the employer the Commission joined the insurance carrier as a defendant and amended its award to include the latter. The order was annulled. The court held that the employee was fully secured by reason of the levy of the execution and that good cause was not shown for amending the award. The court said at page 120, of 12 Cal.2d, at page 605 of 82 P.2d: "All of the equities are in favor of the insurer who had no notice of the injury or of the application for compensation until long after the award became final." In the *Merritt-Chapman* and *Mantyla* cases, supra, the petitions to reopen the proceedings before the Commission were filed by the injured employees and in each case the court held, for reasons previously outlined in this opinion, that "good cause" for reopening had not been shown.

[8,9] The statute is for the benefit of employees and should be liberally construed to the end that they be given all the security afforded by the statute for their indemnity. Equities between employers and their insurance carriers should not be permitted to diminish the remedy of the employee. *American Motorists Ins. Co. v. In-*

dustrial Acc. Comm., 8 Cal.2d 585, 588, 67 P.2d 103. Where both employers are brought before the Commission and the award discharges one instead of making a joint and several award against both, the employer or the insurance carrier against which the award was made may, by petition for review, raise the issue and object to the discharge of the other insurance carrier. *Hartford Acc. & Ind. Co. v. Industrial Acc. Comm.*, 8 Cal.2d 589, 591, 67 P.2d 105.

[10] 4. *The failure of the Commission to hold a formal hearing on the petition to reopen was not jurisdictional.* Petitioner asserts that it was deprived of an opportunity to be heard and also denied due process in violation of section 13 of Article I of the Constitution of California and of the Fourteenth Amendment to the Constitution of the United States by reason of the fact that after the Commission had granted Exchange's petition for rehearing and had reopened the proceedings the Commission did not set a date for hearing and did not conduct a formal hearing upon the petition and petitioner's answer thereto.

Section 5803 of the Labor Code authorizes the reopening of proceedings "upon notice and after an opportunity to be heard is given to the parties in interest." Upon the filing on June 1, 1945, of the petition of Exchange to reopen, the Commission issued a notice of intention reciting that unless good cause to the contrary should be shown within seven days from the date of the notice it would amend its previous findings and award by finding that Dean's claim was not barred against Capital Company and its insurance carrier, and would further amend its findings and award by making an award against Exchange and petitioner, jointly and severally. Thereupon petitioner filed its answer urging that the Commission was without jurisdiction to reopen the case or to reverse its previous decision, that was alleged to have become final, or to enter an award against petitioner. The Commission then issued its order granting the petition for rehearing. Thereafter the Commission issued its notice to all parties stating that unless good cause to the contrary should be shown in writing within seven days from the date of the notice the matter would be submitted upon the record "as it now stands." Petitioner did not file any response to said notice and by neglecting so to do failed to show any cause why

the proceeding should not be submitted as recited in the notice.

The petition for rehearing raised issues of law and not of fact and did not require an examination of the facts other than that which had been had before the Commission in its previous hearings. The objection is disposed of by *Massachusetts Bonding & Ins. Co. v. Industrial Acc. Comm.*, 176 Cal. 488, 168 P. 1050, where, after the original award to the injured employee had been paid in full, he applied to the Commission for an additional allowance on account of a permanent disability rating. The Commission served on the insurance carrier a notice stating that unless good cause to the contrary were shown the previous finding and award would be amended so as to provide for a further allowance. The insurance company filed its answer objecting to the proposed amendment. Without conducting a further hearing the Commission made the additional award petitioned for by the employee. The insurance company's claim that the Commission was without jurisdiction to make the last award for the reason that the notice did not fix a time for hearing was answered by the court in the following language (at page 491 of 176 Cal. at page 1051 of 168 P.), which also answers petitioner's objection in the instant case: "Any notice or method of procedure which does not transgress the constitutional mandate regarding due process of law, or the provisions of the act itself, is within the power of the commission. It is not obliged to follow the methods in use in the ordinary courts of the land. The method here provided gave the parties interested an opportunity to make such objection and opposition before the commission to the proposed amendment as they desired. So far as we can perceive it is not open to any objection on constitutional grounds. The act provides that such awards may be amended, 'if opportunity to be heard is given.' This method afforded such opportunity, and does not contravene the provisions of the act in that regard."

[11] 5. *The right of contribution and reimbursement is not involved in the Commission's order.* The order under review declaring petitioner and Exchange jointly and severally liable contains a finding that Exchange is entitled to credit for all sums previously paid by it as disability indemnity. The Commission is a tribunal of limited jurisdiction, its powers being only those

conferred on it by section 21 of Article XX of the Constitution and the Labor Code, and it is without power "to adjudicate a supplemental controversy involving rights of contribution and reimbursement between two insurance carriers jointly and severally responsible for the payment of a compensation award." *State Compensation Ins. Fund v. Industrial Acc. Comm.*, 20 Cal.2d 264, 266, 125 P.2d 42, 44. In that case no question was raised as to the joint and several liability of the insurance carriers but after the award had become final a petition was filed with the Commission for a supplemental adjustment of obligations between the insurance carriers, the application having been made by reason of the fact that one carrier had received all the insurance premiums based on the employee's earnings and the other carrier had received none. The Commission being without power to determine the question its order refusing to assume jurisdiction was sustained.

[12] The order now under review does not purport to determine the respective rights of petitioner and Exchange as to contribution or reimbursement, if there be such rights (concerning which we intimate no opinion), by reason of the joint and several liability imposed upon them by the award. It goes no further than to grant compensation to Dean against the two insurance carriers, jointly and severally, and in so doing the Commission acted within its jurisdiction. *State Comp. Ins. Fund v. Industrial Acc. Comm.*, Cal.Sup., 158 P. 2d 195, 197. Exchange had paid the entire disability indemnity prior to the final order of the Commission that for the first time directed petitioner to unite in payment of indemnity to Dean. The finding did not purport to adjust the final liability of either of the insurance carriers. Petitioner's liability was determined not by the initiative of the Commission but by the law as pronounced by the Supreme Court, by reason of which it inevitably follows that its liability began at the date of Dean's injury and not at the date of the Commission's order. If the order had failed to allow credit to Exchange for the amounts that it had already paid, petitioner would have been absolved from the payment of any of the indemnity for the period previous to the making of the order. To have permitted it to escape payment of its share of the amounts lawfully payable to Dean

from the date of his injury would have effected an unlawful and inequitable consequence.

The award is affirmed.

MOORE, P. J., and McCOMB, J., concur.



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BENNETT v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

Civ. 3390.

District Court of Appeal, Fourth District, California.

Feb. 21, 1946.

1. Contempt ⇨60(3)

Witnesses ⇨300

A proceeding for constructive contempt is of such a distinctly criminal nature that a mere preponderance of evidence is insufficient, and defendant cannot be compelled to be sworn as a witness nor be convicted on the uncorroborated testimony of an accomplice. Code Civ.Proc. § 1211.

2. Certiorari ⇨64(1)

While the writ of certiorari is not a writ of error, it nevertheless extends to the whole of the record of the court below, and to evidence where necessary to determine jurisdiction.

3. Contempt ⇨67

In certiorari to review a contempt proceeding, the charge, evidence, findings and judgment are strictly construed in accused's favor, and no intendments or presumptions can be indulged in aid of their sufficiency.

4. Contempt ⇨67

In certiorari to review a contempt proceeding where record fails to show affirmatively upon its face the existence of all the necessary facts upon which jurisdiction depends, order must be annulled.

5. Contempt ⇨63(4)

In cases of contempt committed in the presence of the court, the order adjudging

the contempt must recite facts which actually constitute contempt. Code Civ.Proc. § 1211.

6. Contempt ⇨10

Where defendant's theory was that plaintiff's disability and pain, if any, were not the result of injuries suffered on defendant's bus, but because of a syphilitic infection overemphasized by the circumstances of the trial, the act of defendant's counsel in asking five questions about syphilis, in light of five questions by plaintiff's counsel on the subject and one question by trial judge, which drew an answer mentioning syphilis, during the course of a trial lasting three days, did not warrant an adjudication of contempt against defendant's counsel for "repeated and unwarranted" references to syphilitic infection. Code Civ.Proc. § 1211.

7. Damages ⇨166(1)

Trial ⇨110

Where defendant contended that plaintiff's disability and pain, if any, were not the result of injuries suffered on defendant's bus, but because of a syphilitic infection, plaintiff's affliction was an important element in the question of damages, and defendant's counsel was warranted in making inquiry concerning such affliction.

8. Contempt ⇨63(4)

Where attorney was adjudged guilty of contempt for asking repetitious questions and repeating questions already asked and answered, conclusions of trial judge that questions were repetitious, redundant, irrelevant, immaterial, and had been asked and answered, were not sufficient to support order of contempt, and the questions regarded as contemptuous should have been set forth in the order. Code Civ.Proc. § 1211.

9. Contempt ⇨10

Record failed to support specification for contempt that attorney was guilty of repeated interruptions of answers of witnesses, particularly where at no time during three days of trial in question did trial judge call attorney's attention to interruption of a witness when answering a question. Code Civ.Proc. § 1211.

10. Contempt ⇨10

Specification that attorney argued objection before and after court's ruling thereon did not authorize adjudication of

contempt, since it is a counsel's privilege, if not his duty, to argue an objection before trial judge rules upon it, unless requested or instructed not to do so by the court. Code Civ.Proc. § 1211.

11. Witnesses ⇨351

It is not necessary to lay the same foundation in cross-examination of plaintiff to be able to prove acts and circumstances contradicting her testimony that is necessary to establish prior to the impeachment of a witness by former contradictory statements.

12. Contempt ⇨10

A court may not punish an attorney for contempt because attorney is honestly mistaken in his interpretation of the law when he presents his mistaken views to the court in a proper and respectful manner. Code Civ.Proc. § 1211.

13. Contempt ⇨10

Where the only occasion on which there was any extended argument by either counsel after trial judge had ruled on objection occurred with the express consent, if not on the invitation, of the court, such argument furnished no ground for holding counsel guilty of contempt. Code Civ. Proc. § 1211.

14. Contempt ⇨63(4)

Specification that attorney was guilty of the interposition of objections and the indulgence in argument in bad faith was not a sufficient recitation of facts to sustain judgment of contempt. Code Civ. Proc. § 1211.

15. Contempt ⇨10

Record was insufficient to sustain conclusion that attorney was guilty of contempt for the interposition of objections and the indulgence in argument in bad faith. Code Civ.Proc. § 1211.

16. Contempt ⇨10

Trial ⇨110

Witnesses ⇨255(6)

Where plaintiff's disability was an issue and witness testified to plaintiff's ability to move about without discomfort while he observed her during the course of a small claims court trial, but did not recall the date of the hearing, offer of record of small claims court hearing was improper and was properly excluded, since it should have been merely shown to witness to refresh his memory and nothing more, but such offer of incompetent evi-

dence did not warrant an adjudication of attorney in contempt. Code Civ.Proc. § 1211.

17. Evidence ⇨11

It is common knowledge, of which trial judge should have taken judicial notice, that following mobilization after December 7, 1941, all persons were urged to "give servicemen a lift" as a patriotic duty, and that patriotic organizations built stations bearing such signs where servicemen could assemble and be furnished transportation by passing motorists.

18. Evidence ⇨16

It is common knowledge that a great many people use the expression "pickup" when speaking of giving a serviceman a ride in an automobile without intending to imply an improper motive.

19. Contempt ⇨10

Question by defense counsel on cross-examination of plaintiff as to whether plaintiff had "picked up" a sailor, in light of evidence that plaintiff and another woman were in an automobile, that sailor, a pedestrian, was given a short ride to one of the main business streets of the city, all of which occurred during the daytime, indicated that quoted phrase was used in its innocent meaning and did not authorize adjudication of defense counsel to be in contempt for reflecting on the character of plaintiff. Code Civ.Proc. § 1211.

20. Contempt ⇨60(1)

The presumption of innocence must be applied in favor of accused in a contempt proceeding. Code Civ.Proc. § 1211; § 1963, subd. 1.

21. Contempt ⇨10

Witnesses ⇨275(3)

Where plaintiff's disability was a primary issue, question on cross-examination of plaintiff by defense counsel as to whether plaintiff, in the presence of one of her feminine acquaintances and privacy of her home, had not pulled her nightgown off over her head and proceeded to dress herself, was competent to show use of plaintiff's arms and back muscles in contradiction of her other testimony and could not be so twisted as to impute to counsel intention of placing upon the act an accusation of indecent exposure so as to warrant an adjudication of contempt against defense counsel. Code Civ.Proc. § 1211; § 1963, subd. 1.

22. Contempt $\Rightarrow$ 10

Where evidence which counsel for defendant sought to elicit was material to an important issue and during the taking of testimony trial judge did not admonish counsel about his tone or voice or manner, and counsel for plaintiff did not mention such subject and language used by counsel was not offensive and did not violate any rules of law except that some of the questions were complex, adjudication of counsel in contempt on the basis of counsel's tone of voice or the manner in which he referred to plaintiff's disease and to her picking up a sailor in her automobile was unauthorized. Code Civ.Proc. § 1211.

23. Contempt $\Rightarrow$ 10

Intonations of voice, vehemence of objections, or physical attitude in making them in hotly contested case will not alone support order adjudging counsel guilty of contempt, where occasion and language used were proper. Code Civ.Proc. § 1211.

Original proceeding on petition of V. F. Bennett for a writ of certiorari against the Superior Court of the State of California, in and for the County of San Diego, and Honorable Robert B. Burch, Judge of said Superior Court, to review that portion of an order of respondent court finding petitioner guilty of contempt of court and fining him.

Contempt order annulled.

V. F. Bennett, in pro. per., of San Diego, for petitioner.

C. M. Monroe and Harry P. Sweet, both of San Diego, for respondent.

MARKS, Justice.

This is an original proceeding in this court to review a portion of an order of the respondent court, which portion found petitioner guilty of contempt of court and fined him \$250.

Petitioner is an attorney at law with a number of years experience as a trial attorney and for much of that time has been the trial attorney in San Diego for the San Diego Electric Railway Company.

Evalyn Valentine brought an action in the Superior Court of San Diego County against the San Diego Electric Railway Company to recover damages for personal injuries alleged to have been suffered by her on March 1, 1944, when the bus on

which she was a passenger for hire was brought to a rather sudden stop in an intersection to avoid hitting an automobile which entered the intersection without observing a boulevard stop sign and passed through the intersection at a speed of 35 or 40 miles per hour, barely missing the bus by two feet or less.

The pleadings in the damage action are not before us nor is all of the evidence taken during the ten trial days, but the issues rather clearly appear from the portion of the record here. It was the contention of the plaintiff that the sudden stop threw her against parts of the bus causing very serious injuries. She testified that after the accident, when riding in an automobile, she sat on a pillow and had another at her back. It is evident that she maintained there were very serious injuries to her nervous system and body, principally to her back; that she was in constant pain; that she could neither enter nor alight from an automobile without assistance; that she could not stoop down, bend nor rotate her body; that she could not raise her arms above her head; that she was seriously and painfully disabled as a result of her injuries. It is clear from the evidence that Mrs. Evalyn Valentine exhibited signs of acute suffering in the court room; that she had difficulty in walking and while walking supported her body with her hand on her hip. About March 2, 1944, Mrs. Valentine was taken to a hospital operated by the County of San Diego, and was given thorough examinations. Her objective signs of injury were a bruise on the forehead, a bruise behind her left ear and a superficial bruise about five inches in diameter over the prominence of the left hip bone. X-rays showed on old separation of the acromioclavicular joint and an angulated coccyx. The examining physician was of the opinion that the shoulder injury and the angulation of the coccyx were old injuries and in no way connected with the accident. There was also a swelling in the left breast.

The theory of the San Diego Electric Railway Company is equally apparent from the record before us. It was that there was no accident on the bus; that Mrs. Valentine was not injured there; that she was malingering; that if she was suffering pain it was the result of a syphilitic infection which she then had; that if she was suffering that suffering was either

deliberately or innocently over-emphasized by the various physical examinations, her recounting of her supposed injuries, and the fact of the suit to recover damages.

To properly understand and appraise one of the findings in the order adjudging petitioner guilty of contempt of court we must go outside of the typewritten record before us. After a writ of review was issued the members of this court held a conference with petitioner and counsel for respondent to determine what portions of the record should be transcribed as the return. It was agreed that the reporter's notes of the last three days of the trial should be transcribed. Later, on request of counsel for respondent, this record was augmented by a transcript of a small portion of the proceedings of the previous day. During this conference it was admitted that the question of the suffering of Mrs. Valentine from a syphilitic infection was first injected into the case by her attorney, Mr. Henderson, in his examination of prospective jurors.

On the last trial day the judge declared a mistrial on the ground of misconduct of the attorney for the San Diego Electric Railway Company, the petitioner here, and adjudged him guilty of contempt of court, imposing a fine of \$250.

The formal order, omitting the title, is in words and figures as follows:

"Be it remembered that on this 26th day of June, 1945, the above entitled action was proceeding in the 11th day of trial thereof upon the issues joined by the pleading, in the presence of the jury duly sworn and the Court, Robert B. Burch, Judge presiding, being the Superior Court of the State of California in and for the County of San Diego, in Department 3 thereof; James C. Henderson, Esq., appearing and present as attorney for plaintiff Evalyn Valentine, and V. F. Bennett, Esq., appearing and present as attorney for defendant San Diego Electric Railway Company.

"Be it further remembered that by the pleadings and issues joined were limited to the negligent operation of defendant's bus while plaintiff was a pay passenger thereon, the injuries suffered by plaintiff therefrom and the extent thereof while so riding as a passenger on defendant's bus and the contributory negligence, if any, of plaintiff passenger.

"Be it further remembered that on the 9th, 10th and 11th days of said trial the

Court believed that the conduct of said trial was being unduly delayed by conscious wilful and contumacious action upon the part of said V. F. Bennett, with a view to preventing the plaintiff from having a fair and just trial in said action upon the issues joined. Said conduct on the part of said V. F. Bennett is hereby particularized as follows:

"(1) Repeated and unwarranted reference to an unfortunate affliction suffered by the plaintiff in childhood many years ago, commonly known as syphilis, in a tone and manner calculated to reflect dishonor upon the plaintiff.

"(2) The inclusion in questions of matter repetitious, redundant, irrelevant and immaterial.

"(3) The constant and repeated interruptions of the answers of witnesses.

"(4) The argument of objections before and after the Court's ruling thereon.

"(5) The repetition of questions already asked and answered.

"(6) The interposition of objections and the indulgence in argument in bad faith.

"(7) Reference to a suit in the Small Claims Court to collect a bill owing by plaintiff, and the offer in evidence of the transcript of such proceedings, which had no bearing upon the issues, and reference to plaintiff picking up a sailor, which reference was in a manner and tone of voice to cast reflection upon plaintiff's motive and conduct in so doing, and by including in a long, wordy question, the insinuation of indecent exposure upon the part of the plaintiff, by removing her nightgown and assuming a position in the presence of witnesses in the parlor of her home.

"Be it further remembered that as to each and all of these particulars the Court admonished the said V. F. Bennett of the impropriety thereof, and requested of the said V. F. Bennett that he proceed in the conduct of the trial by producing evidence material to the issues joined and refraining from the use of innuendoes and insinuations reflecting upon the character of the plaintiff, but that nonetheless, the said V. F. Bennett, though learned in the law and experienced in trial work, refused to abide by the Court's expressed rulings to the extent that the material evidence in the case was buried beneath the redundant, irrelevant and immaterial matter, whereby a fair consideration of the ma-

terial evidence was seriously interfered with, all of which facts the Court finds to be true.

"Wherefore, it is ordered, adjudged and decreed that a mistrial be and it hereby is declared.

"It is further ordered, adjudged and decreed that the costs of suit, to date, be borne by the defendant and that the plaintiff be given judgment against the defendant therefor.

"It is further ordered, adjudged and decreed that the said V. F. Bennett is guilty of contempt of Court and is fined the sum of \$250.00 and granted 10 days within which to pay the fine.

"Done in open Court this 26th day of June, 1945.

"(Signed) Robt. B. Burch
"Judge of the Superior Court."

One of the principal contentions of petitioner is that the foregoing order is fatally defective because it fails to recite "the facts as occurring in such immediate view and presence" of the court constituting such contemptuous conduct as required by section 1211 of the Code of Civil Procedure, but instead states merely conclusions which are not sufficient to support the order adjudging him guilty of contempt.

The rule relied on by petitioner is set forth in *Overend v. Superior Court*, 131 Cal. 280, 63 P. 372, 374, as follows:

"In the case of a contempt committed in the presence of the court, the section says that the order adjudicating the contempt must contain a recital of the facts. This provision can only mean that the order must contain a recital of those facts which make out a case of contempt; that is, a recital of those facts which in a case of constructive contempt the law says must be incorporated in an affidavit.

"In *People [ex rel. Field] v. Turner*, 1 Cal. [152], 155, it is said: 'We think it follows, from the distinction above considered, that the final order of the court by which a party is adjudged to have been guilty of a contempt should always show, upon its face, the facts upon which the exercise of the power is based and the adjudication is made.'"

In support of this rule the following cases are cited in the opinion: *Ex parte Rowe*, 7 Cal. 181; *Batchelder v. Moore*, 42 Cal. 412; *Ex parte Zechandelaar*, 71 Cal. 238, 12 P. 259, and *Schwarz v. Su-*

perior Court, 111 Cal. 106, 43 P. 580. See also, *In re Shortridge*, 5 Cal.App. 371, 90 P. 478; *In re Lake*, 65 Cal.App. 420, 224 P. 126; *Curran v. Superior Court*, 72 Cal. App. 258, 236 P. 975, and *Wilde v. Superior Court*, 53 Cal.App.2d 168, 127 P. 2d 560.

In reply respondent argues that the contempt consisted (1) in a course of conduct of petitioner during three trial days, and that it was unnecessary and impracticable to detail all of the happenings of those three days in the order, and (2) that part of the acts of contempt consisted of the manner and tone of voice of petitioner which can only be described and not reproduced in the order. In support of these arguments he cites *Hallinan v. Superior Court*, 74 Cal.App. 420, 240 P. 788; *In re Grossman*, 109 Cal.App. 625, 293 P. 683; *In re Hallinan*, 126 Cal.App. 121, 14 P.2d 797; *Rose v. Superior Court*, 140 Cal. App. 418, 35 P.2d 605, and *Gillen v. Municipal Court*, 37 Cal.App.2d 428, 99 P.2d 555. An inspection of those cases shows the orders there were much more detailed and complete in the descriptions of the conduct, tone of voice and manner of the various persons found guilty of contempt than in the order before us here.

In view of all the circumstances of this case we prefer to assume, without holding, that the order adjudging petitioner guilty of contempt, considered as a whole, sufficiently describes his actions and conduct and we will go to the record to determine whether or not it supports the judgment of contempt, though some of the specifications in the order are clearly defective in merely stating conclusions rather than facts.

[1-5] Before going to the evidence, a few well established rules governing contempt of court should be outlined. In *Hotaling v. Superior Court*, 191 Cal. 501, 217 P. 73, 74, 29 A.L.R. 127, a case involving constructive contempt, it was said:

"Contempt of court is a specific criminal offense. *McClatchy v. Superior Court*, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691; *Ex parte Gould*, 99 Cal. 360, 33 P. 1112, 21 L.R.A. 751, 37 Am.St.Rep. 57; *Ex parte Hollis*, 59 Cal. [405], 408; *Reymert v. Smith*, 5 Cal.App. 380, 90 P. 470. * * * The proceeding is of such a distinctly criminal nature that a mere preponderance of evidence is insufficient (*In re Buckley*, supra, [69 Cal. 1, 10 P. 69]); the defendant cannot be compelled

to be sworn as a witness (Ex parte Gould, supra), and he cannot be convicted upon the uncorroborated testimony of an accomplice (In re Buckley, supra). * * *

"While the writ of certiorari is not a writ of error, it nevertheless extends to the whole of the record of the court below, and even to the evidence itself where necessary to determine jurisdiction. Schwarz v. Superior Court, supra [111 Cal. 106, 43 P. 580]; McClatchy v. Superior Court, supra; Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P. 35. In reviewing this proceeding, the charge, the evidence, the findings and the judgment are all to be strictly construed in favor of the accused (Schwarz v. Superior Court, supra), and no intendments or presumptions can be indulged in aid of their sufficiency (Frowley v. Superior Court, supra [158 Cal. 220, 110 P. 817].) If the record of the proceedings, reviewed in the light of the foregoing rules, fails to show affirmatively upon its face the existence of all the necessary facts upon which jurisdiction depended, the order must be annulled. Frowley v. Superior Court, In re McCarty, [154 Cal. 534, 98 P. 540] and other cases above cited."

In Wilde v. Superior Court, 53 Cal.App. 2d 168, 127 P.2d 560, 565, it was said:

"In cases of contempt committed in the presence of the court, the order adjudging the contempt must also recite facts which actually constitute contempt. It is also true that as the proceedings are of a criminal nature no presumptions may be indulged in favor of the judgment. These rules were clearly stated in Re Lake, supra [65 Cal.App. 420, 224 P. 126]: * * * 'There is the same unanimity of opinion supporting the rule that in cases of direct contempt the order of commitment is void, 'unless it shows on its face acts sufficient to constitute a legal contempt. The order must contain a statement of facts equivalent to those which the law says must be incorporated in an affidavit for constructive contempt; and such facts must prove the contempt. Here conclusions are not sufficient.' 5 Cal.Jur. pp. 950, 951."

The foregoing rules are so well established in California that further citation of authorities should be unnecessary although there are many cases supporting them. Only three decisions of District Courts of Appeal are cited where it is intimated, but not directly held, that different rules might apply.

The first specification in the order before us for review has to do with "repeated and unwarranted" reference to a syphilitic infection "suffered by plaintiff in childhood many years ago" and the manner and tone of voice in which such references were made.

[6] A careful check of the record before us shows that petitioner asked five questions about syphilis or tabes dorsalis, two of the jurors each asked one question about syphilis, and Mr. Henderson, the attorney for plaintiff, asked five questions about syphilis or its treatment or tabes dorsalis, and the trial court asked one question in the answer to which syphilis was mentioned. The partial record of the hearing on the day previous to the three days mentioned in the order shows that after objection was made to a question put by petitioner to Dr. Louis Strahlmann, which question had nothing to do with the disease, the following occurred:

"The Court: The difficulty is you (Mr. Bennett) keep hammering out on one point all the time and it gives the jury a bias and prejudice and disqualifies them more or less to consider all the evidence. If by any chance the doctor has anything to tell us that he hasn't told us, he may do so.

"The Witness: The conclusion from the second examination and inspection of the hospital records and X-rays indicated that the previous conclusion as to injury was correct; that in addition to that the patient had had a syphilitic infection and that it was quite probable that the headache and the varying complaints to a large extent were due to the previous syphilitic infection, probably with involvement of the brain and spinal cord."

We have 248 pages of reporter's transcript of the three days of trial which show that petitioner's five references to syphilis, or tabes dorsalis, and the answers to his questions on those subjects, compose a very small fraction of the whole. For us to hold that these five references were so repetitious as to be contemptuous would seem to us to be entirely unjustified.

The next question is—were those references "unwarranted" as found by the trial judge? The answer to this question seems obvious as illustrated by the answer of Dr. Strahlmann, already quoted.

As we have already observed, the plaintiff claimed to have been suffering serious

disabilities during the trial and her actions indicated she was in great pain. It was one of the theories of the San Diego Electric Railway Company that if plaintiff was actually disabled and was actually suffering pain it was not because of any injuries suffered while a passenger in the bus but because of a syphilitic infection over emphasized by the circumstances of the trial. There is considerable evidence in the record supporting this theory.

[7] Pain and suffering are elements of damage if they result from injuries for which a defendant is responsible. If they result from other causes they are not proper elements of damage. Here the question of the cause of plaintiff's suffering bore directly on the amount of damages to be awarded her, if any. The question of her "unfortunate affliction," to adopt the language of the trial judge, was an important element in the question of damages and their amount so it cannot be said that petitioner's five references to that affliction were "unwarranted." Instead, those references were on a material issue pertinent to the issues before the court and jury.

The balance of the first specification that the reference "to the unfortunate affliction suffered by plaintiff in childhood many years ago, commonly known as syphilis", is misleading to say the least and, if taken literally, is not only not supported by, but is contrary to the record.

In none of his questions did Mr. Bennett refer to an early syphilitic infection *many years ago* but to one found to exist during the month of March, 1944, the month plaintiff claimed to have been injured while a passenger on the bus. There were five hospital records before the trial court which are not before us. There is evidence indicating that at least two of these records had to do with tests made on the plaintiff for syphilis. A Wasserman test was made on March 26, 1944, with a positive reaction, probably plus four. A Kahn and Kolmer test was made on March 27, 1944, with a negative reaction. A physician of long experience testified that it is possible for the Kahn and Kolmer test to be negative and the Wasserman test to be positive when the patient is suffering from syphilis in the tertiary degree. This same physician examined the plaintiff on three separate occasions and formed the opinion that she was malingering and was not suffering severe pain either from the accident, if any, or as a result of syphilis.

We will reserve, until later in this opinion, comment on the finding as to the tone of voice and manner of petitioner contained in the first specification as similar matters are set forth in the seventh specification.

The fifth specification of the order may be considered with the second as both refer to repetitious questions and the repetition of questions already asked and answered. The second also pertains to questions on redundant, irrelevant and immaterial matters. If the trial court had included in the order that Mr. Bennett had asked compound and complex questions it would have found more support in the record than the finding that his questions were repetitious.

The first example of any impatience on the part of the trial judge with Mr. Bennett for repeating questions was during the examination of Dr. Andrews, a witness for the defendant, where the following occurred:

"The Witness: To the extent that she is worried and perplexed about the final outcome of this issue, that is the great shadow upon her mind. If there had never been any question of this sort she should long ago have been past any idea of disability. Let me say here that disabilities due to organic causes do not come and go rapidly, as this patient before me walked in a more lame condition than you have seen her walk here and before the end of my examination was walking with perfect freedom and going through movements. If that interference was due to damage, organic damage to nerve structures, it would be fixed for a time. It would not be subject to these rapid changes. Only emotional interference explains those rapid changes.

"By Mr. Bennett: Q. Doctor, just state what, in your opinion, is the situation as to whether or not the hope of gain in connection with the outcome of this action has anything to do with these symptoms that we have of her at one time, as you have described, walking worse than we have seen her walk here and then shortly walking upright and without any of those signs? A. Yes—

"Mr. Henderson: We object—May I have my objection, doctor, please? We ask that the answer be stricken. We object to that as being asked and covered.

"The Court: The objection will be sustained and after deliberation only I will

decide not to punish counsel for having intentionally asked it, in the teeth of the direct ruling of the Court upon the same question yesterday afternoon.

"By Mr. Bennett: Q. Doctor, in your opinion, is this woman malingering or not? A. To some degree malingering.

"Q. Are you able to give us any idea as to the degree, basing it upon your observations and examinations of her? A. Due to the effect upon her emotional instability and the controversy now before the court.

"Mr. Bennett: Cross examine."

The question to which objection was sustained on the previous day occurred during the examination of Dr. F. G. Lindemulder, a witness for defendant. The supplemental reporter's transcript shows the following:

"By Mr. Henderson: Q. And in all honesty on her part she might unconsciously, because of all of those other matters and her case being discussed and talked over and around, unconsciously limp more than she would if we did not have all of those factors present? Isn't that true? A. Yes.

"Q. That is quite common, that when one has to come before a group and discuss injuries and have all their case gone over, that the power of suggestion reaches the point where perhaps a person does over-emphasize their particular disability in that regard and that they are not faking in that regard? Isn't that right? A. Yes.

"Mr. Henderson: That is all.

"Further Re-Direct Examination

"By Mr. Bennett: Q. What would be the accentuating or motivating factor in connection with over-emphasis that you say might be occasioned by either the trips to examining doctors and taking depositions in connection with a law suit where they are seeking to recover \$25,000.00 for alleged injuries? What would be the motivating factor, Doctor?

"Mr. Henderson: Object to that as assuming something not in evidence.

"The Court: Well, it is inconsistent with the doctor's answer perhaps to the last question to assume that it is done with a motive. The doctor has no suggestion that it was done with a motive, or not, in accordance with the last answer given. It might be or it might not be. I will sustain the objection."

The ground on which the trial court sustained the objection should be particularly observed, namely, that the question called for information inconsistent with the previous answer. There is nothing in the testimony of Dr. Andrews inconsistent with the answer apparently expected by petitioner when he asked the question already quoted. Thus the reasons given by the trial judge when he sustained the objection on the previous day would furnish no grounds for belief that it would be regarded as contemptuous to propound a somewhat similar question to Dr. Andrews.

[8] However it is not necessary to lengthen this opinion with further consideration of these questions. The contempt found in these specifications consists in certain questions put by petitioner. These questions are not set forth in the order but only the conclusion of the trial judge that the questions were repetitious, redundant, irrelevant, immaterial and had been asked and answered. These conclusions are not sufficient to support an order of contempt as the facts, that is the questions regarded as contemptuous, should have been set forth in the order. Sec. 1211, Code Civ.Proc.; Ex parte Rowe, supra; Overend v. Superior Court, supra; In re Battelle, 207 Cal. 227, 277 P. 725, 65 A.L.R. 1497; In re Zukor, 13 Cal.App. 2d 427, 56 P.2d 1261. This is true not only because of the statutory requirement but because the proceeding is criminal in nature with no presumption in favor of the adjudication and all the presumptions in favor of the accused.

[9] What we have just said applies with equal force to the third specification which refers to "repeated interruptions of the answers of witnesses." In this connection we will add that we have searched the record and have found surprisingly few, if any, instances where petitioner interrupted the answers of any witness. It is significant that at no time during the three days of the trial in question here did the trial judge call Mr. Bennett's attention to the interruption of a witness when answering a question. His counsel have failed to point out any such occurrences in their brief. This specification is not supported by the record.

[10] The fourth specification relates to "the argument of objections before and after the Court's ruling thereon." We had

always supposed that it was a counsel's privilege, if not his duty, to argue an objection before the trial judge ruled on it (*Platnauer v. Superior Court*, 32 Cal.App. 463, 163 P. 237) unless requested or instructed not to do so by the court which was not done here. In fact petitioner courteously obeyed all admonitions of the court and did very little arguing on objections before a ruling was had, which rulings in several instances were unnecessarily caustic and were made in the presence of the jury. To illustrate, we quote from the direct examination of the witness William H. Huntley, as follows:

"Q. Can you give us the approximate date of that trial? A. Well, I got it on the books; not right offhand I couldn't. We had so much of that work I don't know. I couldn't exactly give you the date. I don't know without looking at the books.

"The Court: This type of evidence should not be introduced, Mr. Bennett. It is calculated to prejudice the jury. It cannot be of any other value.

"Mr. Bennett: That is, you mean the evidence of the witness, your Honor?

"The Court: If you don't know what I mean I will put you some place where you will have time to think it over and discover.

"Mr. Bennett: All right, your Honor."

The only argument of any moment on questions, after the trial court had ruled on objections, occurred on the afternoon of Friday, June 22, 1945, and the morning of the following Monday during the cross-examination of Mrs. Valentine, the plaintiff. To understand the situation we must briefly outline the circumstances leading up to it.

The plaintiff, Mrs. Evalyn Valentine, and Marion Valentine of Los Angeles, first met about August 30, 1944. The acquaintance seemingly was sought by Marion. Just who she was and her relationship with the case was not developed before the trial judge declared a mistrial, though from the questions asked of Evalyn it would be assumed that Marion was an investigator employed by the San Diego Electric Railway Company.

During this cross-examination Evalyn Valentine proved herself a difficult witness with a very faulty memory. First she denied being with Marion Valentine except on a very few occasions. Upon being

pressed by petitioner, and her memory refreshed with the times, places and incidents, she admitted being with Marion Valentine on several occasions. Particularly, she first denied going to the home of a Mr. and Mrs. Hanlon in the Marion Valentine automobile, obtaining a lawn mower there, taking it to her home for sharpening and returning it to the Hanlon home. Subsequently she corrected her testimony after having talked with her "secretary," a neighbor who lived across the street, and she then admitted the trip for the lawn mower. She denied that she had lifted the heavy end of the mower into the Marion Valentine automobile or had carried that end when it was placed in the automobile for the return trip to the Hanlon home.

Mr. Bennett attempted to lay the foundation for impeachment of Mrs. Evalyn Valentine by seeking to establish the times, places, parties present during the happening of these various events as well as circumstances surrounding each one. Some of his questions were long and involved and objections were properly sustained to them on the ground that they were complex.

[11,12] Mr. Bennett seemed to be of the mistaken but honest opinion that it was necessary to lay the same foundation in cross-examination of the plaintiff to be able to prove acts and circumstances contradicting her testimony, that is necessary to establish prior to the impeachment of a witness by former contradictory statements. This is not the law. 27 Cal.Juris. p. 149, sec. 123. However, there is nothing to indicate that Mr. Bennett was not sincere in his mistaken construction of the law. We know of no rule of law permitting a court to punish an attorney because he is honestly mistaken in his interpretation of the law when he presents his mistaken views to the court in a proper and respectful manner. As said in *Ex parte Lake*, supra [65 Cal.App. 420, 224 P. 130]: "It never has been held that in the trial of an issuable fact an attorney is guilty of contempt in merely offering insufficient, or even incompetent, evidence in an effort to prove that fact."

As we have observed, this occurred on Friday afternoon, June 22, 1945. Mr. Bennett did not unduly argue with the court after objections to his questions had been sustained and as far as the record discloses his attitude toward the court was

courteous. The following is a fair example of what occurred on that afternoon:

"By Mr. Bennett: Q. On this same day, did you not, with the assistance of Marion Valentine, pick up a lawnmower that was at the Hanlon property and take it to your home, for your husband to sharpen the lawnmower?

"Mr. Henderson: Objected to as argumentative.

"The Court: Sustained.

"Mr. Bennett: I am attempting, your Honor, to lay the foundation for impeachment, and it is my understanding that this is the correct procedure. I don't want to ask these questions notwithstanding your Honor's ruling.

"The Court: Well, you see, you fix a date when she says she wasn't there at all and you do not fix a date that she was there, and I sustain the objections on those grounds.

"Mr. Bennett: My understanding of the rule is that you have to specify the time and the place in question.

"The Court: All right. You certainly have specified the time and place many, many times this afternoon in the last ten minutes; many, many times.

"By Mr. Bennett: Q. Did you not on this same occasion pick up the heavy end of the lawnmower and put it into Marion Valentine's car, with her assistance?

"The Court: Well, I will sustain it. You can ask her if she did not at that house, though.

"The Witness: What was your question, your Honor?

"The Court: I haven't asked any question, Mrs. Valentine. Counsel is giving you the question.

"Mr. Bennett: I didn't hear your Honor's remarks.

"The Court: I say there is no occasion in the question. Now, you can ask her if she picked up a lawnmower and walked around the yard at any time.

"By Mr. Bennett: Q. Did you at any time subsequent to March 1st, 1944, pick up a lawnmower at the Hanlon residence and put it into Marion Valentine's automobile? A. I did not. I wasn't there with her. I don't see how I could put it in there. Anyway, I don't even mow the lawn or touch the lawn at my home. I don't see how I could do it at some neighbor's house.

"Q. And did you not when you got to your home assist in lifting and taking this lawnmower out of Marion Valentine's automobile?

"Mr. Henderson: Objected to as argumentative and incompetent, irrelevant and immaterial.

"The Witness: Your Honor, I said it didn't happen.

"The Court: Well, I think it is. It assumes that she went there, in the face of her testimony that she did not, and therefore that phase of the question certainly must be objectionable, and in her testimony she has had it frequently called to her attention whether she went there on that day with Mrs. Valentine and she has frequently said no. So there can be no inadvertence about that. Therefore, it is argumentative. You are arguing that she did go there, and did do certain things.

"Mr. Bennett: Well, Your Honor, please, it is near our adjournment time and may we adjourn now and may I discuss this matter with your Honor?

"The Court: I will adjourn now and let the jury off until Monday morning, with the admonition not to discuss the issues of the case."

After the jury was excused the trial judge and Mr. Bennett discussed the law and the trial procedure. The trial judge explained his reasons for sustaining objections, which reasons were sound. Mr. Bennett asked leave to present authorities on the question and the judge remarked: "Get me some law on it and if I am wrong I will change the situation." The time taken by this portion of the record was almost entirely consumed by the remarks of the trial judge with very brief and courteous replies from Mr. Bennett.

On Monday morning the following occurred:

"The Court: Have you a little law to present to the Court, Mr. Bennett?

"Mr. Bennett: Yes, I have something that I think will be helpful.

"The Court: What is this on?

"Mr. Bennett: This is in reference to the cross-examination of the witness with reference to impeaching questions. (Argument by Mr. Bennett.) (Argument by Mr. Henderson.)"

[13] This is the only occasion on which there was any extended argument by either counsel after the trial judge had ruled on

objections. As this argument was had with the express consent, if not on the invitation of the court, it can furnish no ground for holding petitioner guilty of contempt of court.

Mrs. Evalyn Valentine was recalled for further cross-examination on the afternoon of Monday, June 25th. She changed and corrected her testimony and admitted being various places with Marion Valentine which she had denied on previous occasions, including the trip for the lawn mower. Mr. Bennett then proceeded to cross-examine her as to her actions on these occasions, such as getting into and out of an automobile unassisted, running, walking up and down steps, lifting weights and carrying them, including the lifting of the heavy end of the lawn mower into and out of Marion Valentine's car, taking dishes and other objects from high shelves and replacing them, all of which tended to contradict her testimony as to her physical disabilities and were very material on the issue of the extent of her injuries, if any. While some of Mr. Bennett's questions were compound and therefore objectionable, that does not seem to have been the ground of the trial judge's rulings towards the close of that day, as shown by the following:

"Q. Did you not on that day go there and after having gotten out of the automobile, standing on the curb, stoop over and pick up an empty whiskey bottle which was lying in front of the tire of the Marion Valentine automobile and remove it from the front of the automobile?"

Mr. Henderson: Objected as immaterial. She probably should have left it there.

"Mr. Bennett: We object to the remarks of counsel.

"The Court: I think that all of this is immaterial. I don't think that the witness can remember a lot of things you have written down, which some spotter has observed. I don't believe that is laying the foundation for impeachment. I will sustain the objection to the general line of questioning."

There are other comments, made in the presence of the jury, on the weight of evidence and credibility of witnesses without any cautionary warning. Sec. 19, Art. VI, Const.

We find nothing in the record to sustain the specifications in the order that

Mr. Bennett had improperly argued objections before or after the trial court had ruled on them or had interposed objections and indulged in argument in bad faith.

[14, 15] The sixth specification relates to "the interposition of objections and the indulgence in argument in bad faith." Clearly this is not a sufficient recitation of fact to sustain the judgment of contempt. Further, we have searched the record and have found nothing in it to sustain this conclusion of the trial judge. His counsel have failed to cite us to any portion of the record supporting this conclusion. Attorneys and some times judges are mistaken in their interpretation of the law without being accused of contempt of court. There is nothing to indicate bad faith on the part of Mr. Bennett in making his objections and in arguing them. To reach any such a conclusion we would have to violate one of the fundamental rules in proceedings of this kind and indulge in presumptions against Mr. Bennett instead of presuming him innocent of wrong.

Before proceeding to the consideration of the seventh specification we should quote the final proceedings on the last day of the trial which were as follows:

"By Mr. Bennett: Q. Did you not on this same day get in the automobile after cashing the check and ride with Marion Valentine to La Jolla, and did you not suggest to Marion Valentine that you pick up a sailor at the Destroyer Base and after he got in the machine did you not turn around and twist around in the front seat and talk with the sailor until he was left out at Market and Pacific?"

"Mr. Henderson: Object to it as immaterial, argumentative and complex.

"Mr. Bennett: It has to do, if your Honor please, with the ability to bend her back.

"Mr. Henderson: May we present this matter without argument?"

"Mr. Bennett: Well, you have been arguing. Has there been a ruling Mr. Reporter?"

"The Court: Not yet. Do you recall, Mr. Bennett, the Court's ruling on the transcript of the Small Claims Court?"

"Mr. Bennett: The what, your Honor?"

"The Court: The offer of the transcript of the Small Claims Court.

"Mr. Bennett: Yes, your Honor, I do.

"The Court: Do you recall my ruling about the nudity of the plaintiff and the nightgown episode in the front room of her home and the Court's ruling on that?

"Mr. Bennett: No, I do not, your Honor.

"The Court: Now, we have the sailor episode. Now, what are the purposes, Mr. Bennett, of these several offers?

"Mr. Bennett: I don't understand your Honor's last remark.

"The Court: Read it to him. (Record read.)

"Mr. Bennett: Well, I will take the first one, about getting down on her hands and knees and reaching under the bed to pull out the 'jeep' toy and so forth.

"The Court: You are out of order. Read counsel my remarks. (Record read.)

"The Court: What was your purpose in offering in evidence the transcript of the proceedings to collect the bill for the furniture? What was your purpose of including in your question the narration about the indecent conduct of the plaintiff in respect to her nightgown, and now again in respect to a sailor that she picked up? Will you answer me that?

"Mr. Bennett: I will, your Honor. The one with reference to the proceedings was to fix the date of the proceedings, if your Honor please, and the one with reference to the nightgown was to show her ability to pull her nightgown up over her head, to show the free and unrestricted use of her arms and of the muscles of her back, and the one with reference to the sailor, if your Honor please, was to show her ability to turn around in her seat and talk with a person in the back; in other words, to show the freedom with which she could use the muscles of her back without restriction and without pain, to twist and turn freely without the pain that she claims that she has here, your Honor. Those are the purposes I had in mind.

"The Court: I doubt it. I am very sorry, indeed. I believe that the greatest institution in the world is the jury trial. I believe that it contemplates that citizens of the county where the litigants live shall come and hear the evidence and determine the truth and the just rights of free men. I believe that in the conduct of this trial, after the Court has repeatedly endeavored to make known to counsel the Court's dissatisfaction with the manner in which the character of the plaintiff has been at-

tacked, that the possibility of a fair trial, in my mind, and hence I must conclude in the minds of the jury, is impossible, gone, destroyed, by a failure to appreciate the importance of a fair and just trial. Under the circumstances I feel it necessary to declare a mistrial and assess the costs upon the defendant and fine counsel for his conduct in the sum of \$250."

The seventh specification divides itself into three parts: (1) The small claims court case; (2) "picking up a sailor"; and (3) the nightgown episode.

The small claims court specification refers to an offer in evidence of a certified copy of a proceeding in that court during the examination of William H. Huntley, a witness for the San Diego Electric Railway Company. This witness and his brother, George A. Huntley, were in business together as upholsterers. William interviewed Evalyn Valentine about May 1st, 1944, in reference to re-upholstering some of her furniture. The two brothers called for the furniture a few days later and delivered it in about ten days. They described her actions and manner of walking as normal. William saw her a few days later walking normally with her husband. George testified that he saw her in the small claims court in National City; that "on the 19th of June she was summoned into court to pay the bill that she refused to pay"; that "when the decision was rendered against her she walked up to the judge and paid the judge the money at the time"; that she got out of an automobile without help and walked without limping. This evidence was received without objection. William corroborated the testimony of his brother except that he did not know the date of the hearing in the small claims court. Mr. Bennett offered in evidence a certified copy of the proceedings in that court for the purpose, as he said, of fixing the date of the hearing.

[16] The offer of the record was improper as it should have been shown the witness to refresh his memory and nothing more. The trial judge properly excluded this incompetent evidence. However, the offer could not have been prejudicial to the plaintiff as the fact of the hearing and the judgment against the plaintiff had been detailed by George A. Huntley without objection, and those facts were known to the jury. As we have already seen, the offer of incompetent evidence bearing on an issuable fact has never been considered of

itself ground for holding an attorney guilty of contempt of court. *Ex parte Lake*, *supra*.

It is true that Mr. Bennett asked Evalyn Valentine if on a certain date while riding with Marion Valentine on Pacific Highway in San Diego, she had not suggested they "pick up" a sailor. The facts would seem to be that Pacific Highway is a very busy thoroughfare which runs by the Destroyer Base and crosses Broadway. This "pick up" happened in the daytime and there were two women in the automobile.

[17-19] Following mobilization after December 7, 1941, all of us were urged to "give service men a lift" as a patriotic duty. Patriotic organizations built stations bearing such signs where service men could assemble. There are many of these in San Diego County and elsewhere. This is common knowledge of which we can, and the trial judge should have taken judicial notice. It is also common knowledge that a great many people use the expression "picked up" when speaking of giving a service man a ride without intending to imply an improper motive. The expression was used generally and innocently by a great many people.

But, argue counsel for respondent, the words "pick up" have another meaning and are used to describe the accosting of a person of one sex by a person of the other as a preliminary to an assignation. This is true but the circumstances should be considered, if necessary, to determine the meaning Mr. Bennett intended to convey in using these words in his question. There were two women in the car. It was broad daylight on a busy street of an overcrowded city. The sailor only rode from the Destroyer Base to the foot of Market, a principal street of San Diego. It would be very strange indeed if one of the two women should accost a sailor under those circumstances with improper motives. We do not believe that we, as presumably reasonable human beings, should put any such far-fetched meaning on the expression under the circumstances appearing here.

[20] We have already seen that in reviewing a proceeding of this kind the evidence, the findings, and the judgment are to be strictly construed in favor of the accused and that no intendments or presumptions can be indulged against him. *Hotaling v. Superior Court*, *supra*. There

is also what has been characterized as one of the strongest presumptions "that a person is innocent of crime or wrong." Sec. 1963, Subdiv. 1, Code Civ.Proc. This presumption is with us here and should have been invoked in favor of petitioner in the trial court. *Wilde v. Superior Court*, *supra*. Therefore we must conclude, and the trial judge should have concluded, that the expression "pick up" was used in the sense of defining the customary and praiseworthy act of giving a service man a lift and did not reflect on the character of Evalyn Valentine.

[21] The nightgown incident occurred at the home of Evalyn Valentine when Marion Valentine called upon her. Marion was met at the door by Evalyn who was dressed in her nightgown. The question implies that Evalyn, in the presence of Marion and no one else, and in the privacy of her own home, pulled her nightgown over her head and proceeded to dress herself. This evidence was admissible to show the use of her arms and back muscles in contradiction of her other testimony. To twist these acts into an accusation of indecent exposure would be to violate the rules of law last referred to. We would also have to impute to Mr. Bennett the intention of placing upon an act innocent in itself a far fetched meaning that his question does not imply.

[22] We must now return to that portion of specification one relating to the tone of voice and manner in which petitioner referred to the disease from which plaintiff was suffering and the portion of specification seven relating to his tone of voice and manner when referring to picking up the sailor. As we have already seen, the evidence evidently sought to be elicited was very material to an important issue in the case. It is significant that not once during the taking of testimony concerning the disease did the trial judge admonish Mr. Bennett about his tone or voice or manner, nor did counsel for plaintiff mention those subjects. There was nothing in the questions asked by Mr. Bennett to reflect on the plaintiff other than the fact that she was suffering from the disease which evidently she had admitted and which was a material subject of inquiry in the case. We have already described the "pickup" incident. The language used by petitioner in either instance was not offensive nor did it violate any

rules of law known to us except that some of his questions were complex.

[23] In this connection we deem the following language used in *Curran v. Superior Court*, 72 Cal.App. 258, 236 P. 975, 979, appropriate and applicable here:

"The second finding, namely, that the remarks addressed by the petitioner to the court were spoken in a loud, combative, and contentious tone of voice, and that such loud expressions and intonations were disorderly, contemptuous, and insulting to the court, can refer only to the statements heretofore shown in the order and taken down by the shorthand reporter at the time. As the court said in the case of *Platnauer v. Superior Court*, supra [32 Cal.App. 463, page 475, 163 P. 242]: 'If in discharging his duty he (counsel) happens to be persistent or vehement or both in the presentation of his points, he is still, nevertheless, within his legitimate rights as an attorney, so long as his language is not offensive or in contravention of the common rules of decorum and propriety.' While the courts in other jurisdictions have held that the tone of voice and attitude of counsel in making on proper occasions proper statements to the court may constitute contempt, yet we are reluctant to extend the rule farther than was done in the *Platnauer* and *Shortridge* cases, supra, and hold that, the occasion and the language being proper the intonation of the voice, the vehemence of the objections or the physical attitude of counsel in making them would alone support the conclusion of the judge that such behavior was disorderly, contemptuous, or insolent toward the court, and tended to interrupt the due course of the trial, and thus subject the offender to a judgment of fine and imprisonment. The relations between court and counsel may and often do during the course of a trial become strained; mutual conditions of irritation may be created in the heat of debate, leading to tones and demeanor which in other situations would clearly manifest contempt, but which, under the conditions often existing in a hotly contested criminal case, such as is indicated by the record here, should lead to no such conclusion. Much must be pardoned under the circumstances to the infirmities of human nature, and as much excused by the liberty of speech if in the heat of a trial the expressions of counsel are not always coldly precise, or

his tones unmarked by excitement or even anger."

We are of the opinion that the record before us does not disclose acts or conduct on the part of petitioner showing him guilty of contempt of court. Therefore, in finding him guilty the trial judge exceeded his jurisdiction and the order is void.

The portion of the order adjudging petitioner guilty of contempt of court and fining him \$250 is annulled.

BARNARD, P. J., and GRIFFIN, J., concur.



**MIDWAY SCHOOL DIST. OF KERN
COUNTY et al. v. GRIFFEATH. ***
Civ. 3188.

District Court of Appeal, Fourth District,
California.

March 4, 1946.

Hearing Granted April 29, 1946.

1. Schools and school districts ⚡63(1)

Under the education code, the discretion, formerly vested in school board to act on the evidence taken after dismissal charges are filed against a permanent employee, is now vested in the superior court and the board is required to follow the court's directions. Education Code, §§ 13521, 13529, 13551, 13552.

2. Schools and school districts ⚡63(1)

Under education code, the appellate court must reverse a judgment of the superior court where a breach of discretion is shown on the part of the superior court in rendering judgment determining whether or not school board may dismiss a permanent employee. Education Code, §§ 13521, 13529, 13551, 13552.

3. Appeal and error ⚡996

Where reasonable minds might differ as to the conclusions to be drawn from the evidence, appellate court would not substitute its judgment for that of the superior court rendering judgment against dismissal of permanent teacher by school board, in-

* Subsequent opinion 172 P.2d 857.

asmuch as discretion was vested by law in the superior court. Education Code, §§ 13521, 13529, 13551, 13552.

4. Schools and school districts ⇨141(5)

A judgment of superior court against dismissal of permanent teacher by school board was not a breach of discretion, notwithstanding that teacher attempted to deceive board as to condition of his health and purpose of his absence from school, where it might be reasonable to conclude that dismissal was too severe a penalty to be imposed upon the teacher in view of his long and faithful service and his single breach of ethics and strict honesty. Education Code, §§ 13521, 13529, 13551, 13552.

5. Schools and school districts ⇨141(5)

A judgment of superior court against dismissal of permanent teacher by school board would not be reversed on ground that superior court failed to find on material issues, where superior court's conclusion that the teacher's derelictions did not constitute sufficient ground for dismissal was sufficiently stated. Education Code, §§ 13521, 13529, 13551, 13552.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by the Midway School District of Kern County and others against Glenn A. Griffearth, to determine the right of the district to dismiss a permanent employee. From the judgment, the plaintiffs appeal.

Affirmed.

Alfred Siemon, Walter L. Maas, Jr., and Oscar F. Catalano, all of Bakersfield, for appellants.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

MARKS, Justice.

This is an action brought by the Midway School District of Kern County to determine its right to dismiss Glenn A. Griffearth who had attained status as a permanent employee of the district.

Griffearth had been employed for twenty years as a teacher in the district and had rendered very satisfactory service. Up to September 27, 1944, he had been energetic, cooperative and willing and at times had performed more than the usual duties required of him.

On the afternoon of September 27, 1944, he desired to hunt deer in Nevada. Knowing this would not be a ground for temporary leave of absence he left the following note on the desk of the principal:

"On account of coming illness I find it necessary to be absent from school the rest of the week. My lesson plans are on my desk. Will try to be back Monday but will probably be absent again on Wednesday until the next Monday as I will probably enter the hospital under Dr. Johnson for observation."

He did not return until October 6, 1944, his earlier return having been prevented by a severe snowstorm. He was called before the principal and he admitted he had been hunting. His attitude was not cooperative but was rather defiant. He was called before the school board and assumed the same attitude.

It is true he was suffering from hives and claimed he feared he was suffering from either cancer or appendicitis, but his ailments were not sufficient to keep him from going on a long hunting trip into the mountains of a neighboring state. He was not sufficiently disabled to prevent him from performing his duties as a teacher. He had made no arrangements for going into a hospital or for examination or treatment by a physician before going on the trip.

After hearing Griffearth and seeing his uncompromising attitude the school board passed a resolution for his dismissal. Griffearth refused to resign and demanded a court hearing. This proceeding followed and after a trial the trial judge found that Griffearth could not be dismissed by the school board.

Appellants attack the judgment on several grounds. They argue that the evidence shows conclusively that Griffearth wilfully violated the rules by absenting himself from his duties without lawful reasons; that he was rather defiant when called before the principal and again when called before the school board; that he was guilty of dishonesty, or at best duplicity, in writing the quoted note and conveying the false impression that his absence was due to sickness rather than a desire to pursue his own pleasures. We agree with counsel for appellants that the evidence fully establishes these derelictions of duty on the part of Griffearth.

It is further argued that it having been established that Griffeath was proved guilty of unprofessional conduct and dishonesty (Sec. 13521, Education Code) the trial court should have permitted the school board to dismiss Griffeath; that the final act of dismissal rested with the school board and that the court could only review the proceedings before that board to determine whether it had exceeded its jurisdiction in deciding to dismiss Griffeath.

We cannot agree with this argument under the law as it exists today. Section 13529 of the Education Code provides in effect that after having been served with notice of the board's intention to dismiss him, an employee may demand a hearing; that the board may then rescind its action or file a complaint in the superior court "setting forth the charges against the employee and asking that the court inquire into the charges and determine whether or not the charges are true, and if true, whether or not they constitute sufficient grounds for the dismissal of the employee, under the provisions of this code, and for judgment pursuant to its findings."

[1] After a hearing the court must enter judgment which "shall determine whether or not the governing board may dismiss the employee." Sec. 13551, Education Code. The school board must act in accordance with the judgment and may not dismiss the employee unless the judgment permits it to do so. Sec. 13552, Education Code. Thus the discretion formerly vested in the board to act on the evidence taken after charges are filed against a permanent employee is now vested in the superior court and the board is required to follow its directions.

This is the view of the law taken in *Board of Education v. Mulcahy*, 50 Cal. App.2d 418, 123 P.2d 114, 116, where it is said:

"As is said in *Board of Education v. Ballou*, 21 Cal.App.2d 52, 55, 68 P.2d 389, 391: 'The Legislature in 1935 by amending the School Code brought about very significant changes in the procedure for dismissing permanent teachers for cause. Administrative school officials were deprived of the power to dismiss permanent teachers for cause and it was made necessary for the governing board, in order to bring about a dismissal, to file a complaint in the superior court "asking that the court inquire into such charges and determine

whether or not such charges are true, and if true, whether or not they constitute sufficient grounds for the dismissal of such employee, under the provisions of this code, and for judgment pursuant to its findings.'" The Legislature has placed upon the judges the duty of determining whether a teacher should be dismissed when charges such as incompetency are filed. A duty essentially administrative has been withdrawn from administrative officials and imposed upon officials exercising judicial functions.'

"That a judicial determination as to the competency of a teacher against whom charges are made may be interpolated between the initial charge and the final order of dismissal is supported by both reason and authority. It is both fair and logical that the existence of proper grounds should be judicially determined before a teacher may be deprived of her right to tenure."

[2] It may be true that the judgment of the superior court may not be final and conclusive in all cases. There may be cases in which the fitness of the permanent teacher to continue teaching in a school are so clearly established that it would be a breach of judicial discretion not to enter judgment permitting his dismissal. Under the present state of the law we take it to be the duty of an appellate court to reverse a judgment of the superior court where a breach of discretion is shown on the part of the superior court in rendering judgment in cases of this kind.

[3,4] While the evidence in this case clearly would have supported a judgment permitting the board to dismiss Griffeath, we cannot regard the judgment as a breach of discretion. It is true that the conduct of Griffeath was reprehensible, especially in attempting to deceive the board as to the condition of his health and the purpose of his absence. Still in view of the long and faithful service rendered to the school district, and his single breach of ethics and strict honesty, it might be reasonable to conclude that dismissal was too severe a penalty to be imposed upon him. Where reasonable minds might differ as to the conclusions to be drawn from evidence we cannot substitute our judgment for that of the trial court as discretion in the case is vested by law in that court and not in us. By so holding we do not wish to be understood as condoning or in any manner approving the conduct of Griffeath.

[5] Appellant urges that the trial court failed to find on material issues and that the judgment should be reversed for that reason.

While the pleadings presented other issues, only two were principally covered in the evidence, (1) Griffeath deserting his duties without leave, and (2) dishonesty in misrepresenting the reason for his absence. While the findings could have been much improved, we believe they are sufficient and that they resolve both questions against Griffeath. The conclusion that these derelictions did not constitute sufficient ground for dismissal is sufficiently stated.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



73 Cal.App.2d 367

NORTHWESTERN PAC. R. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.
Civ. 12987.

District Court of Appeal, First District,
Division 1, California.

March 1, 1946.

Hearing Denied April 29, 1946.

1. Workmen's compensation ⇨734

Generally, if an employer furnishes transportation under control of employer to an employee, not as an independent act of courtesy, but as an actual incident appertaining to the employment, an injury sustained during transportation "arises out of and in course of employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Arise Out of and in Course of Employment".

2. Workmen's compensation ⇨97

In situations in which the Federal Employers' Liability Act is applicable, Congress is deemed to have intended its applicability to be exclusive of all state and local workmen's compensation laws. Federal Employers' Liability Act, §§ 1, 4, 45 U.S.C.A. §§ 51, 54.

3. Commerce ⇨27(5)

Where railroad and labor organization had entered into agreement that transportation from terminal to designated point would be provided by railroad at hours when public transportation facilities were not available, employer-employee relationship in engaging in interstate commerce did not end until railroad fulfilled its obligation by transporting employee to point designated. Federal Employers' Liability Act, §§ 1, 4, 45 U.S.C.A. §§ 51, 54.

4. Courts ⇨489(1)

Cases involving injury to employee sustained in intrastate business are relegated to state tribunals to settle.

5. Courts ⇨97(5)

State court in matters presenting jurisdictional issues under federal acts should be guided by federal legislative and judicial views.

6. Commerce ⇨27(5)

Workmen's compensation ⇨97

Where railroad had contracted to furnish transportation to employees from terminal to a designated point at hours when public transportation facilities were not available and brakeman was fatally injured in 1936 in collision between automobile and taxicab furnished by railroad after terminating day's activities involving interstate commerce, the brakeman was engaged in "interstate commerce" at time of accident so that State Industrial Accident Commission was without jurisdiction. Labor Code, § 3203; Federal Employers' Liability Act, §§ 1, 4, 6, as amended, and § 10 as added in 1939, 45 U.S.C.A. §§ 51, 54, 56, and 60.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

7. Master and servant ⇨284(1)

The purpose of the 1939 Amendment to the Federal Employers' Liability Act was to eliminate the necessity of court's determining border line cases with respect to whether transportation was in interstate commerce. Federal Employers' Liability Act, §§ 1, 4, 6, as amended, and § 10 as added in 1939, 45 U.S.C.A. §§ 51, 54, 56, and 60.

Appeal from award of the Industrial Accident Commission.

Proceeding by the Northwestern Pacific Railroad Company, employer, to annul an order of the Industrial Accident Commission of the State of California awarding death benefits to Sarah F. Skinner for the death of her husband, Eugene N. Skinner, employee.

Order annulled.

Lawrence L. Howe, of San Francisco, for petitioner.

R. C. McKellips and Dan Murphy, Jr., Deputy, both of San Francisco, for respondents.

WARD, Justice.

The petitioner, Northwestern Pacific Railroad Company, seeks to annul an award of an order of the Industrial Accident Commission awarding death benefits to the widow of Eugene N. Skinner, a railroad brakeman, formerly conductor, who died as the result of a collision between an automobile and a taxicab. The brakeman was being transported in a taxicab furnished by the employer railroad company to convey train crews to and from work during hours when public transportation was unavailable.

Whether the deceased was engaged in interstate commerce at the time of his death is the sole question to be decided. The respondent commission concedes as it must that if the employee was engaged at the time of his injury in interstate transportation or in work so closely related to it as to be practically a part of it, the respondent commission would be without jurisdiction. See Labor Code, § 3203.

[1] At the hearing one of the issues was whether the injury arose out of and in the course of the deceased's employment. The commission found "Said transportation was furnished to the employee by the employer as part of the contract of hire and was under the control of the employer, and therefore while using it said employee was performing a service in the course of his employment, and said injury arose out of and in the course of the employment." The finding was made pursuant to the general rule that if an employer furnishes transportation under the control of the employer, to an employee, not as an independent act of courtesy, but as an actual incident appertaining to the employment, and an injury is sustained during the transportation, such injury arises out of and is in the course of the employment. Cali-

fornia Casualty Indem. Exch. v. Ind. Acc. Comm., 21 Cal.2d 461, 132 P.2d 815; Smith v. Industrial Acc. Comm., 18 Cal.2d 843, 118 P.2d 6; Trussless Roof Co. v. Industrial Acc. Comm., 119 Cal.App. 91, 6 P.2d 254; Boggess v. Industrial Acc. Comm., 176 Cal. 534, 169 P. 75, L.R.A. 1918F. 883; Dellepiani v. Industrial Acc. Comm., 211 Cal. 430, 295 P. 826. The federal courts in determining whether an injury arises out of and in the course of interstate employment apply the same rule. Atlantic Coast Line R. Co. v. Williams, 5 Cir., 284 F. 262; Sassaman v. Pennsylvania R. Co., 3 Cir., 144 F.2d 950, 953; Marceau v. Great Lakes Transit Corporation, 2 Cir., 146 F.2d 416, 418.

The commission found that "both employer and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Laws of California." The deceased had worked for approximately four years as a brakeman or conductor. The last train operated on which decedent was a member of the crew contained, among other cars, interstate commerce cars. The referee reported: "There can be no question that as long as the employee was on active duty on Train 2973, that is from the time it left Willits to the time it was registered and cleared at Tiburon, he was rendering a service in interstate commerce, for the two jurisdictional conditions precedent would have been present, namely, a common carrier by rail engaged in interstate commerce and an employee performing a service in such commerce. (45 U.S.C.A. § 51 and 54.)" However, the referee concluded that the "Interstate character of service terminated when train was registered and cleared at terminal, and thereafter employee and employer were subject to the provisions of the State Compensation Laws." The last quoted statement is the foundation for the determination of the jurisdiction of the state commission upon the sole issue presented—the character of decedent's work.

[2] Preliminarily it should be noted that this court in King v. Schumacher, 32 Cal. App.2d 172, 177, 89 P.2d 466, 469, said: "It is well settled that by the Federal Employers' Liability Act congress took possession of the field of employers' liability in interstate transportation by rail, and that the rights and obligations of persons within its provisions depend upon the act and applicable legal principles as interpreted by the federal courts." In situations in

which the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., is applicable, Congress is deemed to have intended its applicability to be exclusive of all state and local workmen's compensation laws. In *Southern Pac. Co. v. Ind. Acc. Comm.* (Mistretti), 19 Cal.2d 271, 120 P.2d 880, 886, an employee was repairing a mechanical instrument used to clear tracks on which the petitioner company engaged in interstate commerce. It was held that the repairer was performing a duty in furtherance of interstate commerce and was not subject "to the Workmen's Compensation Laws of the State of California." In *Southern Pac. Co. v. Ind. Acc. Comm.* (Rodgers), 19 Cal.2d 281, 120 P.2d 887, where it was part of decedent's duties to switch and break up trains in both intrastate and interstate commerce, it was held that an award of the state industrial accident commission should be annulled, the Federal Employers' Liability Act being the exclusive remedy. In *Southern Pac. Co. v. Ind. Acc. Comm.* (Wills), 19 Cal.2d 283, 284, 120 P.2d 888, 889, the court said: "The duties performed by Wills in the repair of cars devoted to general freight service were in furtherance of interstate commerce in a way which directly, or closely and substantially, affected that commerce. It follows that the respondent commission was without jurisdiction to make the award." In *Lewis v. Industrial Acc. Comm.*, 19 Cal.2d 284, 286, 120 P.2d 886, 887, the court said: "In any event, petitioner's duty as a member of the switching crew of an interstate railroad seems to us to affect interstate commerce directly or closely and substantially, even though at the moment of his injury he was not engaged in the movement of interstate traffic." In *Copley v. Industrial Acc. Comm.*, 19 Cal.2d 287, 120 P.2d 879, in the case of a bridge carpenter working on a trestle used by interstate and intrastate commerce, the court said at page 288 of 19 Cal.2d, at page 880 of 120 P.2d: "If the federal remedy is inadequate, those subject to its exclusive control cannot alter their status by virtue of that fact but should address such complaints to Congress. Since the decedent was performing duties which have a direct relation to interstate commerce, the Industrial Accident Commission was without jurisdiction to proceed in the case."

[3] The present accident, the foundation for the state commission's award, occurred in 1936. The respondent commis-

sion urges that at that date the jurisdiction of the Federal Employers' Liability Act was limited to those acts which "at the moment of injury" were so closely related to interstate transportation as to be a part thereof; and consequently, here, the deceased employee was not within the jurisdiction of the act as he had ceased his interstate work for the day. The factual situation to which the "moment of injury" test was intended to be applied, relied on by the respondent commission, and the factual situation to which the enlarged scope of the act subsequent to 1939 was intended to be applied, are different from the factual situation here. The borderline cases "in the twilight zone" which made necessary the "moment of injury" test and the 1939 amendment, 45 U.S.C.A. §§ 51, 54, 56, 60, were inherent in the nature of railroad operations which are in part interstate and part intrastate, one employee being called upon to perform services in both. *Shanks v. Delaware L. & W. R. Co.*, 239 U.S. 556, 36 S.Ct. 188, 60 L.Ed. 436, L.R.A.1916C, 797; *Knowles v. New York, N. H. & H. R. Co.*, 223 N.Y. 513, 119 N.E. 1023. Here it is conceded that the services performed by the applicant all during the day terminating in his death, were in interstate commerce. Therefore, the reason for the "moment of injury" rule is inapplicable. In the present case there were no available lodging accommodations at the terminal of the railroad. Some eighteen years prior to the accident the Trainmen's Brotherhoods and the president of the petitioner railroad, or its predecessor, entered into an agreement that transportation from the terminal to a designated point would be provided by the company "at hours when public transportation facilities" were not available. On the day of the accident decedent arrived at the terminal about 1 a.m., when public transportation was not available. The employer-employee relationship in engaging in interstate commerce did not end until the employer fulfilled his contract by transporting the employee to a point where public transportation could be obtained. Such transportation was an incident of, arose out of and occurred in the course of employment in interstate commerce railroad work.

If liability for accidents occurring while the employer transports his employees to and from work is imposed by reason of such transportation's being an incident to

the employment, though no services are being performed at the moment of the accident, jurisdiction over the liability, logically, should be governed by the character and purpose of the services which have been performed. The basic principle to be applied to the present facts was enunciated in *Erie R. Co. v. Winfield*, 244 U.S. 170, at page 173, 37 S.Ct. 556, 557, 61 L.Ed. 1057, Ann.Cas.1918B, 662, decided in 1917, wherein the court stated the rule as follows: "In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See *North Carolina R. Co. v. Zachary*, 232 U.S. 248, 260, 34 S.Ct. 305, 58 L.Ed. 591, 596. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so, when he was leaving the yard at the time of the injury, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is, for present purposes, of no importance." In *St. Louis-San Francisco R. Co. v. Mills*, 5 Cir., 3 F.2d 882, the Circuit Court of Appeals held that employment in interstate commerce could continue during a ride from work in a street car not under the control of the employer and not the only means of transportation. As part of the contract of employment, the employer undertook to guard the employee from injury from strikers going to and from work. The case was reversed on other grounds in 271 U.S. 344; 46 S.Ct. 520, 521, 70 L.Ed. 979, 983, where the court said: "We need not inquire whether decedent was employed in interstate commerce at the time of his death, or whether the rule laid down in *Erie R. Co. v. Winfield*, 244 U.S. 170, 37 S.Ct. 556, 61 L.Ed. 1057, Ann.Cas.1918B, 662, [14 N.C.C.A. 957], can be extended, as the court below held, so as to support the judgment of the District Court."

The respondent commission relies on a group of cases exemplified by *Milburn v. Chicago, M. St. P. & P. R. Co.*, 331 Mo. 1171, 56 S.W.2d 80. In that case an employee of a railroad lived in a bunk house near his place of work which was supplied by the railroad. His work consisted of repairing tracks, the bunk houses being moved with the jobs. He was in-

jured when a kerosene stove exploded as he lighted it. The injury occurred long after he had returned from his day's work in interstate commerce but while he was required by his job to be in the bunk house on call for emergencies. The court in its decision (page 87 of 56 S.W.2d) recognized the rule in the *Winfield* case: "As shown above, an employee after he has stopped his actual work is under the protection of the federal act for a reasonable time in which to leave the railroad premises, and under the authorities above quoted this includes, if necessary, taking him to a place where he can conveniently reach his lodgings." However, in the case before the court it was held that the employee's "actual employment [then, at the time of injury] was holding himself ready * * * to respond to a call for service." The court seems to segregate this type situation into a series of acts in employment which do not partake of the character of the acts preceding or succeeding. See *Arkell v. Baltimore & O. R. Co.*, Mo.Sup., 131 S.W.2d 590, for this distinction.

The commission attempts to distinguish the cases following the *Winfield* case on their facts, stating that in all of them the employee was injured on the premises of the employer. e.g. *New York, Cent. R. Co. v. Marcone*, 281 U.S. 345, 50 S.Ct. 294, 74 L.Ed. 892; *Williams v. Chicago, R. I. & P. R. Co.*, 155 Kan. 813, 130 P.2d 596. The fact that the transportation furnished to and from work is on the railroad line or under the control of the employer has no bearing upon the interstate character of the employment relationship at that point in time if in fact the transportation is a necessary incident of the day's work such as to make an injury occurring at that time one which arises out of and in the course of the employment. *Lopez v. Hines*, Mo.Sup., 254 S.W. 37, 41, and *Louisville & N. R. Co. v. Mullins' Adm'x*, 181 Ky. 148, 203 S.W. 1058, 1059, are both cases in which the railroad furnished the employee with hand cars to go to and from work on the railroad line and the principle of the *Winfield* case was applied.

One California case is cited by the commission to support its position: *McKinney v. Industrial Acc. Comm.*, 137 Cal.App. 206, 30 P.2d 78. (No petition for hearing in the Supreme Court.) *McKinney*, the husband of petitioner, in the employ of the Southern Pacific Company was employed to inspect and repair electrical equipment of

locomotives in the roundhouse. On his way to work through the roundhouse he fell into a pit. An order of denial of award by the Industrial Accident Commission was annulled for the reason that, at page 208, of 137 Cal.App., at page 79, of 30 P.2d: "In the present case, however, while decedent was subject to be employed in both interstate and intrastate commerce, he had not been assigned to work in either." Here it is admitted that the employee was employed only in interstate commerce on the day of his injury.

[4,5] It must be admitted that some confusion appears in various jurisdictions. The commission argues that this confusion can be explained on the basis that the appellate courts support the first fact finding tribunal, whether the district court or the state compensation commission, i.e., their finding of jurisdiction will be supported because both systems, federal and state, of compensation are to be liberally construed in favor of the workman. A careful examination of the seeming conflict in the various jurisdictions and in the respective positions of the commission and petitioner with respect to the issue now being considered indicates that the confusion results from the fact that the courts "in discussing the status of particular employees, frequently are somewhat elliptical in stating their conclusions, omitting reference to 'course of employment,' although deciding the question of 'employment in interstate commerce' upon that very basis." (Roberts, Federal Liabilities of Carriers, vol. 2, p. 1391; see, also *Sassaman v. Pennsylvania R. Co.*, supra.) Further in support of its position the commission cites *Davis v. Department of Labor of Washington*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246. In that case the court seems to hold that though, where Congress has acted in the maritime or interstate commerce fields, its jurisdiction is exclusive, "There is * * * clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. * * * Faced with this factual problem we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves." 317 U.S. 249, 63 S.Ct. at page 229, 87 L.Ed. at page 250. There is no basis on which to apply this rule to the facts here. There is no

question of fact to be decided. The applicant was employed actively in interstate commerce. There is no confusion of employers and employees operating both in intrastate and interstate commerce. If the employee's injury arose out of and in the course of his employment as a necessary incident thereto, it arose out of and in the course of interstate commerce, it being conceded that his day's active duties were in interstate commerce. The basic reason for the rule of exclusive jurisdiction of the federal law is present. The application of the state law would disturb the uniform application of the Federal Employers' Liability Act. *Occidental Indem. Co. v. Ind. Acc. Comm.*, 24 Cal.2d 310, 315, 149 P.2d 841; *Clark v. Cahill Bros.*, 67 Cal.App.2d 689, 693, 155 P.2d 125. There is no "twilight zone" of interstate and intrastate activities upon which conflicting findings of fact might be based. It is settled law that intrastate business is relegated to state tribunals to settle contested questions; that Congress had made clear that the state must refrain from attempting jurisdiction in matters that bear an exclusively interstate aspect; and that state courts in matters presenting questional jurisdictional issues should be guided by the federal legislative and judicial views.

In *Occidental Ind. Co. v. Ind. Acc. Comm.* (Ruljanovich), 24 Cal.2d 310, 149 P.2d 841, *Davis v. Department of Labor of Washington*, supra, and *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann.Cas. 1917E, 900, which initiated the "perplexing problem" in the *Davis* case, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 248, are discussed at length. In the *Occidental Ind. Co.* case, Ruljanovich, a seaman fisherman, was injured on shore while performing an errand for his employer. It was held that the maritime law is exclusive. In likening the jurisdictional problem of a seaman's obtaining damages, *Jones Act*, 46 U.S.C.A. § 688, or his maintenance and cure under admiralty law to the same problem under the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60, the court said at page 315, of 24 Cal.2d, at page 844 of 149 P.2d:

"In other fields, for illustration, injury to railway employees, it has been consistently held that the remedy given by the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60, is exclusive of rights and remedies under state workmen's compensation laws;

that act extends to all railway employees, as expressed in its 1939 amendment.
* * *

"From the foregoing it remains to be determined whether the facts of the instant case bring the employee within the exclusive jurisdiction of the maritime law or the state Workmen's Compensation Law or in the twilight zone mentioned in *Davis v. Department of Labor and Industries*, supra; and in so doing we are not aided by the discussion in the *Davis* case of the *presumption* of the correctness of a determination by the state Industrial Accident Commission that it had jurisdiction inasmuch as both it and the federal court have assumed jurisdiction." (Italics added.)

The court concluded at page 323 of 24 Cal.2d, at page 848 of 149 P.2d "that the respondent commission did not have jurisdiction of the case at bar and therefore its award is annulled."

In the record before us it appears that the applicant commenced a suit under the Federal Employers' Liability Act, but it does not appear what happened to that suit, hence the force of the *Davis* case has not been dissipated as in the *Occidental Ind. Co.* case by the assumption of jurisdiction under the federal act by the federal court. However, the facts in the instant case do not present the "perplexing problem" of alternating territorial jurisdiction of activity on land and sea or alternating commerce jurisdiction of activity in interstate and intrastate commerce. For this reason the assumption of jurisdiction by the state tribunal is not aided by the "presumption" in the *Davis* case.

[6,7] To summarize: Irrespective of the 1939 amendment, which is referred to herein as indicative of recent legislative thought, the order of the commission must be annulled. The decedent brakeman was riding in the taxicab as an incident of his interstate work. An incident of employment derives its character from the work performed in the occupation. Without the designated principal work there would be no "incident" to the "employment." Prior to the 1939 amendment, sec. 1 of the act, 45 U.S.C.A. § 51 provided that every common carrier by railroad while engaging in

commerce between any of the several states should be liable in damages to an injured employee while employed by such carrier in such commerce. The employment here was in interstate commerce. The Federal Employers' Liability Act therefore for the reasons stated as in *Occidental Ind. Co. v. Ind. Acc. Com.*, supra at page 314 of 24 Cal.2d, at page 844 of 149 P.2d, "supersedes the operation of state workmen's compensation laws." The purpose of the 1939 amendment was to eliminate the necessity of the courts determining borderline cases. This is not a borderline case. It is conceded that if the transportation was connected with the work so closely as to be an incident of interstate commerce, respondent commission is without jurisdiction. The working hours of decedent and the conditions at the terminal at Tiburon required a continuance of his interstate employment until the taxicab should have transported him to a place where a public conveyance could be obtained. Any disputed legal point raised in this case may be settled by reference to federal decisions which must prevail over state opinion. *New York C. R. Co. v. Marccone*, supra; *San Pedro, L. A. & S. L. R. Co. v. Davide*, 9 Cir., 210 F. 870; *St. Louis-San Francisco Ry. Co. v. Mills*, supra; *Atlantic Coast Line R. Co. v. Williams*, supra; *Lukon v. Pennsylvania R. Co.*, 3 Cir., 131 F.2d 327; *Chicago, M., St. P. & P. R. Co. v. Kane*, 9 Cir., 33 F.2d 866; *North Carolina R. Co. v. Zachery*, supra; *Erie R. Co. v. Winfield*, supra. A movement toward home in transportation supplied by the employer is a necessary incident to the commerce in which the employee has last been engaged. *Director General of Railroads v. Bennett*, 3 Cir., 268 F. 767, certiorari denied, 254 U.S. 656, 41 S.Ct. 218, 65 L.Ed. 460. If the deceased had been engaged in intrastate and interstate work during the day or night preceding his death, the intrastate work would be of no importance. *Dennison v. Payne, Agent, etc.*, 2 Cir., 293 F. 333; *Erie R. Co. v. Winfield*, supra.

The order is annulled.

PETERS, P. J., and SCHOTTKY, Justice, pro tem., concur.

73 Cal.App.2d 125

ROSELIP et al. v. RAISCH.

Civ. 14989.

District Court of Appeal, Second District,
Division 2, California.

Feb. 19, 1946.

1. Appeal and error ⇨1010(1)

In action for damages for negligent destruction of asphalt plant by fire during lessee's occupancy, finding of lessee's continuous possession until after fire, and consequent liability for the fire, was supported by substantial evidence and could not be disturbed on appeal.

2. Bailment ⇨1

In lessor's action for damages for negligent destruction of asphalt plant by fire during lessee's occupancy, record was insufficient to sustain lessee's theory that lessor was responsible because he became bailee of plant during temporary absence of lessee.

3. Bailment ⇨12

Where no consideration was paid by lessee for lessor to hold premises or for use of plant during lessee's temporary absence, if lessor became a bailee of lessee's interest in property, lessor would have been merely a gratuitous bailee, and would be liable only for gross negligence during his possession, and not at all if destruction by fire occurred without his fault.

4. Bailment ⇨22

Even if lessor of asphalt plant was bailee during lessee's temporary absence, the bailment terminated on lessee's re-entry and resumption of operations, so that lessor was not responsible for destruction of plant by fire after lessee resumed operations.

5. Landlord and tenant ⇨55(2)

Where lessee of asphalt plant used fuel oil as fuel, lessee was under duty to have an engineer of such experience in charge of plant as would not only know perils of heating with fuel oil, but would exercise such care as to test for presence of water.

6. Landlord and tenant ⇨55(3)

In lessor's action for negligent destruction of asphalt plant by fire during lessee's occupancy, evidence disclosing application

of excessive heat to fuel oil tank containing water warranted finding, under charge of general negligence, that lessee was liable.

7. Negligence ⇨121(2)

Where plaintiff relies on doctrine of res ipsa loquitur to establish liability of defendant, plaintiff must allege merely general acts of negligence.

8. Negligence ⇨121(2)

Plaintiff is not deprived of benefit of res ipsa loquitur doctrine merely because of proof which does not clearly establish the facts or leaves the matter doubtful.

9. Negligence ⇨121(2)

The res ipsa loquitur doctrine is applicable where plaintiff's pleading or evidence leaves the cause of injury in doubt so long as destructive or injurious instrumentality was under exclusive control of defendant and injury was one which in natural course of things would not have occurred had defendant used due care.

10. Negligence ⇨121(2)

That dangerous instrumentality was under defendant's control at time of its destructive behavior establishes his liability in absence of proof of successful interference by another, and he cannot avoid liability for injury resulting from its mismanagement because out of a number of probable causes of injury he may have concluded and produced witnesses to testify that injury was due to one cause and not to another.

11. Negligence ⇨22

In using a dangerous instrumentality, the amount of care of user increases in proportion to the danger, and whether he should have anticipated injury depends on facts that beset him.

12. Appeal and error ⇨996

Reviewing court must sustain all reasonable inferences of the trial court.

13. Appeal and error ⇨996

Where two or more inferences can be reasonably deduced from facts, the appellate tribunal is without power to substitute its deductions for those of trier of facts.

14. Landlord and tenant ⇨55(2)

Lessee's fireman in starting fire under fuel oil tank without first having ascertained presence of water in the oil was guilty of negligence, rendering lessee liable for destruction of lessor's asphalt plant.

15. Landlord and tenant Ⓒ55(3)

Where lessor sought damages on account of loss of rental value of asphalt plant, destroyed through negligence of lessee, during period of reconstruction, orders, "backlog", and promises of patronage were not proper basis for assessing damages for loss of rentals.

16. Landlord and tenant Ⓒ55(3)

Where lessor sought damages on account of loss of rental value during reconstruction of asphalt plant destroyed through negligence of lessee, evidence as to rental value, and that time consumed in reconstruction was a reasonable time, was insufficient to sustain recovery of \$4,617.60 for loss of rentals.

17. Damages Ⓒ62(3)

Where lessor's asphalt plant was destroyed through negligence of lessee, lessor had duty of taking such reasonable steps as would avoid, or minimize, his own losses by any reasonable exertion without serious expense to himself.

18. Damages Ⓒ62(3)

Where lessor's asphalt plant was destroyed by fire during lessee's occupancy, and lessee submitted contract whereby construction of plant might proceed with provision that rights of both parties were preserved as to final determination of liability for losses caused by the fire, but lessor refused to execute proposed contract and thereby lost opportunity to fill Army orders, lessor violated duty to take reasonable steps to minimize damages.

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action by Walter B. Roselip and others against A. J. Raisch for negligent destruction of an asphalt plant by fire and by the named plaintiff for rentals. From an adverse judgment, defendant appeals.

Judgment modified and as modified affirmed.

Nelson & Castro and A. V. Muller, all of San Luis Obispo, for plaintiffs and respondents.

Cooley, Crowley & Supple and Courtney L. Moore, all of San Francisco, for defendant and appellant.

MOORE, Presiding Justice.

Respondent Roselip was the owner of a sand and gravel pit and asphalt plant at Atascadero. After trial he was awarded damages for its negligent destruction by fire during appellant's occupancy. On this appeal we are to determine (1) whether the negligence was that of appellant or of respondent and (2) whether the allowance of rentals for the plant prior to its reconstruction is authorized by law.

Appellant held a contract with the state to build a 30-mile highway near Camp Roberts and was in need of facilities to supplement his own mixing plant which he proposed to erect on the premises of respondent. On July 28, 1942, by writing appellant purchased from respondent certain mineral aggregates, screenings and sand and rented a portion of respondent's asphalt plant. No question as to the rentals or the payments for mineral aggregates or sand is involved in this appeal, hence no further mention thereof. Pursuant to the written contract respondent rented to appellant a satisfactory site for the latter's own plant and sufficient land for the storage of materials together with free access to the public highway, which privileges appellant exercised and enjoyed during the period of his occupancy. Respondent's plant was to be restored to its original condition, reasonable wear and tear excepted.

The Findings.

Contemporaneously with the execution of the written contract and delivery of possession to appellant the parties orally agreed that during the occupancy Raisch would make plant-mix for Roselip's use in local construction at 70 cents per ton and appellant agreed to pay respondent as compensation for use of the plant in making the plant-mix three cents per ton: the oil, rock and sand to be supplied by respondent at the plant. But that portion of the judgment awarded for making the last mentioned plant-mix is not involved in this appeal. After defendant had finished construction of the state highway but while he was still in possession, the asphalt plant by reason of his negligence was destroyed by fire.

Following the fire the corporate plaintiffs paid Roselip* the amounts due him under their insurance policies and were subrogated to his claims against appellant for his negligence in causing the fire. They joined

* Inasmuch as the corporate plaintiffs are not involved in the issues of this ap-

peal, the term respondent will refer to Roselip only.

in this action to recover the sums paid while respondent sued for the rental value of his plant during the period prior to its reconstruction. The court found the above recited facts and determined that appellant was indebted by reason of his negligence in causing the fire in the sum of \$8,470.74 and for loss of rentals in the sum of \$4,617.60.

It was also found that on August 16, 1942, appellant took possession of respondent's property in good condition and repair. He arranged and paid for such power and water as was required, made extensive modifications of the plant, replaced the wood-heating unit with an oil burner, installed a fuel-oil line to the burner and supplied the fuel oil. The burner was of the variety customarily used for a fire box. It was regulated by petcocks, and steam from the nearby boiler was used to force the oil to the burner. The fuel-oil tank was a cylindrical, metal receptacle with a man-hole 15 inches in diameter in its upper side and was set on a brick foundation. It was fed from a tank alongside of it, elevated "on stilts," which was in turn fed from a larger tank on a slight elevation some 60 feet away. The smoke from the burner was conducted upward through a flue. If while the burner was operating an obstruction had been placed on top of the chimney, it would cause the fire to shoot backwards. A possible cause of the subsequent conflagration appears to have been the excessive heat generated by the oil burner under the fuel-oil tank. The purpose of heating such tank was to facilitate the flow of the fuel oil, not to cause it to boil. But if excessive fuel oil was forced by the steam into the burner it would force the flames to the rear end of the furnace and up the flue and to the outside.

On November 2, 1942, having completed his 30-mile highway construction, appellant left his equipment and maintenance men at the asphalt plant and went to Hamilton Field to complete unfinished work there with the understanding that he would return in about a week to produce the plant-mix required by respondent for his unfilled orders. He returned on November 30 to fulfill his promise and to put the plant in its former condition. Shortly after the commencement of operations on the following day the heating unit ignited and the flames which spread from the furnace destroyed the asphalt plant and adjoining property and movables of respondent. The plant was

not placed in repair until March 21, 1943. Respondent was awarded damages for the loss of his property and for its rental value prior to its reconstruction.

Contentions of Appellant.

Appellant contends that the evidence does not support the findings: (1) That the defective conditions of the plant were due to appellant's lack of ordinary care during his occupancy and hence the doctrine of *res ipsa loquitur* is not applicable; and (2) that the loss of rental value was due to appellant's own failure promptly to replace the plant. He argues that he had restored possession of the plant on November 2 to respondent who thereafter was in control of it; that the oil was ignited by reason of the negligence of respondent who had originally constructed the plant; that the receiving tank on top of the hill was "not a closed container, but had a peaked roof which was open at both ends"; that during appellant's absence a severe rainstorm on November 17 and 18 resulted in the entry of a generous supply of water into the metal cylinder containing the oil; that the water, having taken its place at the bottom of the cylinder, by reason of the application of excessive heat, boiled, causing the oil to foam out; that the vapors from the heated oil ignited which in turn set aflame the foaming oil.

With reference to the damages resulting from delays in the reconstruction of the plant, appellant contends that "if Roselip had been willing to sign the reservation of rights agreement both his and Raisch's plant could have been put back in operation within a week"; that respondent is not entitled to the rental value of the plant until March 21, 1943, because he did not exercise diligence to avoid loss or to minimize the resulting damage, and that the rental value allowed was not proved.

Was Appellant Negligent?

In order to determine which party was negligent, we have first to ascertain whether appellant's occupancy was continuous as found by the trial court after November 2, and if so then whether any act or omission of respondent relieved appellant of his duty to protect the asphalt plant against the hazards of fire and explosion. Notwithstanding the contentions of appellant that on his departure from the leased premises respondent reentered and occupied the property and neglected so to care for the fuel-oil tank as to permit rain to fall there-

in, the facts in evidence justify the finding that appellant's possession was intended by him to continue until he withdrew his own possessions and restored respondent's plant in good order and repair. The modifications of respondent's plant as shown by his testimony clearly indicate the conclusion derived by the court below. Such changes were evidently made for the purpose of enabling appellant to enjoy the benefit of the maximum productive capacity of the plant and of enhancing the efficiency of his own machinery there installed. The hopper was placed 60 feet away from its former position; conveyor belt No. 9 was cut and left lying on the ground; conveyor belt No. 17 was cut and used to run rock material off at a different point; the electric motor was placed on the steel tank near road No. 1 for transferring the asphalt oil to appellant's asphalt plant; the chain and transmission assembly was dismantled and removed from its place on the bunkers; the conveyor frame No. 9 was taken apart and laid on the ground; the electric wiring and lighting systems were taken apart; the pipelines from the boiler were changed to run to appellant's plant; the bunkers on top were reconstructed; bulkheads on the southwest side were built and a bumper was framed there for trucks in order to load directly into the bunkers instead of using a bulldozer as respondent had done; an additional fuel tank was installed on the hill; the power was disconnected at the switch transferring it to appellant's switch panel and the lighting system was changed in order to get his own lights off the same power he had for his plant; the oil lines were disconnected from the concrete tank and all of the oil lines were changed to match appellant's set-up. Giannini, appellant's engineer, testified that he removed the fire box in which respondent had burned wood and installed and used an oil burner. Appellant notched and weakened timbers supporting the bunkers in order to enable him to install timbers to hold up his feeders.

Besides the changes made there is other evidence indicating that appellant intended only a brief absence when he left on November 2. Roselip testified that in a conversation between Roselip and Stanley, superintendent of appellant, before the withdrawal on November 2, Stanley said that they were then hurriedly leaving the plant to finish work in Marin county which would require about a week but were returning soon to run 2600 tons of plant-mix

required for respondent and would then remove appellant's plant. He told Gibson on November 29 that he was ready to run the plant-mix for respondent and Gibson replied that appellant would return, produce the hot-mix and then remove his own equipment. Before Stanley finally left he instructed respondent to have asphalt in the concrete tank that loss of time might be avoided at the commencement of the final run. Also, on November 2 appellant left a crawler-type crane, a shovel with a boom on it and two trucks and his tools without asking the consent of respondent. Thereafter appellant's employees who remained entered the asphalt plant. They were engaged in hauling sand from the stock pile and appellant's equipment was stored in and around the asphalt plant. Such employees passed through respondent's plant area to get drinking water. The trucks of appellant left behind on November 2 were stored north of the boiler at the asphalt plant. Appellant had a crew of several men around the plant until November 14 when the 30-mile strip was completed. In addition to these facts, according to Mr. Gibson, from and after November 2, appellant kept certain maintenance men on his payroll and two of them were on respondent's premises at all times painting appellant's dryer and cyclon. Also, appellant maintained his headquarters in Atascadero until about November 25.

[1] Nothing appears in the evidence to indicate that respondent took any step to repossess the plant after November 2. On the contrary, the interest displayed by Stanley in furnishing asphalt hot-mix in the area surrounding Atascadero further indicates that the purpose of appellant was to continue his operations for some time after the temporary sojourn of the main portion of appellant's crew in Marin county. The trial court was not obliged to be governed in deriving its findings by the fact that respondent had repossessed the plant after November 2 merely because he appeared at his office on the premises. The occupancy of his office was an essential part of his rock and sand business which had continued during appellant's actual occupancy of the plant after August 16. Neither did respondent's employment of his watchman indicate a resumption of possession. All of respondent's employees who entered the premises prior to the fire were there to assist respondent in the operation of his rock plant only. It thus appears that the

asphalt plant of respondent was at all time in November and on the day of the fire under the dominion of appellant. On the other hand there is no evidence that respondent exercised any control thereof or that he owed any obligation arising out of the final run of hot-mix except to pay appellant the price agreed upon July 28. It thus appears that the finding of appellant's continuous possession and consequent liability for the fire is supported by substantial evidence. Hence it cannot be disturbed on appeal. *Olivero v. Rosano*, 42 Cal.App. 2d 740, 743, 109 P.2d 976; *Fischer v. Keen*, 43 Cal.App.2d 244, 248, 110 P.2d 693.

Respondent Was Not Bailee of His
Plant After November 2.

[2-4] Appellant's theory that respondent is responsible for the condition of the fuel oil subsequent to November 2 because under the evidence respondent at least became bailee of the plant even though appellant held it under his leasehold is not supported. The record is destitute of proof that Roselip consented to a bailment of the property. The court was not obliged to find that respondent's failure to protest the temporary absence of appellant from Atascadero was conclusive proof of his agreement then to occupy the plant. No consideration was paid by appellant for respondent to hold the premises or for the use of the plant after November 2. If it were conceded that respondent became a bailee of appellant's interest in the property, he would have been merely a gratuitous bailee and would be liable for only gross negligence during his possession (4 Cal.Jur. 21), and not at all if the loss occurred without his fault. *Wolfe v. Willard H. George, Inc.*, 110 Cal.App. 532, 294 P. 436. Also, if it be conceded that Roselip was bailee in November prior to appellant's return, surely the bailment would have terminated on appellant's re-entry and resumption of operations. The simple fact found by the court and proved by the evidence is that Raisch announced his plan to be absent from the plant at Atascadero while completing the Marin contract. From this the inference was not unreasonable that appellant did not purpose to surrender his lease pending his absence. Respondent never said that he would operate it or disturb the arrangements of any part of the equipment as established by Raisch. He did not operate the plant even though on November 2 he was obligated to deliver

asphalt mix to the city of San Luis Obispo and to the county as well.

Therefore Appellant Was Liable

[5,6] It follows that appellant was chargeable as occupant and operator of the hot-mix plant on December 1. He as such operator knew the plant was so geared as to use fuel oil as fuel; that such oil had been purchased for his own operations; that it was charged with readily inflammable gases; that such gases would pass off under the influence of heat; that water is often contained in fuel oil; that such water rests at the bottom of a tank; that upon its boiling under such heat the water drives upward, causes the oil to bubble over and to dissolve into its gaseous constituents which in turn will be ignited by a flame. It was appellant's duty to have an engineer of such experience in charge of the plant on December 1 as would not only know the perils of heating fuel oil but would exercise such care as to test for the presence of water. This he could have done either by use of the bleeder on the pipeline of the fuel oil theretofore used by respondent or by extending the fuel oil pipes to the bottom of the fuel-oil tank, thereby first removing the water. The results of applying heat to the fuel-oil tank had been observed by appellant's fireman, the witness Ledbetter, in the spring of the year. Negligence in the application of excessive heat to the fuel-oil tank was certain to cause such overflow of the oil. If the fire under the fuel tank was sufficiently intense to send flames up the flue and an obstruction was placed on the top thereof, it would impede the upward direction of the flames and spread them in all directions; and if the oil was fed in such abundance and with sufficient force, its flame would contact the gaseous vapors from the oil. The oil was caused to bubble over by the application of heat on December 1; gases from the oil filled the area surrounding the fire-box; the oil gushed from the hole in the top of the fuel tank; the pressure of the fuel oil in the fire-box caused the flames to shoot from the chimney and out of the fire-box to ignite the fuel oil whose flames instantly spread to the top of the fuel tank. There was yet another course the flames might have taken. The fuel oil could have reached and ignited the 18,000-gallon tank of asphalt. Whatever might have been the precise origin of the flames, it is clear that the trial court was warranted in finding

under the charge of general negligence that appellant was liable.

The Doctrine of Res Ipsa Loquitur.

[7-9] The principles of this doctrine are invoked by respondent as applicable to the facts of this case. They are clearly and forcefully announced in many California decisions. Where one relies upon the doctrine to establish liability of the defendant he must allege merely general acts of negligence. But plaintiff is not deprived of the benefit of the doctrine merely because of proof "which does not clearly establish the facts or leaves the matter doubtful." The doctrine is applicable where plaintiff's pleading or evidence leaves the cause of the injury in doubt so long as the destructive or injurious instrumentality was under the exclusive control of the defendant and the injury was one which in the natural course of things would not have occurred had the defendant used due care. *Keller v. Pacific Telegraph & Telephone Co.*, 2 Cal.App.2d 513, 38 P.2d 182; *Carlsen v. Diehl*, 57 Cal.App. 731, 208 P. 150; *Jorgensen v. East Bay Transit Co.*, 46 Cal.App.2d 189, 115 P.2d 556; 45 C.J. 1206; *Chauvin v. Krupin*, 4 Cal.App.2d 322, 40 P.2d 904.

[10] No person in charge of a dangerous instrumentality can avoid his liability for an injury resulting from its mismanagement because out of a number of probable causes of the injury he may have concluded, and procured witnesses to testify, that the injury was due to cause A and not to cause B. That such instrumentality was under his control at the time of its destructive behavior establishes the liability of the operator in the absence of proof of successful interference by another. Respondent did not allege a specific act of negligence as the cause of the fire. Neither did he attempt to prove a specific cause. His allegation was that "through the carelessness and negligence of defendant and through his, defendant's lack of ordinary care," defendant set fire to respondent's property. And at the trial respondent had no witness who observed the origin of the fire. In his brief appellant admits that "no possible inference could be drawn, either logically or scientifically, from the gushing oil tending to prove that the fire originated by reason of the fact that the oil burner was shooting flames out of the chimney. * * *" But if the fire in the burner was so forceful as to drive the flames out at

the top of the flue; if the flames were there so spread as to reach the light ends afloat in the air around the flue; if the fuel oil was caused to bubble over by reason of its water content and by the application of excessive heat to the fuel-oil tank, then under the general charge of negligence judgment against appellant was justified under the *res ipsa* doctrine.

[11-14] Moreover, in using a dangerous instrumentality the amount of care of the user increases in proportion to the danger, and whether he should have anticipated injury depends upon the facts that beset him. 19 Cal.Jur. 563. Appellant was on December 1 using equipment which he had himself installed to heat the fuel. The combination of heat, inflammable oil and steam under pressure was sufficient to arouse the brain centers of caution in an experienced fireman. Such facts required appellant in the exercise of ordinary care to know of the attendant dangers and to avoid them. The finding of appellant's negligence in view of the events is justified by the doctrine that it is the duty of the reviewing court to sustain all reasonable inferences of the court below. *Patten & Davies Lumber Co. v. McConville*, 219 Cal. 161, 25 P.2d 429. And when two or more inferences can be reasonably deduced from the facts the appellate tribunal "is without power to substitute its deductions for those of the jury." *Fischer v. Keen*, 43 Cal.App.2d 244, 248, 110 P.2d 693, 695. That appellant installed the burner with which to heat the fuel oil is admitted. That he agreed to supply respondent with such hot-mix as he might require is not denied. Even the last attempt to run on December 1 was for the purpose of supplying respondent's local demands. No fuel oil was purchased by respondent prior to the day of the fire. It was appellant's oil. He maintained possession under lease until he should remove his own equipment and dismantle and reorganize the plant of respondent. His own crew was in control and was actively operating at the time of the fire. His engineer knew or should have known that the fuel oil contained water; that water when mixed with oil and subjected to excessive heat is a dangerous element; and that there should have been a "bleeder" in the "lowest part of the tank" so that the water accumulated "from the crude oil or from leaky roofs and rainfall" could be drained off. According to the testimony of the witness Todd, manager of the Union Oil Com-

pany at San Luis Obispo, such has been the approved practice for forty years in determining the presence of water in oil, and it is a fact that such a bleeder had been used by respondent prior to appellant's occupancy. It was therefore negligence of the fireman not to have first ascertained the presence of water in the oil.

When the flames shot from the top of the flue on the firebox, unobstructed, they might have escaped without tragedy. But in violation of fundamental principles of physics appellant's employees held a flat object over the top of the chimney. When the flames were thus spread destruction of the plant was inevitable.

Was Judgment for Loss of Rental
Value Justified?

After the court had correctly determined appellant's liability for the destruction of respondent's asphalt plant it was confronted with the latter's demand for damages on account of the loss of its rental value during the period of reconstruction. There is no evidence to warrant the finding that the plant had a rental value of \$44.40 per day. The proof of rental value was that such a plant is customarily leased on a tonnage-run basis. The very contract of July 28 leased this plant to appellant "in consideration of a rental rate of three cents per ton on the quantity of mineral aggregate purchased by the buyer." Not only is there no proof of such daily rental value of the plant as \$44.40 but the only proof of respondent's operations for others is that during four months in 1942 he sold 6,588 tons which at the rate of 15 cents a ton would give a rental value of \$8.25 per day. Neither is there satisfactory proof that 104 days was a reasonable time for its reconstruction.

[15] Respondent claims loss of the use of his plant for such period. There is no satisfactory explanation of his delay in commencing his operations to about January 10, 1943. Moreover, in the 64 days during which the reconstruction actually proceeded there were 9 Sundays, 2 holidays and 11 non-working days, leaving only 42 actual working days during the reconstruction. At \$8.25 per day respondent could by leasing his plant have earned only \$346.50. Besides this vice in the court's finding as to rental losses there is no proof of certainty of rentals during the shut-down period. Even though the government might have actually employed respondent to

deliver the hot-mix for a particular construction, the army agents might have negotiated a different deal and the possible trade of the public might have gone to other asphalt plants. All of the "definite orders" for hot-mix asserted to have been held by respondent on December 1, the "back log," the "promises" of patronage—these were not proper bases for assessing damages for loss of rentals of the plant. "Prospective" work to be done at the airport or in San Luis Obispo, or by the county or by any of its municipalities was only speculative until signed contracts for hot-mix reposed in the locker of respondent, and did not justify a finding of losses of daily rental value.

[16] There being neither proof of a daily rental value of \$44.40 or of any other sum nor satisfactory evidence of the certainty of a continuous flow of business during 104 days of the plant's silence it must be held that recovery in the sum of \$4,617.60 for loss of rentals was not justified.

Duty to Mitigate Damages.

[17, 18] There is no satisfactory evidence that respondent exercised reasonable diligence in rebuilding his plant. There is some competent and undisputed evidence that it could have been erected within a week and that with the assistance of army officers materials and equipment could have been immediately procured. In order to expedite the reconstruction a contract was drafted on December 8 at the request of appellant whereby the plant's construction might proceed, with the provision that the rights of both parties were preserved as to a final determination of liability for the losses suffered in the fire. In declining to subscribe to the proposed contract and thus to cooperate with appellant respondent not only delayed the reconstruction but lost the opportunity to fill army orders. It was respondent's duty to take such reasonable steps as would avoid, or minimize, his own losses by any reasonable exertion without serious expense to himself. 15 Am.Jur. 422, 425; 17 C.J. 767, 776-778; 25 C.J.S., Damages, §§ 33, 35; 8 Cal.Jur. 782. Respondent contends that it would have been futile for him to sign the proposed reservation of rights agreement in the absence of a contract between the army, a construction company and both litigants for the rebuilding of the plant. But such argument begs the question. An agreement to defer a decision as to which was liable for the fire

could in no event have impaired the rights of respondent, as "the law's delays" in this action have demonstrated. The serious attempts of the United States Engineer's office in acting for the army to obtain materials essential to the plant's reconstruction must be credited with a soupcon of sincerity under the circumstances confronting the republic on December 8, 1942, when every available, useful facility had been requisitioned to meet the most distressing national emergency in our history.

In view of the foregoing the judgment is modified by deducting therefrom the sum of \$4,617.60, and as so modified it is affirmed.

McCOMB and WILSON, JJ., concur.



73 Cal.App.2d 301

GLESBY v. GLESBY.
Civ. 14991, 15019.

District Court of Appeal, Second District,
Division 3, California.
Feb. 27, 1946.

1. Divorce ☞229

Where, after husband had taken appeal from order granting attorney's fees to wife's attorney in divorce action, an order to show cause why order should not be modified was issued, but husband's appeal was abandoned before hearing on the show cause order, the attorney waived any objection he might have had to validity of the show cause order when he appeared at hearing and participated therein on the merits. Code Civ.Proc. § 954a.

2. Divorce ☞229

Where, after husband had taken appeal from order granting attorney's fees to wife's attorney in divorce action, an order to show cause why order should not be modified was issued, but husband's appeal was abandoned before hearing on the show cause order, attorney's objection to jurisdiction of court made after major portion of testimony had been presented at hearing came too late. Code Civ.Proc. § 954a.

3. Time ☞10(9)

Where last day of period within which an appeal from order is permitted is Sunday, a nonjudicial day, an appeal filed on following day is in time.

4. Divorce ☞229

Where on October 11, court made oral order in divorce action awarding wife attorney's fee, and order for fee was entered on October 16, order of Monday December 11 modifying the order for attorney's fee was made before the original order would have become final. Code Civ.Proc. § 473.

5. Divorce ☞229

A modification of an order for attorney's fees for wife in divorce action can be validly based on change of circumstances occurring after order had been made.

6. Divorce ☞229

Where defendant in divorce action was ordered to pay \$5,000 attorney's fees to plaintiff but reconciliation between parties was effected, modification reducing attorney's fees to \$2,500 was appropriate and reasonable.

7. Divorce ☞286

Where original order awarding attorney's fees to wife in divorce action was modified but husband appealed from original order as a measure of caution, affirmation of order of modification rendered moot matters discussed in appeal claimed by husband from original order.

Appeals from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action for divorce by Jeanette Glesby against David Glesby. From an order for attorney's fees in favor of Harry G. Sadicoff, the defendant appeals and from an order modifying the award of fees by reducing it, Harry G. Sadicoff appeals.

Modification order affirmed and appeal of defendant dismissed.

Harry G. Sadicoff, of Los Angeles, for appellant.

Roth, Brannen & Schwab, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

There are two appeals pending in this matter. One was taken by defendant David Glesby from an order for attorney's fees in favor of Harry G. Sadicoff, who filed

this divorce action in behalf of Mrs. Glesby; the other was taken by Mr. Sadicoff, hereinafter called the attorney, from an order of the trial court modifying the award of fees by reducing it. We shall consider first this latter appeal, numbered 15019.

A few days after the divorce action was filed the attorney secured an order from the court, Honorable Stanley Mosk, which, in the minute order of October 11th, reads as follows: " * * * Custody of the minor children is awarded to the plaintiff, and defendant may visit the children at all reasonable times. Defendant is ordered to pay the sum of \$105.00 per week for the support of plaintiff and the minor children, payable on Saturday of each week, beginning October 14, 1944. In addition, defendant is ordered to maintain the taxes, insurance and necessary repairs on the community home. By stipulation, the balance of attorney fees may be fixed at time of trial. Defendant is ordered to pay the sum of \$5,000.00 attorney fees and \$250.00 court costs, payable \$2,500.00 forthwith and \$2,500.00 within sixty days, direct to counsel for the plaintiff." This minute order was entered on October 16, 1944. Meantime, on October 13th, the attorney secured and filed a formal order signed by Judge Mosk incorporating the terms of the minute order. A few days later he obtained a writ of execution for the sum of \$2,500 on account of the \$5,000 order for attorney's fees. The writ was not served however, Mr. Glesby's check in the sum of \$2,500 reaching the attorney in the following morning's mail. For this the attorney filed, on November 7th, a "partial satisfaction of said order for attorney's fees." At just about this time efforts looking toward reconciliation between Mr. and Mrs. Glesby were successful and, on November 15th, Mrs. Glesby wrote the attorney, instructing him "to stop all divorce proceedings against my husband." On November 17th, Mr. Glesby filed his notice of appeal from the order requiring him to pay the sum of \$5,000 as an attorney's fee and on the following day, filed an amended notice of appeal from that order. On Saturday, December 9, 1944, the court, upon application of counsel for Mr. Glesby, issued an order to show cause directed to Mrs. Glesby and said attorney requiring them to show cause why the order for \$5,000 attorney's fee should not be modified. This order was made returnable two days later and on Monday, December 11th, before any

hearing was held thereon, counsel for David Glesby filed an abandonment of the appeal which had been taken on November 16th, and filed the following day, from that portion of the order made by the court awarding to the wife's attorney the sum of \$5,000 as fees. The abandonment also included the appeal which had been designated as "Amended Notice of Appeal" filed November 18, 1944. After the filing of this abandonment, Judge Mosk proceeded with the hearing upon the order to show cause, in which the attorney participated actively, was sworn and testified. At the close of the hearing the court made the following statement:

"First let me say I am convinced Mr. Sadicoff has ably and conscientiously represented the plaintiff, and I do not think there is any imputation that he has not faithfully discharged his duties to the plaintiff.

"However, I cannot help but feel that the reasonable value of the services rendered to date does not exceed the amount paid by the defendant, and from the testimony there seems to be no likelihood of additional services. On the other hand, if there are additional services there is no reason why the plaintiff cannot come into court for other counsel fees and make a demand for additional attorney fees.

"Previous order of the Court is modified to provide that attorney fees shall be in the amount of \$2500, which amount counsel has indicated has already been paid, and costs in the amount of \$24.55, in lieu of the previous order of \$250 costs."

[1] The attorney contends, first, that the court was without authority to modify the original order for fees, an appeal from that order having been taken, which appeal was pending on December 9th, the day upon which the order to show cause re modification was issued. He argues that since the appeal had not been abandoned when the order to show cause was issued, the superior court had no jurisdiction to issue it, and since that order was invalid the court had no jurisdiction to hold the hearing on December 11th, after the appeal had been abandoned, or to make the order of modification at the conclusion of the hearing. The attorney's second contention is that an order for attorney's fee in a divorce action is a final judgment and cannot be modified except by motion under section 473, Code of Civil Procedure, or by a motion for a new trial or by an appeal. A third contention is that an order for attorney's fee in

a divorce action cannot be modified because of a change in circumstances occurring after the order has been made.

In support of his first contention the attorney cites *In Re Shafter-Wasco Irrigation District*, 1942, 55 Cal.App.2d 484, at page 486, 130 P.2d 755, at page 757, where the court said: "When the notice of appeal is properly filed it has the effect of removing the cause from the jurisdiction of the trial court." He also calls attention to the case of *Vosburg v. Vosburg*, 1902, 137 Cal. 493, at page 494, 70 P. 473, cited with approval in *Browne v. Browne*, 1943, 60 Cal. App.2d 637, 141 P.2d 428, where the court said: "The contention which must be sustained is that while the appeal was pending from the original judgment [re custody of children] the court had no jurisdiction to modify or change it." If, however, the court had jurisdiction by reason of the abandonment, these authorities cited by the attorney are not in point. Section 954a of the Code of Civil Procedure, in effect on December 11, 1944, provided that "At any time before the filing of the record or transcript in the court to which the appeal has been taken, an appellant may abandon the appeal by filing in the office of the clerk of the trial court a written abandonment thereof; and the parties may effect a withdrawal of the appeal by filing in said office the stipulation of their counsel therefor. Upon filing of either such document, the jurisdiction of the trial court over the subject matter of the judgment or order designated in the notice of appeal, will be completely restored. * * * It is our opinion that appellant waived any objection he might have had to the validity of the show cause order when he appeared at the hearing of December 11th and participated therein on the merits. The court stated in *People v. Macken*, 1939, 32 Cal. App.2d 31, at page 38, 89 P.2d 173, at page 177: "Appellant appeared in response to the order of the court and participated in a trial on the merits of that proceeding. Conceding that the requirement of service of points and authorities under section 527 of the Code of Civil Procedure is mandatory, nevertheless, the conduct of appellant in appearing at the hearing and participating therein was a waiver of the statutory requirement therein and gave the court jurisdiction. Anyone may waive the advantage of a law intended solely for his benefit. Civ.Code, §§ 3515, 3516. As was said in *Walberg v. Underwood*, 39 Cal.App. 748,

751, 752, 180 P. 55, 57, 'Where the object of a notice was accomplished, it is immaterial whether there was notice or not. When both parties appear, no notice whatever is necessary to be shown.' See, also, *Simmons v. Simmons*, 1941, 45 Cal.App.2d 695, 114 P.2d 659; *Remsburg v. Hackney Manufacturing Co.*, 1917, 174 Cal. 799, 800, 164 P. 792; and *Olcese v. Justice's Court*, 1909, 156 Cal. 82, at page 87, 103 P. 317, at page 319. In the latter case reference is made to the "well-settled rule that, if a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection."

[2] In the present case no special appearance was made nor was any objection interposed to the hearing at the morning session thereof. At the opening of the afternoon session the attorney made the following statement: "I object to any further proceedings in this matter upon the ground that the Court has no jurisdiction in the same. It appears that we are here in response to an order to show cause issued by this Court on Saturday, December 9, 1944." It does not appear that the court ruled directly upon the objection, but the fact that the hearing then continued and was concluded, with the attorney still participating, may be taken to indicate that the trial judge believed that the objection came too late, as indeed it did, the major portion of the testimony having already been presented.

[3, 4] Answering appellant's second contention, respondent says in his brief: "Respondent has never contended that an order for alimony pendente lite or attorney's fees in a divorce action does not become a final judgment or order. The question involved in the case at bar is whether the trial court may modify such an order before the statutory time for appealing therefrom has expired, that is, before the same becomes final." He then relies upon language in *St. Laurent v. St. Laurent*, 1939, 35 Cal.App.2d 345, 95 P.2d 475, a case cited by appellant, to point out that modification can be made before the order appealed from becomes final upon the lapse of sixty days. That language is as follows (35 Cal.App.2d at page 346, 95 P.2d at page 475): "*Since the motion, upon which the order now under consideration was based, was not made until more than sixty days*

had elapsed, the order of May 31, 1938, was final and the trial court was without jurisdiction to modify its prior order in respect to costs, attorney's fees, and accrued alimony, except upon proper showing pursuant to the requirements of section 473 of the Code of Civil Procedure." (Italics ours.) He then proceeds to show that the December 11th order of modification in the instant case was made within sixty days after the order for fees was entered on October 16th and also within sixty days after the court signed the formal order on October 13th, by which, incidentally, the court had ordered the second payment of fees to be made "within sixty days." Having in mind the fact that the trial court on October 11th orally made the order for fees, it is interesting to note that the sixtieth day thereafter fell on Sunday, December 10th. Under the rule stated in *Grande v. Donovan*, 1942, 55 Cal.App.2d 694, 695, 131 P.2d 855, "Where the last day of the period within which an appeal from an order is permitted is Sunday, a nonjudicial day, an appeal filed on the following day, Monday, is in time. [Citing cases.]" From this, it appears in the present case that even though the time be reckoned from October 11th, the date the oral order was made, that order could not become final prior to December 12th. However, in *Grande v. Donovan*, supra, the statement is made (55 Cal.App.2d at page 695, 131 P.2d at page 855) that "The time for filing a notice of appeal runs from the actual entry of the order from which an appeal is taken in the *regular minutes* of the court * * *." From all of the foregoing it is clear that the order for fees was modified before the time when the original order would have become final.

[5, 6] The third and last contention of the appellant,—that a modification of an order for attorney's fees cannot be validly based upon a change of circumstances, seems to be adequately disposed of by the short opinion in *Nightingale v. Superior Court*, 1920, 184 Cal. 583, 194 P. 1002, where an application for a writ of certiorari to review an order modifying an order concerning counsel fees in a divorce action was denied. There the court said: "We entertain no doubt of the power of the court in divorce actions to modify its orders for the payment to the wife of money necessary to enable her to support herself during the pendency of the action, or to enable her to prosecute or defend the ac-

tion, as the circumstances with regard to necessity change. As to orders for the payment of money for support there has never been any question in this behalf, and there is no difference in principle with relation to money to be paid to her for the purpose of enabling her to pay attorneys." It is clear to us that the trial court had power to make the modifying order, and that due to the change of circumstances it was appropriate and reasonable. The order from which the attorney appealed is affirmed.

[7] As to the other appeal, numbered 14991, taken by Mr. Glesby from the original order awarding attorney's fees, there is this to be said: that within sixty days after it was taken it was abandoned and the modification ordered. This order, of course was satisfactory to Mr. Glesby but subsequent to the hearing and still within sixty days he filed a new notice of appeal from that original order as a measure of caution and prudence, according to his counsel. By virtue of our decision affirming the order of modification, matters discussed in the appeal claimed by Mr. Glesby have become moot and that appeal, therefore, is ordered dismissed.

SHINN and WOOD, JJ., concur.



73 Cal.App.2d 284

KOMPf v. MORRISON et al.
Civ. 12928.

District Court of Appeal, First District,
Division 1, California.
Feb. 27, 1946.

1. Appeal and error ⇐907(3)

On a clerk's transcript appeal, the appellate court must conclusively presume that evidence is ample to sustain the findings, and only questions presented are as to sufficiency of pleadings and whether findings support the judgment.

2. Appeal and error ⇐907(3)

Generally, on a clerk's transcript appeal, findings on probative facts whether they do not preclude the possibility of ex-

istence of other evidence to support ultimate facts do not limit or modify findings of ultimate facts.

3. Appeal and error ⇨907(3)

Under general rule that findings on probative facts, where they do not preclude possibility of existence of other evidence to support ultimate facts, do not limit or modify findings of ultimate facts on a clerk's transcript appeal, a finding of ownership is usually a finding of an "ultimate fact" and not a "conclusion of law", although under particular circumstances it may be a conclusion of law.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law" and "Ultimate Fact".

4. Appeal and error ⇨1008(1)

In resolving apparent inconsistency between findings of ultimate and probative facts, probative facts are to be disregarded unless it appears that ultimate fact was based exclusively upon probative facts which tend to show that ultimate fact found was against the evidence.

5. Appeal and error ⇨907(3)

Sufficiency of evidence to support fact findings is admitted, on appeal on judgment roll alone.

6. Appeal and error ⇨907(3)

Where, on appeal on judgment roll alone, ultimate facts are found which are sufficient in themselves to support judgment entered, mere fact that court also makes findings, in which probative facts are incorporated, which indicate that ultimate facts are not sufficiently approved, requires that probative facts set forth in findings must be disregarded.

7. Appeal and error ⇨907(3)

On appeal on judgment roll alone, all intendments and presumptions are in favor of the judgment.

8. Appeal and error ⇨907(3)

The rule that all intendments and presumptions are in favor of judgment on appeal on judgment roll alone specifically applies to construction of findings of fact to effect that findings will be construed to uphold rather than to defeat the judgment.

9. Appeal and error ⇨544(1)

Under new rules on appeal, if appellant desired to present single issue to ap-

pellate court on evidence produced before trial court, appellant should have come up on an agreed statement of facts or on a settled statement on a partial transcript and not on a clerk's transcript alone. Rules on Appeal, rules 4(b), 6, 7.

10. Automobiles ⇨19

Every transfer of a motor vehicle not in accordance with motor vehicle act is not ineffectual for every purpose. St.1929, p. 514, § 45(a,e).

11. Appeal and error ⇨907(3)

Where appeal was on clerk's transcript alone, and trial court simply found that motor vehicle department had registered automobile, which had struck plaintiff and which had been registered in name of such defendant's husband prior to his death in name of their daughter, with no findings as to circumstances under which change in registration was secured, District Court of Appeal would presume in support of the judgment that motor vehicle department performed its official duty in making the registration. St.1929, p. 514, § 45(a,e); Code Civ.Proc. § 1963, subd. 15.

12. Appeal and error ⇨907(3)

A finding of ultimate fact would be presumed to be supported on a clerk's transcript appeal where it was not inconsistent with probative findings.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Louise Kompf against Allen Morrison, Laura Groat, and Laura Morrison for injuries suffered by plaintiff when she was hit by an automobile driven by defendant Allen Morrison. From that part of judgment in favor of defendant Laura Groat, after rendering judgment in favor of plaintiff against other defendants, the plaintiff appeals.

Affirmed.

Hauerken, Ames & St. Clair, George H. Hauerken, and Alden Ames, all of San Francisco, for appellant.

Arthur J. Healy, of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Louise Kompf, brought an action against Allen Morrison, Laura Groat Morrison, who is Allen's wife, and Laura

Groat, who is Allen's mother-in-law, for damages suffered by plaintiff when she was hit by an automobile driven by Allen Morrison. Liability was sought to be imposed on Laura Groat (the mother-in-law) as owner of the car on her statutory liability. The cause was tried before the court without a jury. Judgment was rendered against Allen and Laura Morrison in the sum of \$4,844.15, plus costs, but in favor of Laura Groat. The basis of the judgment in favor of Laura Groat was a finding that she was not the owner of the automobile in question. Plaintiff appeals from that portion of the judgment exonerating Laura Groat. She has elected to appeal on the clerk's transcript alone, so that none of the evidence produced in the trial court is before us.

[1-9] Because of the confusion that seems to exist in the briefs as to the rules applicable to such an appeal, some reference should be made to such rules before discussing the findings. It is elementary and fundamental that on a clerk's transcript appeal the appellate court must conclusively presume that the evidence is ample to sustain the findings, and that the only questions presented are as to the sufficiency of the pleadings and whether the findings support the judgment. *Ward v. Ward*, 15 Cal.2d 234, 100 P.2d 773; *Delanoy v. Delanoy*, 216 Cal. 23, 13 P.2d 513; *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 22 P.2d 5; *Shaw v. Imperial Mut. L. & B. Ass'n*, 4 Cal.App.2d 534, 41 P.2d 574; *W. & J. Sloane v. Barnett*, 26 Cal.App.2d 650, 80 P.2d 137; *Hoyt Heater Co. v. Hoyt*, 68 Cal.App.2d 523, 157 P.2d 657. Moreover, on such an appeal, it is generally true that findings on probative facts, where they do not preclude the possibility of the existence of other evidence to support the ultimate facts, do not limit or modify the findings of ultimate facts. *Enterprise Foundry Co. v. Polly*, 73 Cal.App. 225, 238 P. 722; *Gill v. Driver*, 90 Cal. 72, 27 P. 64; *Lamanet v. Lamanet*, 18 Cal.App.2d 402, 63 P.2d 1195; *J. Musto etc. Co. v. Pacific States Corp.*, 48 Cal.App. 452, 192 P. 138; *Fitzpatrick v. Underwood*, 17 Cal.2d 722, 112 P.2d 3. Under this rule it is usually recognized that a finding of ownership is a finding of an ultimate fact and not a conclusion of law (*Colver v. W. B. Scarborough Co.*, 73 Cal.App. 421, 238 P. 1096; *Enterprise Foundry Co. v. Polly*, 73 Cal.App. 225, 238 P. 722), although under particular circumstances it

may be a conclusion of law (*Levins v. Rovegno*, 71 Cal. 273, 274, 12 P. 161; *Gardner v. San Gabriel Valley Bank*, 7 Cal.App. 106, 93 P. 900). Whether ownership is an ultimate fact or a conclusion of law depends upon the issues presented. In the present case the appellant did not plead any evidentiary facts in support of her allegation of ownership in Laura Groat, merely pleading that "defendants, and each of them, were the owners of the said Chevrolet sedan automobile," and that it was operated with their consent. The answer of all defendants on this issue was a general denial. Thus, so far as the pleadings are concerned, the issue as to whether Laura Groat was the owner was treated as an ultimate fact. Since the trial court has found that Laura Groat was not the owner, such was clearly a finding of ultimate fact and not a conclusion of law. This being a clerk's transcript appeal, we must conclusively presume that that ultimate fact is supported, even if that ultimate fact were contrary to the probative facts found. That ultimate fact obviously supports the judgment. We would be justified, therefore, in affirming the judgment on this reasoning alone, even if there were a conflict between the ultimate and probative facts. As was said in *Lamanet v. Lamanet*, 18 Cal.App.2d 402, at page 405, 63 P.2d 1195, at page 1197: "In resolving any apparent inconsistency between findings of ultimate and probative facts, the rule is that such probative facts are to be disregarded unless it appears that the ultimate fact was based exclusively upon the probative facts found and tend to show that the ultimate fact found was against the evidence. Here no claim is made of the insufficiency of the evidence inasmuch as the appeal is presented on the judgment roll alone, so that the sufficiency of the evidence to support the findings is admitted. Where ultimate facts are found which are sufficient in themselves to support the judgment entered, the mere fact that the trial court also makes findings in which probative facts are incorporated which indicate that the ultimate facts are not sufficiently proved and an appeal is had upon the judgment roll alone, the probative facts set forth in the findings must be disregarded. [Citing cases.] We do not know what other evidence there may have been to sustain the finding of the ultimate fact and appellant makes no claim that the probative facts relied upon constitute the sole facts upon which the ultimate finding of change of

possession was based. All intendments and presumptions are in favor of the judgment. This rule specifically applies to the construction of findings of fact to the effect that findings will be construed to uphold rather than to defeat a judgment." See, also, *Fitzpatrick v. Underwood*, 17 Cal.2d 722, 112 P.2d 3. This rule of law is not technical, nor as appellant's counsel claimed at the oral argument, the result of any desire on the part of appellate judges to uphold judgments even at the expense of fairness and logic, but the inevitable result of the method of appeal chosen by appellant herself. The new Rules on Appeal provide several inexpensive and flexible methods by which single issues may be presented to the appellate court on the evidence produced before the trial court. Thus, under Rule 6 appellant could have come up on an agreed statement of facts, or under Rule 7 on a settled statement, or under Rule 4(b) on a partial transcript. Appellant, however, elected to come up on a clerk's transcript alone, under which method, of course, no evidence at all is before this court. Grave miscarriages of justice would result if an appellant was permitted to argue factual questions on such an appeal.

The above discussion has proceeded on the assumption that even if the ultimate fact found that Laura Groat was not the owner of the car, was contrary to or inconsistent with the findings of probative facts, the judgment must be affirmed. A reading of the findings, however, demonstrates that the ultimate and probative facts found are not inconsistent, and that they disclose another independent ground upon which the judgment must be affirmed. So far as is pertinent to the issue of ownership of the car, the trial court found that on March 8, 1943, the date of the accident, the Chevrolet in question was registered in the name of Laura Groat, 1284—21st Avenue, San Francisco, as the registered and legal owner thereof; that all three defendants live at that address; that defendant Laura Groat is the mother of defendant Laura Morrison; that the latter defendant was, before her marriage to Morrison, also known as Laura Groat; that the Chevrolet in question was purchased by Charles Groat, husband of Laura Groat and father of Laura Groat Morrison, prior to 1934 and was registered in his name at the time of his death in October, 1934; that the automobile had been

purchased with the community funds of Charles and Laura Groat, and was their community property; that the decree of distribution in the estate of Charles Groat, without specific mention of the automobile, distributed all community property to Laura Groat, his wife; that prior to his death Charles Groat made an oral gift of the automobile to his daughter Laura Morrison, then known as Laura Groat; that said gift was not accompanied by any writing; that "three years after the death of said Charles F. Groat, defendant Laura Morrison, then known as Laura Groat, brought the ownership certificate of the said vehicle to the Department of Motor Vehicles, and the Department of Motor Vehicles re-issued said ownership certificate upon the request of Laura Morrison, then known as Laura Groat, in the name of Laura Groat, 1284 21st Avenue, San Francisco, as the registered and legal owner thereof. That said Laura Groat in whom said Chevrolet Sedan automobile was so registered is the defendant Laura Morrison, then known as Laura Groat, and not the defendant Laura Groat"; that at the time of the accident defendant Allen Morrison was operating the car with the permission of Laura Groat "to whatever extent she was the legal and registered owner of the automobile"; that defendant Laura Groat does not own the automobile.

[10] Appellant contends that the only basis of the finding of ownership in Laura Morrison is the oral gift from her father, and she argues at length that such transfer was not in the form required by § 45(a) of the Motor Vehicle Act, as that statute read in 1934, St.1929, p. 514, and, for that reason, and that under § 45(e), the purported oral transfer was, as then provided in that section "incomplete and not to be valid or effective for any purpose." Based on this premise it is urged that the mother, respondent Laura Groat, became the legal owner of the car by the decree of distribution under which all community property was distributed to her. The Supreme Court of Nebraska, on substantially similar facts, has held, in accordance with appellant's contentions, that an attempted inter vivos gift is ineffective to pass title. In *re Wroth's Estate* 125 Neb. 832, 252 N.W. 322; see annotation on the general subject in 94 A.L.R. 948. However, in California it is not literally true that every transfer not in accordance

with the statute is ineffectual for any purpose. See *Schmidt v. C. I. T. Corporation*, 14 Cal.App.2d 92, 57 P.2d 1016; *Parke v. Franciscus*, 194 Cal. 284, 228 P. 435; *Ferroni v. Pacific Finance Corp.*, 21 Cal. 2d 773, 135 P.2d 569. The daughter, Laura Morrison, has had actual possession under the oral authorization for over five years, with full knowledge of her mother. It might be argued that in any event she has title by adverse possession.

[11] But even if the oral gift were totally ineffective, and if the daughter has not title by adverse possession, and if the decree of distribution did distribute the car to the respondent Laura Groat, that would not aid appellant. That would not prove that respondent was the owner of the car in 1943. The trial court expressly found that in 1937, after the date of the decree of distribution, the Motor Vehicle Department issued its certificate showing that Laura Groat was the owner, and that by that registration the Motor Vehicle Department intended to and did designate Laura Groat the daughter, and not Laura Groat the wife of Charles Groat, and respondent here, as the owner. The court made no findings as to the circumstances under which this change in registration was secured—it simply found that the department then registered the car in the name of the daughter. Can we assume that the Motor Vehicle Department, without authority, in violation of law, so registered the car? Must we not presume in support of the finding, and in accordance with subd. 15 of § 1963 of the Code of Civil Procedure, that "official duty has been regularly performed"? The answer to these questions is obvious. Since appellant has not seen fit to present us with any of the evidence on the issue we must assume that the department made the registration lawfully and only upon a proper showing that Laura Groat, the daughter, was the true owner. Whether this was based on a confirmation by the mother of the oral gift to the daughter, or upon a direct transfer from the mother to the daughter, the findings do not disclose. Regardless of how ownership reached the daughter, in view of the finding that the department, in 1937, registered the car in the name of the daughter, we must assume that such registration was made on proper affidavits of the mother and daughter as to the ownership of the car. What appellant wants us to do is to presume that either

the Motor Vehicle Department acted unlawfully, or that the daughter was guilty of a grave fraud, and all this without a finding or evidence on either issue. That we cannot do.

[12] Appellant argues that the finding that the car, in 1937, was registered in the name of the daughter is inconsistent with the findings in reference to what she claims was the abortive gift. For reasons already stated, the contention is unsound. The registration finding can stand regardless of whether the findings relating to the gift render that gift abortive. If, as has already been pointed out, a finding of ultimate fact will prevail even where there are inconsistent findings of probative facts, certainly a finding of ultimate fact must be presumed to be supported on a clerk's transcript appeal when it is not inconsistent with the probative findings.

The portion of the judgment appealed from is affirmed.

WARD, J., and SCHOTTKY, Justice pro tem., concur.



73 Cal.App.2d 405

EDGAR et al. v. PENSINGER et al.

Civ. 3192.

District Court of Appeal, Fourth District,
California.

March 4, 1946.

Rehearing Denied March 28, 1946.

Hearing Denied April 29, 1946.

1. Waters and water courses ⇨156(8)

Where first paragraph of reservations reserved existing ditches and second paragraph subjected land to its share of charges under existing contract for water rights and reserved to grantor, its successors and assigns, rights of way for construction of new ditches that might be considered proper by grantor, its successors or assigns, the right to establish new ditches was one personal to grantor.

2. Waters and water courses ⇨156(4)

Where deed contained reservation of existing ditches, contained reference to general contract settling water rights and

to possible construction of new ditches, reservation of existing ditches on land conveyed was in nature of a grant of an easement for benefit of other land owned by grantor, to extent that existing ditches were used to carry water across the land conveyed to other lands.

3. Waters and water courses ⇨156(4)

Where deed conveying lots 13, 14, 15, and 16 reserved existing ditches, but short ditch, existing only on lot 16 and not connected with any ditch on any other property, was clearly intended to facilitate distribution of water only on part of land conveyed, the reservation did not operate as an implied grant of an easement insofar as such ditch was concerned.

4. Waters and water courses ⇨154(1)

Where parts of lots were in one ownership, there could be no dominant and servient tenements established over part of lot arising from taking of water over such part to other parts of lot.

5. Waters and water courses ⇨154(1)

Even if plaintiffs had acquired easement by prescription to take water across defendants' land, by failing to exercise easement for period of nine years, the easement was lost.

6. Waters and water courses ⇨158½(1)

In action to establish easement to take water across defendants' land, evidence and findings supported judgment declaring that plaintiffs had no such easement.

7. Waters and water courses ⇨158½(1)

Where defendants and their predecessors had taken water through ditch each year for more than 40 years, but plaintiffs and their predecessors had also taken water through ditch to water their lands each year for more than 40 years, so that plaintiffs' right was equal to that of defendants and neither was superior to the other, decree quieting title in ditches in defendants and enjoining plaintiffs from such maintenance or repair of ditches as might reasonably be required to enable them to continue their use thereof was improper.

for an injunction and to establish certain easements. Judgment for defendants, and plaintiffs appeal.

Reversed with directions.

Siemon, Maas & Catalano and Siemon, Maas & Siemon, all of Bakersfield, for appellants.

Harvey, Johnston, Baker & Palmer, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action for an injunction and to establish certain easements.

The Kern County Land Company diverted water from Kern River, built some canals and subdivided and sold large tracts of land with water rights. It subdivided the half section part of which is here involved into sixteen 20-acre tracts, eight on the north and eight on the south of the middle line of the half section. The north lots were numbered consecutively from 1 on the east to 8 on the west, and the south lots consecutively from 9 on the west to 16 on the east, so that lot 16 is the E½ of the SE¼ of the NE¼ of the section. In 1911 the land company deeded lots 13, 14, 15 and 16, subject to certain reservations which will be later referred to, to W. W. Pensinger and several others. Between 1911 and 1915 these others deeded their interests to W. W. Pensinger, with no reservations appearing in the deeds. In May, 1931, W. W. Pensinger deeded the middle nine acres of lot 16 to the defendant James Henry Pensinger. In June, 1931, he deeded the south five acres of lot 16 to the plaintiff Ruby Edgar and in April, 1932, he deeded the north six acres of lot 16 to plaintiff John H. Edgar, neither of these deeds containing any reservations. For convenience, these three parcels will be referred to as the north parcel of lot 16, the middle parcel of lot 16 and the south parcel of lot 16.

The plaintiffs subsequently acquired lots 15, 14, 13, 12, 10, 7 and 5, the defendant Pensinger acquired lots 6 and 11, and the defendant Pitt acquired lot 9. The plaintiffs also own the south half of lots 1, 2 and 3, where their home is situated.

The 1911 deed from the land company to W. W. Pensinger and others contained the following reservations:

"Excepting and reserving therefrom all existing easements, servitudes and rights of way for canals, ditches, roads, high-

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by John H. Edgar and another against James Henry Pensinger, also known as Henry G. Pensinger, and others,

ways, telegraph lines, railroads and other purposes.

"The land above described is granted subject to any charge created against it by the contract of settlement of water rights made between Henry Miller and others and James B. Haggin and others, under date of July 28th, 1888, and recorded in the office of the County Recorder of said County of Kern. The party of the first part reserves to itself and its successors and assigns the right of way over and upon said land for the construction and maintenance of such ditches, canals, pipes and aqueducts as may, in the judgment of the party of the first part, its successors or assigns, be necessary or proper for supplying water to any lands described in said contract between Miller and others, and Haggin and others, to which, for a description of said lands, reference is hereby made."

At that time, and ever since, the canal supplying water to the southern and western lots in this subdivision has crossed the south parcel of lot 16, and a headgate has been located thereon. Since that time, as well as long before, the main ditch has run from this headgate in a westerly and north-westerly direction across the south parcel of lot 16, across lots 15, 14 and 13, and thence north and west across lot 12 to the common corner of lots 5, 6, 11 and 12. From that point it runs north near the westerly line of lot 5 to a point about 400 feet south of the northwest corner of lot 5, thence west to the west line of lot 6, thence southerly through lots 6 and 7 to a point near the southeast corner of lot 7. From that point it proceeds on west over a course that has been established by a previous judgment. At that time there was also another ditch running from this headgate northerly through the south parcel of lot 16, across the middle parcel of lot 16, and to a point about midway between the north and south lines of the north parcel of lot 16.

It appears from the evidence that the first of these ditches, which we will call the South ditch, has been continuously used by both plaintiffs and defendants to water lands in this subdivision for 40 years. The second ditch above described, which we will call the East ditch, existed from 1907 or 1908, and there is evidence of its use between 1924 and 1936 for the purpose of irrigating the middle and north parcels of lot 16 and a few acres at the northern end

of lots 15 and 14, with a little at the northeast corner of lot 13. However, the north parcel of lot 16 has been irrigated mostly with pump water since 1929. There is evidence that the plaintiffs, after acquiring lots 13, 14 and 15, rebuilt an old ditch running east and west and constructed extensions thereto so that there is now a ditch running west from the north end of the old East ditch, through the north parcel of lot 16 and lots 15, 14 and 13, about 200 feet south from the north line of those lots, and connecting with the South ditch at a point near the northeast corner of lot 12. This ditch, which we will call the North ditch, has been used by the plaintiffs to carry water from a pumping plant and also water which they took from the main canal at another headgate near lot 1. But this ditch, which is entirely on plaintiffs' land, has never been used to irrigate any of the lots in the western half of this subdivision. There is evidence that the plaintiffs took no water through the East ditch across the middle parcel of lot 16 for nine years before this action was filed and that they largely destroyed that ditch from the north line of the middle parcel of lot 16 to the north end of that ditch. There is also evidence that the plaintiffs, by leveling operations on the south parcel of lot 16, made it necessary for the defendants Pensinger to put in a dam in order to raise the water sufficiently to flow across that parcel so that they could obtain water for their own use on the middle parcel of lot 16. The defendants Pensinger have constructed three houses and sets of buildings on the middle parcel of lot 16, all near the line of the old ditch which for nine years has been used by them in connection with that parcel.

Briefly stated, the plaintiffs sought in this action to establish their right to an easement across the middle parcel of lot 16; to enjoin the defendants from using that portion of the South ditch between the headgate on the south parcel of lot 16 and the junction of that ditch with the North ditch; to quiet their title to the land over which that portion of the South ditch passes; and to compel the defendants to take their water through a reestablished East ditch and thence through the North ditch to the present junction of the North and South ditches. They also sought to establish a new ditch across the northern end of lot 11 to take the water of the South ditch across lot 11 and to the point in the

south-east corner of lot 7 from whence the established ditch runs west, and to thus eliminate the portion of the South ditch which now runs most of the way around lot 6.

The defendants alleged their long use of the South ditch, that it had become hardened by long use and was the most practical way to carry water to their lands, and by way of affirmative relief asked to have their title to that ditch quieted and the plaintiffs restrained from interfering with their rights thereto.

The court found in favor of the defendants, finding, among other things, that the South ditch had been used for more than 20 years to carry water by the respective owners and their predecessors; that the plaintiffs acquired title to their lands subject to said easement and right of way; that the East ditch for more than 20 years has been used to carry water across the south parcel of lot 16 and on to the middle parcel thereof; that it has never had a capacity in excess of two second feet of water; that it has never been used except to irrigate the south parcel of lot 16, the middle portion of lot 16, and approximately 10 acres of low land lying partly in the north parcel of lot 16 and partly in the northerly portion of lot 15; that the plaintiffs, more than nine years prior to the bringing of this action, totally destroyed and abandoned that portion of the East ditch in the north parcel of lot 16 by filling and leveling processes; that for more than nine years the plaintiffs have not received water from the East ditch through the middle parcel of lot 16; that the East ditch across the south parcel of lot 16 has been used for more than nine years to carry water to the land of the defendants in the middle portion of lot 16; and that the plaintiffs have never used the North ditch to carry water from the main canal through lots 16, 15, 14, 13 and 11. As conclusions of law it was found, among other things, that the plaintiffs have no easement or right of way across the middle parcel of lot 16; that the defendants are entitled to a perpetual easement and right of way to carry water through the South ditch, with the right to use such additional land on each side of the ditch as may be necessary to provide repair material; and that the plaintiffs be permanently restrained from interrupting the repair, maintenance, rebuilding or cleaning of said ditches or with the defendants' right to use the same.

Judgment was entered awarding the defendants a perpetual easement and right of way for the South ditch and for that portion of the East ditch which crosses the south parcel of lot 16, with the right to take land from the sides of the ditches to maintain the same; quieting title to said ditches and rights of way in the defendants; restraining the plaintiffs from interfering with the defendants' use and enjoyment of said ditches and rights of way; restraining the plaintiffs from interfering "with the repair, maintenance, construction, reconstruction and/or rebuilding of said ditches or with the defendants' use thereof"; and decreeing that the plaintiffs have no easement or right of way over and across the middle parcel of lot 16. From this judgment the plaintiffs have appealed.

The appellants' main contention is that it appears from the evidence that they have an easement over the middle parcel of lot 16, which easement was created by grant; that an easement thus created cannot be lost by abandonment or nonuse; and that it follows that the evidence and findings do not support that part of the judgment which declares that such an easement does not exist. In this connection, it is also contended that the evidence shows that the best and most practicable way of taking water from the headgate to the point where the North ditch joins the South ditch is through the East ditch across the middle parcel of lot 16 and then through the North ditch to the point of junction, rather than through that portion of the South ditch between that point and the headgate; that it thus appears that the respondents are making an unreasonable and oppressive use of their easement across appellants' lands by their use of that portion of the South ditch; and that a court of equity may, and should, prevent such an unreasonable and unnecessary burden on the appellants and decree that the one, instead of the other, of the two fixed locations should be used.

The contention that the appellants have an easement across the middle parcel of lot 16 which was created by grant is based upon the reservations above quoted, which appear in the 1911 deed from the land company to W. W. Pensinger and others. It is argued that these reservations were for the benefit of other parcels of land, and that such a reservation of an easement in the deed by which land is conveyed is equivalent to an express grant of the ease-

ment. *Watson v. Heger*, 48 Cal.App.2d 417, 120 P.2d 153; *Weller v. Brown*, 160 Cal. 515, 117 P. 517, and *Wagner v. Hanna*, 38 Cal. 111, 99 Am.Dec. 354, are cited in support of this proposition. There are many cases holding that a grant will be implied, although a reservation is expressed, where the language used in the instrument and the surrounding circumstances disclose that the parties had such an intention. This is pointed out in *Weller v. Brown*, 160 Cal. 515, 117 P. 517, 519, where, in quoting from a New Jersey case, it is said:

"That when it appears to be the true construction of the terms of a grant that it was the well-understood purpose of the parties to create or reserve a right, in the nature of a servitude or easement in the property granted, for the benefit of other land owned by the grantor, no matter in what form such purpose may be expressed, whether it be in the form of a condition, or covenant, or reservation, or exception, such right, if not against public policy, will be held to be appurtenant to the land of the grantor and binding on that conveyed to the grantee, and the right and burthen thus created and imposed will pass with the lands to all subsequent grantees.'"

[1] The first paragraph of the reservations in question reserved existing ditches. The second paragraph subjected the land to its share of charges under an existing contract for water rights and also reserved to the grantor, its successors and assigns, rights of way for the construction of new ditches that might be considered proper by the grantor, its successors or assigns. Clearly, the right to establish new ditches thus reserved to the grantor was one personal to it and there is no evidence that that right has ever been assigned to the plaintiffs or to anyone else.

[2] Any possible claim of the appellants to an easement by reason of these reservations must come from the reservation of existing ditches in the first paragraph. The deed in which these reservations are contained conveyed lots 13, 14, 15 and 16, or about 80 acres. The reference to existing ditches, to a general contract settling water rights, and to the possible construction of new ditches, taken in connection with the surrounding circumstances, may well be taken as indicating an intention that the reservation of existing ditches on the 80 acres conveyed was in

the nature of a grant of an easement for the benefit of other land owned by the grantor, to the extent that the existing ditches were used to carry water across the 80 acres to other lands or possibly, where they were evidently intended to be used for that purpose. Under the facts as disclosed by the evidence, this could apply only to what we have termed the South ditch, which extended across the 80 acres and into other property.

[3] A different situation appears with respect to what we have called the East ditch. This was a short ditch existing only on lot 16, extending only part-way through it and not connecting with any ditch on any other property, and it was clearly intended to facilitate the distribution of water only on a part of the land conveyed. It was entirely similar to the private ditches existing on most irrigated farms for the purpose of taking water from the main ditch to other portions of the owner's property. In view of the language of the deed and the surrounding circumstances it cannot be held that any intention appears, in connection with this ditch, that it be used in carrying water to other lands owned by the grantor and, under the rule relied upon, there was no grant of an easement insofar as that ditch is concerned. That ditch served and could serve only a part of the land conveyed and there was no dominant tenement.

[4-6] Between 1911 and 1931, all of lot 16, as well as lots 13, 14 and 15, remained in one ownership and there could be no dominant and servient tenements established over parts of lot 16 arising from the taking of water by W. W. Pensinger to the middle of the north parcel of lot 16. *Oliver v. Burnett*, 10 Cal.App. 403, 102 P. 223. The deeds by which the appellants acquired the north and south parcels of lot 16 contained no reservations with respect to ditches or rights of way across the middle parcel of lot 16. After the appellants acquired the north parcel of lot 16 in 1932, they took some water across the middle parcel of lot 16 for four or five years. If it be assumed that this period was long enough to establish an easement therefor, such easement arose from prescription and not from a grant. Under familiar rules the appellants, by failing to take water across the middle parcel of lot 16 for a period of nine years before this action was brought, lost that easement, if any they had. It follows that the evidence and findings sup-

port that part of the judgment which declares that the appellants have no such easement.

[7] Under the rule contended for by the appellants the right of the respondents to take water through the South ditch was one based upon a grant to be implied from the language used in the 1911 deed from the land company to W. W. Pensinger and others. Moreover, the evidence shows that the respondents and their predecessors have taken water through that ditch each year for more than 40 years, and an easement by prescription for that purpose abundantly appears. However, error appears in one respect in this connection. The evidence shows, without conflict, that the appellants and their predecessors have also taken water through that ditch to water their lands each year for more than 40 years. Whether the right be regarded as one arising from grant or, in part, upon prescription their right to carry water through this ditch, when it is allotted to them by the canal company, is equal to that of the respondents and neither is superior to the other. However, the court in its conclusions of law, not only found that the respondents were entitled to an easement for the purpose of carrying water through the South ditch and through the East ditch over the south parcel of lot 16, but further found that title and the right to possession in and to both of these ditches should be quieted in the respondents, together with the right to take material from the sides of the ditches to repair the same. And the judgment, in addition to awarding the respondents an easement and right of way through these ditches, with the right to repair them, quieted title and possession of both of these ditches and rights of way therefor in the respondents. The decree not only enjoined the appellants from interfering with the respondents' use of these ditches but further enjoined them from in any way interfering with the repair, maintenance, or rebuilding of said ditches. The appellants not only had an equal right to use the South ditch and that part of the East ditch which was within the south parcel of lot 16, but they owned much more land irrigated from the South ditch than was owned by the respondents and had long used that right. Having at least an equal right to the use of that ditch they should not be deprived of their interest therein, and should not be restrained from such maintenance and repair of the ditch

as might be necessary during the times they were using water through it and, if necessary, at such other times as might be necessary to safeguard their rightful use of it. No reason appears, in fact or in law, for quieting title in those ditches in the respondents or for enjoining the appellants from such maintenance or repair of the ditch as might reasonably be required to enable them to continue their use thereof. The conclusions of law and the judgment should be so modified as to protect these rights, to which the appellants are clearly entitled. *Wallace Ranch Water Co. v. Foothill D. Co.*, 5 Cal.2d 103, 53 P.2d 929.

What we have already said disposes of the contentions that there were two fixed locations and easements through which water could be taken from the headgate through lots 16, 15, 14, 13 and 12 to the point where the North ditch now joins the South ditch, and that the court should have required the respondents to use the northerly route as being better and less burdensome upon the appellants than the one to the south; and that a court may change a fixed location when another is available, and when such relief may be given without impairing the rights of the holder of an easement. It may be further observed, in this connection, that there is a conflict in the evidence with respect to the question as to whether the northerly route is actually better than the one to the south.

The appellants further contend that the part of the judgment establishing the upper portion of the South ditch around and across lot 6 "cannot be supported on any ground involving reasonable usage, feasibility or necessity." It is argued that this portion of the South ditch runs through rising ground in such a way that it is difficult to get much water through it and that water could be gotten to the southeast corner of lot 7, from which it is taken on westward, much better by constructing a connecting ditch from that point across the northerly part of lot 11 to the South ditch at a point on the line between lots 11 and 12, than by continuing the present arrangement whereby the South ditch proceeds on around most of lot 6 and comes back to the southeast corner of lot 7. If it be assumed that this proposed change would be better, the facts remain that there is an easement over the present course of this portion of the South ditch and none over the line of the connecting link thus suggested by the appellants.

Nothing is pointed out which indicates error in this portion of the judgment.

The judgment is reversed, with directions to the trial court to amend the conclusions of law and judgment in the respects above suggested and so as to conform with the views herein expressed. Each party to pay his own costs.

MARKS and GRIFFIN, JJ., concur.



73 Cal.App.2d 451

Petition of FAWELL.

FAWELL v. LOOP et al.

Civ. 15124.

District Court of Appeal, Second District,
Division 2, California.

March 7, 1946.

Rehearing Denied April 2, 1946.

Hearing Denied May 6, 1946.

Judgment ⇨707

Records ⇨9(13¼)

Where petitioner for a certificate of title was not a party to original action against petitioner's predecessor in title, an order in such case could not affect petitioner's interest in property and, as she had obtained a decree quieting title to such property as against judgment creditor in original action, assignees of judgment creditor had no interest in property and trial court properly directed registrar of titles to issue a certificate of title free from claims of such assignees. Gen.Laws, Act 8589, § 98.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Proceeding in the matter of the petition of Margaret Fawell for an order under section 98 Land Title Act, Gen.Laws, Act 8589, wherein Helen Loop and Mabel B. Howard interposed objections. From a decree directing registrar of titles to issue petitioner a certificate of title free from claims of objectors, objectors appeal.

Affirmed.

Ray Howard, of Los Angeles, for appellants.

John F. Poole, of Los Angeles, for respondent.

McCOMB, Justice.

From a decree directing the Registrar of Titles of Los Angeles County to issue petitioner a certificate of title free from the claims of appellants as assignees of a judgment creditor, Loop Building Co., claiming under levies of execution upon a money judgment in favor of that company, assigned to it against the judgment debtor C. A. DeCoo, petitioner's predecessor in interest in the land in question, objectors appeal.

The facts are these:

On June 20, 1930, Loop Building Company obtained a money judgment against Mr. DeCoo. Prior to that time Mr. DeCoo had conveyed his land by "Torrens Title" deed to Mr. Fredenhagen under an oral trust for the benefit of petitioner. On August 8, 1930, an order was made restraining Messrs. DeCoo and Fredenhagen from transferring the land in question pending the termination of an action which Loop Building Company was given leave to commence for the recovery of the judgment debtors' interest in such land.

A second suit was instituted by Loop Building Company against Fredenhagen and after an adverse judgment to the plaintiff had been reversed by the District Court of Appeal (Loop Building Company v. Fredenhagen, 3 Cal.App.2d 151, 39 P.2d 222), the action of Fawell v. Loop Building Company instituted by the present petitioner as plaintiff to quiet title to the land involved was tried, and a decree quieting plaintiff's title in the land was entered, which decree was subsequently affirmed by the District Court of Appeal and a hearing denied by the Supreme Court. (Fawell v. Loop Building Co., 46 Cal.App.2d 426, 116 P.2d 88.)

After the affirmance of this judgment counsel for Loop Building Company obtained upon stipulation an order for the issuance of an execution in the original action of Loop Building Company v. DeCoo. Petitioner here was not a party to such action. Thereafter she made a motion to set aside the order directing the issuance of the execution and to quash the execution. This motion was denied for the reason that

not being a party to the action she had no standing before the court.

This is the sole question necessary for us to determine:

Did the order of the superior court directing that an execution issue and the execution pursuant to such order constitute a lien on the property as to which petitioner's title had been quieted in the action of Fredenhagen v. Loop Building Company, supra?

This question must be answered in the negative. Since petitioner was not a party to the original action of Loop Building Company v. DeCoo, an order in such case could not affect her interest in the property, and as she had obtained a decree quieting title to such property as against the Loop Building Company, appellants, assignees of such company, have no interest in the property involved and the trial court properly directed the Registrar of Titles to issue a certificate of title free from the claims of appellants.

For the foregoing reasons the judgment and each order from which an appeal is taken is affirmed.

MOORE, P. J., concurs.

WILSON, J., deeming himself disqualified, did not participate in the foregoing opinion.



73 Cal.App.2d 343

HANEY et al. v. KINEVAN et al.
Civ. 14979.

District Court of Appeal, Second District,
Division 2, California.

Feb. 28, 1946.

Rehearing Denied March 18, 1946.

1. Limitation of actions ◊19(1)

An action to recover real property cannot be maintained unless the one asserting the cause of action or under whose title the action is prosecuted, or the ancestor, predecessor, or grantor of such a one, has been seized or possessed of the property within five years before commencement of the action. Code Civ.Proc. § 318.

2. Limitation of actions ◊19(1)

An action to quiet title to real property is an action for the recovery thereof within statute requiring seisin or possession of the property within five years before commencement of action. Code Civ.Proc. § 318.

3. Limitation of actions ◊195(3)

In action to quiet title, burden is on plaintiffs to show that they or their ancestors, predecessors, or the grantors of such persons have been seized or possessed of the property within five years before commencement of action. Code Civ.Proc. § 318.

4. Evidence ◊98

Where no evidence is introduced in support of an issue, finding should be made thereon against the party who has the burden of proof.

5. Limitation of actions ◊201

Trial court properly found as an ultimate fact that cause of action for quieting of title was barred by statute, in absence of evidence that plaintiffs were in possession of disputed property within five years before date action was commenced. Code Civ.Proc. § 318.

WILSON, J., dissenting in part.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by George E. Haney and others against Emmet J. Kinevan and others to quiet title. Judgments for defendants, and plaintiffs appeal.

Affirmed.

Henry Sterling Gill, of Santa Barbara, for appellants.

Leland Crawford, of Santa Barbara, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants in an action to quiet title to certain property located in Santa Barbara county, plaintiffs appeal.

This is the sole question necessary for us to determine:

Were plaintiffs barred by the provisions of section 318 of the Code of Civil Procedure from maintaining the present action?

This question must be answered in the affirmative and is governed by the following pertinent rules of law:

[1] 1) An action for the recovery of real property cannot be maintained unless the person asserting the cause of action or under whose title the action is prosecuted, or the ancestor, predecessor or grantor of such person has been seized or possessed of the property in question within five years before the commencement of the action to enforce such right or claim. (Code of Civil Procedure, section 318; *Housing Authority v. Pirrone*, 65 Cal.App.2d 566, 151 P.2d 22, and cases therein cited.)

[2] 2) An action to quiet title to real property is an action for the recovery thereof within the meaning of section 318 of the Code of Civil Procedure. (*South Tule Independent Ditch Co. v. King*, 144 Cal. 450, 455, 77 P. 1032; *Townsend v. Driver*, 5 Cal.App. 581, 583, 90 P. 1071.)

[3] 3) The burden of proof is upon plaintiffs to show that they or their ancestors, predecessors or the grantors of such persons have been seized or possessed of the property in question within five years before the commencement of the action. (*Patchett v. Webber*, 198 Cal. 440, 451, 245 P. 422; *Akley v. Bassett*, 189 Cal. 625, 646, 209 P. 576.)

[4] 4) Where no evidence is introduced in support of an issue findings should be made thereon against the party who has the burden of proof. (24 Cal.Jur. (1926), p. 945, sec. 189.)

[5] Applying the foregoing rules to the facts in the instant case, since plaintiffs concede that there was no evidence that they were in possession of the disputed property within five years before May 10, 1938, the date the present action was commenced,* the trial court properly found as an ultimate fact "That it is true that the cause of action set out in plaintiffs' complaint is barred by the provisions of section 318 of the Code of Civil Procedure of the State of California."

In view of our conclusions it is unnecessary to discuss other points argued by counsel.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., concurs.

* In plaintiffs' opening brief they say: "There is no evidence on either side showing complete physical possession of 'disputed strip,' either by fencing, cultiva-

WILSON, Justice.

I concur in the opinion with one exception: Since the words "or under whose title the action is prosecuted," which appear in the paraphrase of section 318 of the Code of Civil Procedure, are not a part of said section and are not necessary to a decision of this action, they should be deleted. I am averse to the interpolation of language in a statutory rule where, as here, the statute is self-sufficient.



73 Cal.App.2d 361

GARDNER v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 3505.

District Court of Appeal, Fourth District, California.

Feb. 28, 1946.

Rehearing Denied March 28, 1946.

Hearing Denied April 25, 1946.

1. Workmen's compensation ☞1939

Findings of Industrial Accident Commission are subject to review only in so far as they have been made without any evidence to support them.

2. Workmen's compensation ☞1939

In compensation proceeding, it is not the function of the courts to determine credibility of witnesses or weight attached to their testimony, since Industrial Accident Commission is final arbiter on questions of fact.

3. Workmen's compensation ☞1939

Where the evidence is conflicting but decision of Industrial Accident Commission is supported by evidence, court has no jurisdiction to disturb finding of commission even though an opposite conclusion would also have been fully supported by the evidence.

4. Workmen's compensation ☞696

Where bartender while on duty engaged in an argument with a customer be-

tion or in any other manner, within five years before May 10, 1938, when this action was commenced."

cause he refused to sell customer a drink when customer was intoxicated, and bartender was injured by customer after bartender's quitting time but before his duties were finished and while he was attempting to eject customer in a recurrence of argument, bartender's injuries "arose out of and in course of employment" and were compensable. Gen.Laws, Act 3796, §§ 40, 62.

See Words and Phrases, Permanent Edition, for all other definitions of "Arose Out of and in Course of Employment".

Original proceeding on the petition of Jake W. Gardner to review an award of the Industrial Accident Commission in favor of Percy F. Ballinger for injuries received.

Award affirmed.

Strother P. Walton, of Fresno, for petitioner.

R. C. McKellips and Joseph Sheehan, both of San Francisco, for respondents.

MARKS, Justice.

This is an original proceeding in this court to review an award of the Industrial Accident Commission in favor of Percy F. Ballinger, the employee, against Jake W. Gardner, his employer, for injuries received on December 19, 1943.

Jake W. Gardner owned a cocktail bar at 1043 Broadway in Fresno. Ballinger worked for Gardner as day bartender. J. F. Blake was the night bartender. On December 19, 1943, Ballinger's left ankle was broken by kicks inflicted by a Mr. Brooks whom Ballinger was ejecting from the premises.

The sole question presented here is whether or not the evidence sustains the finding of the commission to the effect that the injuries arose out of and in the course of Ballinger's employment.

The evidence on this question is sharply conflicting and it seems to us that the contention of petitioner may be supported by a preponderance of the evidence and that the commission might well have decided the case in his favor although there is evidence to the contrary supporting the award.

[1-3] The rules governing us under such circumstances are clearly set forth in *Ledson v. Pacific Indemnity Co.*, 105 Cal.App. 328, 287 P. 566, 567, as follows: "It is elementary that the findings of the Industrial

Accident Commission are subject to review only in so far as they have been made without any evidence whatever in support thereof. The jurisdiction of an appellate court in cases of this character is limited strictly to determining whether there is evidence sufficient to sustain the award. It is not the function of the courts to determine the credibility of the witnesses or the weight to be attached to their testimony. With these subjects we have nothing to do, as the commission is the final arbiter on questions of fact. It may be that a different conclusion could have been reached by the commission, and, had it been so reached, that it would have been fully supported by the evidence. Whatever our views may be upon the subject are of no consequence, as we have no power to disturb the findings of the commission when supported by evidence. Its conclusion upon a question of fact upon conflicting evidence is final."

A decision of the question presented requires a brief summary of a portion of the evidence. As the commission accepted the evidence offered by Ballinger as true we will summarize the evidence supporting the award and will disregard evidence to the contrary although it was amply sufficient to have supported a decision in petitioner's favor.

Ballinger's regular hours were from 8 o'clock in the morning to 4 in the afternoon. He was required to put the place in order and prepare for its opening at 10 o'clock. He testified that it was frequently necessary for him to reach his place of employment by 7 or 7:30 in the morning in order to perform these duties.

The night bartender relieved Ballinger at 4 o'clock each afternoon. However, Ballinger had duties to perform after that hour. These consisted of cleaning and putting fresh water in the sinks, icing beer, and otherwise putting the place in order for the night man. He described some of his duties as follows:

"Q. Were you able to do it before he came on? A. Before Kelly (Blake) came on?

"Q. Yes. A. No, we never had time to do it. When he came on I would go back and look at the beer and sometimes I would put on as many as five cases to ice it up, and when he come on at night he wouldn't have time to do it.

"Q. Were you under instruction from Mr. Gardner to take care of those duties,

after the other bartender came on? A. Sure was.

"Q. How long had you been doing those duties? A. Ever since I had been there. Mr. Gardner would say, 'Have you everything fixed for Grandpa?' and I said, 'Sure'. He was afraid Grandpa would get mad if I didn't have everything fixed.

"Q. Did he tell you you were supposed to leave at four o'clock? A. Never did. Lots of times I would get the beer when I got through, I would put on ten or twenty cases of beer.

"Q. And that had been going on during the entire time you were working there? A. Yes."

During the afternoon of December 19, 1943, Brooks entered the cocktail bar and asked for a drink of liquor. This was refused by Ballinger because he thought Brooks was intoxicated. About 3 o'clock Brooks returned and again asked for a drink and was refused for the same reason. Ballinger told Brooks if he did not leave the place he, Ballinger, would put him out. Brooks replied, "I will get you when you get out from behind that bar."

At about 3:45 o'clock Mrs. Ballinger came into the place and took a seat at the bar to wait for her husband. Ballinger was relieved by Blake at 4 o'clock and proceeded with his duties of cleaning up and preparing the place for the night trade. Mrs. Ballinger asked for a package of cigarettes which her husband procured for her. She then asked him to join her in a glass of beer which he did, standing in front of the bar while drinking it. Ballinger described the subsequent events as follows: "I was standing there drinking a glass of beer and the day girl brought us down a bag of oranges, and I said, 'I will go back and get them,' and I went back and got the bag of oranges and set them on the bar, and I said, 'Oh, I forgot something; I will have to put some beer on ice,' and I looked around and this same fellow was sitting right behind me. He had already claimed he was going to get me when I came out from back of the bar, and I looked around and there he stood, and he made a swing with his left hand and I grabbed him and put him out the front door. He started back again and I put my hand in his face and shoved him out again, and I shut the door and latched the door inside, so he began kicking and knocking to get in, and Kelly, the night watchman

(man) said, 'Well, we can't keep the door shut all afternoon,' and about that time a fellow came along that wanted to get in, and Grover Gardner was standing there and in the meantime Kelly was calling the officer.

"Q. Who is Grover Gardner? A. Jack Gardner's brother, so he unlatches the door and this fellow run right in behind the other boy and grabbed me again, and I grabbed him in a clinch and got him to the door and I couldn't let loose of him, and we landed up outside and we both went down outside. I still had hold onto him. While I had him in this clinch inside the building there I had him so he never hit me. He didn't strike me at all. He began kicking with both feet as fast as he could, me trying to get him to the door. When we got outside we both went down and I took him down with me. By that time the officer come along and picked him up.

"Q. When did you find that you had been injured? A. I found it after I got up off the sidewalk. I knew I hurt my leg on the inside when he was kicking but I didn't know it was hurt so bad."

[4] Ballinger had not completed his duties and had not put the beer on ice when he was injured at about 4:30 o'clock p.m.

Section 62 of the Alcoholic Beverage Control Act, as amended, Stats.1937, p. 2175, makes it a misdemeanor for any person to sell, furnish or give away any alcoholic beverages to any obviously intoxicated person. A license may be revoked for obvious violations of the same act, Sec. 40. Thus Ballinger was not only performing a duty imposed upon him by law, but was serving the interests of his employer when he refused to serve Brooks and was acting within the scope of his employment in so doing.

It is obvious from the record we have quoted that the final quarrel and the injury of Ballinger had its inception in the refusal to sell Brooks a drink; that the injury was a result of that refusal in a continuance of that controversy by Brooks.

In a somewhat similar case this view was taken by the Court of Appeals of New York in *Field v. Charmette Knitted Fabric Co.*, 245 N.Y. 139, 156 N.E. 642, 643, where it is said: "The quarrel outside of the mill was merely a continuation or extension of the quarrel begun within. * * * Here, almost in the very act of putting his foot without the mill, the em-

ployee is confronted by a danger engendered by his work within. The situation would be hardly different if a struggle, begun back of the threshold, had ended in a fatal blow delivered on the walk."

McGrinder v. Sullivan, 264 App.Div. 640, 37 N.Y.S.2d 1, 2, is factually similar to the instant case. There the injured employee was a bartender. While on duty he ejected an intoxicated customer from the premises. The customer said, "I will see you again." After the employee had finished his work and had left the place of his employment he was injured by the intoxicated person. The court said: "Here we have a situation where claimant justifiably expelled a turbulent patron from his employer's bar room. The latter left with a threat of revenge. Nursing his wrath at the indignity to which he conceived himself to have been subjected he lay in wait for his victim and within sight of the scene of the prior altercation he perpetrated a vicious assault upon him. Under those circumstances we think it must be said that claimant was then in the course of his employment."

While we have found no California case deciding the precise question here presented, on identical facts, there are cases tending to support the award. Some of them are summarized in Fireman's Fund, etc., Co. v. Industrial Acc. Comm., 61 Cal. App.2d 335, 143 P.2d 104, 106, as follows: "In the case of Judson Mfg. Co. v. Industrial Acc. Comm., 1919, 181 Cal. 300, at page 302, 184 P. 1, it was stated: 'The right to compensation is by no means restricted to those cases where the injury occurs while the employé is actually presently manipulating the tools of his calling. * * * It seems to us, however, that when an employé has arrived at the premises of his employer, and is thereon for the purpose of immediately commencing his actual work, he is performing service incidental to his employment.' In Freire v. Matson Navigation Co., 1941, 19 Cal.2d 8, 118 P.2d 809, a janitor, employed by defendant, who regularly reported for duty at 8 a.m., arrived at 7:45 a.m. in a taxicab at a pier where the ship upon which he was to work was moored. As he alighted from the cab he was injured by an automobile operated by defendant's employee. In holding that the injury arose out of and occurred in the course of the janitor's em-

ployment, the court said at page 13 of 19 Cal.2d, at page 812 of 118 P.2d: 'He was obliged to be there on the morning of the accident before 8 o'clock in readiness to go on the pier and thence to his ship at that time.' The court said further on the same page: 'The fact that the accident happened some minutes before plaintiff was to begin work was immaterial.' In California Cas. Ind. Exch. v. Industrial Acc. Comm., 1943, 21 Cal.2d 751, at page 754, 135 P.2d 158, at page 161, it was stated: 'The term "employment" includes not only the doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. * * * In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached.'" See also, Zolkover v. Industrial Acc. Com., 13 Cal.2d 584, 91 P.2d 106.

In the Zolkover case, supra, the Supreme Court followed the rule laid down by the Court of Appeals of New York in Field v. Charmette, supra, and said [13 Cal.2d 584, 91 P.2d 108]: "However, in the present case the assault commenced on premises which must be considered to have been the proper location for the discharge of the duty which Robinson was sent to perform. If at the time of the first injury Robinson had grappled with his assailant and attempted to disarm him while still within the four walls of the premises, it could not be said that additional injuries so received would not be compensable. As the facts in Field v. Charmette Knitted Fabric Co., supra, demonstrate that the same assault may be continuous and be carried outside of the premises, the facts in the present case lead to the conclusion that the sequence of events occurring without opportunity for reflection formed a part of the res gestae and constituted one continuous assault."

As there is substantial evidence in the record supporting the award we cannot disturb it here although we may regard the contrary evidence more convincing. Zolkover v. Ind. Acc. Com., supra.

The award is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

TANNER et al. v. OLDS.

ESCROW-DEPOSITARY CORPORATION
v. SAME et al.

SECURITY-FIRST NAT. BANK OF LOS
ANGELES v. SAME.
Civ. 15086, 15087, 15090.

District Court of Appeal, Second District,
Division 2, California.

Feb. 25, 1946.

Rehearing Denied March 13, 1946.

Hearing Granted April 25, 1946.

1. Mines and minerals ⇨79(1)

An owner of lot which was quitclaimed and released from community oil and gas lease by lessee was not barred from recovering her royalty accruing under community lease by also receiving a landowner's royalty from oil produced from the quitclaimed lot, notwithstanding that such oil production reduced amount of oil recovered by the community wells, where community lease authorized lessee to quitclaim lots and provided that lessee should drill offset wells if there should be substantial drainage to community wells, and contained no provision prohibiting production on a quitclaimed lot.

2. Mines and minerals ⇨79(1)

A community oil and gas lease providing that owner of any lot which should be quitclaimed and released from the lease by lessee was subject to three restrictions would not be construed as impliedly containing a further restrictive provision that owner of quitclaimed lot could not produce oil therefrom in such a manner as would reduce the amount of oil recovered by community wells.

3. Contracts ⇨168

An implied condition cannot be inserted in a contract as against the express terms thereof or to supply a condition upon which the contract is intentionally silent.

4. Contracts ⇨143

Courts cannot alter a contract by construction or make a new contract for the parties, but are confined to the interpretation of the agreement which the parties have made for themselves without regard to its wisdom or folly as shown by events subsequent to the execution of the contract.

5. Contracts ⇨143

Where the parties agree on all the provisions of their contract and provide

that all shall be treated alike and when thereafter in the course of performance of the contract it develops that some of the parties may gain an advantage over the others which might equally as well have fallen to the others, the contract is not incomplete and an implied covenant cannot be read into the contract to equalize the advantage of the parties.

6. Evidence ⇨20(1)

Drainage of leased oil and gas premises is now a generally known fact.

7. Mines and minerals ⇨79(1)

The right of a community oil and gas lessor to share in community royalties is a "right in gross", that is to say, the right is personal to him and is not attached to the land.

See Words and Phrases, Permanent Edition, for all other definitions of "Right in Gross".

8. Mines and minerals ⇨74

If oil and gas lessor should sell his lot which had been released from community lease, the new owner would not be prohibited from drilling oil therefrom even if by so doing he should drain the community pool, and the owner would continue to hold and enjoy the community lease royalty as an interest in gross.

9. Courts ⇨92

A discussion in an opinion relative to a hypothetical situation is dicta and is not controlling.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action to quiet title by Emma Tanner and another against Emma F. Olds, wherein the Escrow-Depositary Corporation, etc., and the Security-First National Bank of Los Angeles, etc., instituted separate interpleader actions joining Emma F. Olds and Emma Tanner and another as defendants. The interpleader action and the quiet title actions were consolidated for trial. From the judgments, Emma Tanner and another appealed. By stipulation the parties agreed that the appeals should be considered together.

Affirmed.

Burke, Hickson, Burke & Marshall and James M. Carter, all of Los Angeles, for appellants.

Cree & Brooks, of Long Beach, for respondent.

McCOMB, Justice.

The undisputed facts are these:

On October 4, 1921, the several owners of lots 168 to 176, both inclusive, in Montebello, entered into a community oil and gas lease with the Standard Oil Company as lessee. Each of the lots contained five acres. Respondent Emma F. Olds and her husband, Frank H. Olds, now deceased, were owners of lot 173. They held this lot in joint tenancy and since the death of Frank H. Olds his widow, Emma F. Olds, has been and is now the owner thereof. George Tanner and Emma Tanner, husband and wife, were the owners as joint tenants of lot 174. George Tanner has died and his widow Emma Tanner is now the owner thereof. Appellants Emery B. Hunt and Mable G. Hunt are the owners of lot 176. The community lease provided that the lessee could at any time at its pleasure quitclaim and release any lot from the community lease.

The lessee proceeding under the community lease drilled two wells and placed the same on production. One of these wells is located on the Tanner lot (lot 174) and the other is located on the Hunt lot (lot 176). On June 1, 1933, the lessee having elected to quitclaim and release all lots except lots 174 and 176 joined with all the owners of the lots comprised in the community lease and executed a certain agreement under which all the lots were quitclaimed and released from the community lease to their respective owners except lots 174 and 176. It was also expressly provided by the terms of the agreement that Emma F. Olds should thereafter continue to receive her proportionate share of the royalty accruing from the operation under the community lease. In October, 1936, Mrs. Olds and the rest of the owners of the lots quitclaimed and released to them commenced an action to quiet their respective titles against appellants Tanner and Hunt and in that action procured a decree quieting their titles to the lots. This decree became final.

In 1937, deeper oil sands were discovered in the Montebello oil field and Mrs. Olds leased her lot to the Bush Oil Company, which company, as lessee, drilled for and produced oil from such lot. Mrs. Olds as a result began to receive a landowner's share of the royalty from the production on lot 173. She also continued to receive her proportionate share of the royalty from the community lease wells until September 18, 1938. Shortly prior to such date appellants Tanner and Hunt asserted that they alone were entitled to all the community royalty for the reason that Mrs. Olds was receiving royalty from the production on the lot quitclaimed to her, to wit, lot 173. When she disregarded this claim and refused to surrender her share of the community royalty, appellants Tanner and Hunt commenced an action against her and others to quiet their titles to all the royalty from the community lease. This action was entitled *Tanner et al. v. Title Insurance & Trust Company et al.* The trial court rendered a judgment in favor of the plaintiffs quieting their titles to the entire royalty from the community lease. This judgment was reversed by the Supreme Court which held that Mrs. Olds was entitled to continue to receive her share of the community royalty notwithstanding that she was also receiving royalty from the production on lot 173. (*Tanner v. Title Insurance & Trust Co.*, 20 Cal.2d 814, 816 et seq., 129 P.2d 383.)

Subsequently appellants Tanner and Hunt amended their complaint by alleging that the oil operation on Mrs. Olds' lot (lot 173) was causing oil to be drained from the common pool from which the community wells were producing. The trial court found that by reason of the production on lot 173 which produced from the common pool the production from the community wells was 15% less than it would have otherwise been. The court entered a judgment decreeing that respondent Olds was entitled to her share of royalty under the community lease and also to her landowner's royalty on oil produced on lot 173. From this judgment appellants Tanner and Hunt have appealed.*

*The community lease provided that the community royalty be paid to an agent for distribution among the persons entitled thereto. At one time the Escrow Depositary Corporation was such agent and thereafter the Security-First National Bank of Los Angeles accepted

this agency. Due to the controversy between respondent Olds and appellants Tanner and Hunt with respect to the royalty designated for respondent Olds, the Escrow Depositary Corporation and the Security-First National Bank in Los Angeles instituted separate interpleader

[1] This is the sole question presented for our determination:

Was respondent Olds barred from receiving her royalty accruing under the community lease because she also received a landowner's royalty from the oil produced on lot 173 since the oil operation on lot 173 reduced the amount of oil recovered by the wells being operated under the community lease?

This question must be answered in the negative. The express provisions of the community lease impel the answer to the foregoing question. Before the execution of the community lease the parties did not know on whose lot oil might be found nor did they know that any oil would be found on any of the lots. Situated alike and with aspirations common to all they placed their respective lots together pursuant to the agreement that should oil be discovered on the community tract, irrespective of the lot or lots on which it might be discovered, the royalty from that oil would be apportioned one ninth to each lot owner. They further expressly provided that in the event the lessee should quitclaim and release any lots from the lease the owners of such lots would continue to participate in the royalty to the same designated extent. It is clear that they contemplated the future and made provision for a contingency that might subsequently occur. Further it was expressly provided in the community lease that when and if a lot was quitclaimed and released the owner thereof would not thereafter hold it completely free of obligations arising from the community lease. For example, they expressly provided that the community lessee while conducting the community operation would have the right of ingress and egress to, from, and over the quitclaimed lot and to lay pipes thereon or therein to the extent that the same might be necessary or convenient to the lessee's operation, and that the lessee, notwithstanding the quitclaim was authorized to retain eight acres surrounding each community well even though such acreage might include a portion of a quitclaimed

lot. Thus the parties did impose restrictions upon the quitclaimed lots which would continue and would encumber such lots and impede some operation thereon as long as the community lessee continue his operation on the community lease. Accordingly, the owner of a quitclaimed lot could not conduct any oil operations upon, or make any use of his lot that would preclude or impede the community lessee from ingress and egress and from laying pipes and, if any portion of the quitclaimed lot was included within the eight-acre rectangular area surrounding a community well, the owner of the quitclaimed lot would be prohibited from using such portion for any purpose which might interfere with any activity which the community lessee might find necessary or convenient to conduct thereon. There were no other restrictions placed upon the quitclaimed lots by the agreement of the parties.

[2] There is no merit in the proposition that the court should imply a further restrictive provision to this effect: "While the owner of a quitclaimed lot may produce oil therefrom he shall be prohibited from producing the same when to do so will cause any drainage from the common pool from which the community wells were producing or forfeit his right to his share of the community lease royalty."

[3] Such a provision would be contrary to the express terms of the contract which named only three restrictions upon a quitclaimed lot. The law is settled that an implied condition cannot be inserted in a contract as against the express terms of the contract or to supply a condition upon which the contract is intentionally silent. (*Tanner v. Title Insurance & Trust Co.*, 20 Cal.2d 814, 824, 129 P.2d 383; *Foley v. Eulless*, 214 Cal. 506, 511, 6 P.2d 956.) Had the parties desired to put a further restriction upon a quitclaimed lot, such as appellants seek to have the court imply, they could have done so by inserting such a provision in the lease. (See *Clark v. Elsinore Oil Co.*, 138 Cal.App. 6, 31 P.2d 476.)

actions joining as defendants the contending claimants to the royalty designated for respondent Olds. These interpleader actions were consolidated for trial and tried with the principal action, that is, the quiet title action. In the interpleader actions judgment was also entered in favor of respondent Olds. From the adverse judgment entered against them in the interpleader actions the appellants

Tanner and Hunt have also appealed, and by stipulation these appeals have been consolidated with the appeal in the quiet title action. By stipulation the parties have agreed that all three appeals may be considered on one set of briefs and that the three cases may be consolidated for decision since the same question is involved in each appeal.

[4, 5] It is not our duty to alter a contract by construction or to make a new contract for the parties. We are confined to the interpretation of the agreement, which the parties have made for themselves, without regard to its wisdom or folly as shown by events subsequent to the execution of the contract. Such a rule is fair and just to all parties. When the community lease was executed the lessors were all equally affected; none knew on whose lot oil might be discovered; none knew whose lot would be quitclaimed or released. The lessee could have drilled the wells on the Olds' lot and quitclaimed the appellants' lots, in which event the appellants would have had the right to drill on their lots. Where the parties agree on all the provisions of their contract and provide that all shall be treated alike, and when thereafter in the course of the performance of the contract it develops that some of the parties may gain an advantage over the others, an advantage that might equally as well have fallen to the others, it cannot reasonably be said that the contract was incomplete or that some implied covenant should be read into the contract to equalize the advantages of the parties.

[6] Drainage of leased premises is now a generally known fact and the parties contemplating this fact, inserted a provision relative to drainage in the community lease. Section 23 of the lease reads as follows: "In the event that wells are drilled and oil procured in paying quantities upon property adjoining the land hereby leased, and within two hundred and fifty (250) feet of the exterior limits of the area covered by this lease, the lessee agrees to protect the lessors' boundary line by offsetting such wells by the commencement of actual drilling within ninety (90) days after discovery of oil in paying quantities in such wells."

The foregoing provision is conclusive of the rights of the parties. It provides that should a well be drilled on adjacent lots within 250 feet of the community wells, the community lessee shall drill offsetting wells. Undoubtedly this provision was inserted in the lease in contemplation, among other things, of the provisions of the community lease which expressly permitted the lessee to quitclaim and release lots from such lease. The parties by such a provision expressly provided what was to be done in the event of drainage irrespec-

tive of the lot or lots on which the draining well might be located.

The provision in the community lease pursuant to which the lessee was authorized to quitclaim and release lots from the community lease, the provision that the lessee would drill an offset well if there should be substantial drainage to the community wells, and the absence of a provision prohibiting production on a quitclaimed lot, must all be considered together, and when the contract of the parties is thus considered only one logical and reasonable determination may be made, viz.: that the parties intended that the owner of a quitclaimed lot could produce therefrom and that the community wells would be protected from drainage by operation of the provision imposing upon the community lessee the duty to offset that drainage. Any other construction would lead to an impractical situation relative to community leases.

The community lease has become a commonly used instrument. It has proved to be a desirable device both to the lessee and to the lessors. The substantial cost of drilling a well would dissuade a lessee from drilling in an area limited only to one or two wells and the lessors, without the device of a community lease, would in most instances be forced to let their lands lie undeveloped. As common as is the community lease is also the provision whereby the lessee may quitclaim lots therefrom and thus relieve himself from further drilling. If such quitclaiming of lots were not a common occurrence the provision allowing the same would not generally be inserted. It cannot be gainsaid that in numerous areas, in and without our jurisdiction, there are now numerous lots and larger areas which were once included in a community lease but have been excluded therefrom. None of these excluded areas could be safely used for the production of oil in the event that production therefrom would cause some drainage to the remaining community wells, if a construction contrary to that which we have placed upon the lease in question were adopted. Such a construction would manifestly stop much present day development, and because it is unreasonable it would cause many an absurd situation. If the right to drill and produce oil on a quitclaimed lot might be circumscribed by the implied proviso that no drainage should thereby be caused to the common pool, the owner of a quitclaimed area a mile away from the com-

munity wells might be denied the right to drill and produce upon his lot. The same oil pool can naturally lie under hundreds of acres. A lot quitclaimed from a community lease may adjoin a lot, never included in the community lease, upon which there is a torrent of production causing substantial drainage to the quitclaimed lot. Is the owner of such quitclaimed lot powerless to offset that drainage merely because production on this lot will cause some drainage to the common pool from which the community wells are producing? That quitclaimed lot might be located at any distance away from the community wells, but nevertheless a well drilled upon it might cause some drainage to the community wells. The position of appellants is therefore obviously untenable.

[7, 8] The right of a community lessor to share in the community royalty is a right in gross, that is to say, the right is personal to him and is not attached to the land. (Tanner v. Title Insurance & Trust Co., 20 Cal.2d 814, 820, 129 P.2d 383.) If such lessor should sell his lot, which had been excluded from the community lease, the new owner of the lot would not be prohibited from drilling oil therefrom even if by so doing he should drain the community pool. At the same time the lessor who sold the lot could continue to hold and enjoy his community lease royalty as an interest in gross.

Appellants contend for conclusions contrary to that which we have reached predicated upon the following statements in Tanner v. Title Insurance & Trust Co., 20 Cal.2d 814, 824 et seq., 129 P.2d 383, 389:

"True, courts have frequently considered implied covenants as being within a contract but such covenants are justified only when they are not inconsistent with some express term of the contract and, in the absence of such implied terms, the contract could not be effectively performed. Williston on Contracts, vol. 5, § 1293; Jones v. Interstate Oil Corp., 115 Cal.App. 302, 1 P.2d 1051. But the facts of the present case do not show any basis for implying a covenant in the lease which would have the effect of dividing the royalty provided for in it differently than the parties have agreed upon by the plain terms of their contract.

"The respondents would be in an entirely different position if their suit was based upon pleadings and proof that the appellants Olds, by the production of oil on

their land, are draining oil from the pool tapped by the wells on lots 174 and 176, and are thus impeding the full performance of the community lease.

"Every contract contains an implied covenant on the part of each party not to prevent or hinder performance by the other party. Williston on Contracts, Vol. 5, § 1293A. Upon fundamental principles, the law will not allow one to claim royalties under a community lease and at the same time diminish the amount of oil which might otherwise be recovered for the common benefit of all the lessors.

"For example, in Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163, the defendant leased plaintiff's oil property and also acquired a lease on adjacent land upon which it drilled wells, thereby draining oil from the plaintiff's land. The lease with the plaintiff contained no offset clause. Nevertheless, the court held that a covenant would be implied obligating the lessee to drill wells to offset those on the adjacent property.

"In the present case, however, no evidence was offered to show that the well on the land of the Olds is draining oil from the source of supply under the community lease, and contrary to the contention of the respondents, this court may not take judicial notice of any such alleged fact." (Italics added.)

The quoted provisions of the opinion in Tanner v. Title Insurance & Trust Co., supra, are inapplicable to the present case for two reasons.

First: In the Tanner case, the Supreme Court expressly recognized the rule that a court may not imply a condition in a contract which is contrary to an express term of the contract. In the instant case the covenant which appellants seek to have implied is as shown above contrary to the express terms of the contract.

[9] Second: The provision of the opinion relied upon by appellants is dicta and was not pertinent to any issue then before the court. This is evidence in the opinion itself wherein it is said the "respondents would be in an entirely different position if their suit was based upon pleadings and proof that the appellants Olds, by the production of oil on their land, are draining oil from the pool tapped by the wells on lots 174 and 176, and are thus impeding the full performance of the community lease." (Italics added.) Obviously if there were

no pleadings and proof that respondent Olds had produced oil on her land which was draining from the common pool there was no issue relative to such matter before the court and the discussion relative to a hypothetical situation was dicta and is not controlling in view of the facts in the instant case.

For the foregoing reasons the judgments are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.



CARR v. CROWELL.*

Civ. 15157.

District Court of Appeal, Second District,
Division 2, California.

Feb. 28, 1946.

Hearing Granted April 25, 1946.

1. Master and servant ⇨202

Employee, whose sole duty was to procure and lay out plates after hardwood men had laid and oiled floor, was not engaged in the scope of his employment when he threw hammer at employee engaged in laying flooring, so as to impose liability on contractor for resultant injuries.

2. Master and servant ⇨302(3)

An employer is not liable for an assault committed by an employee whose act is without the scope of his employment.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Hubert L. Carr, against R. A. Crowell, doing business as Wm. C. Crowell Company, to recover damages for injuries resulting from an assault. Judgment for defendant on a directed verdict, and plaintiff appeals.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellant.

Kenneth J. Murphy, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant predicated upon the granting of his motion for a directed verdict in an action to recover damages for injuries resulting from an assault, plaintiff appeals.

The essential facts are these:

Defendant, a general contractor, employed Mr. Enloe as a lay-out man, it being his duty to lay out plates and mark where pieces of timber went onto the plates. This work followed the laying of the hardwood floors. The hardwood floors generally had to be oiled to protect them from the weather. On February 2, 1944, plaintiff whose duty it was to lay flooring and then oil it was working on the building while Mr. Enloe was laying plates. Plaintiff saw Mr. Enloe putting a plate down and went over to him saying, "Take it easy, they [referring to the hardwood floor men] are not through yet." Mr. Enloe replied, "I am taking it easy." Plaintiff then picked up the plate which Mr. Enloe had placed and threw it off onto the roof of a porch. Mr. Enloe remarked, "You think you have done something smart." Plaintiff turned and walked away and went to work between two stairways. Later plaintiff noticed that Mr. Enloe was putting the plate back again in the same place. He thereupon took one step, reached the plate and kicked it off with his foot, at which time Mr. Enloe threw a hammer which hit plaintiff in the head seriously injuring him. Whereupon Mr. Enloe quit work and walked off the job.

[1] This is the sole question necessary for our determination:

Was Mr. Enloe engaged in the scope of his employment when he threw the hammer at plaintiff?

This question must be answered in the negative. Mr. Enloe was not hired to throw hammers. His sole and only duty was to get two by fours (plates) and lay them out after the hardwood men had laid and oiled the floor. Mr. Enloe's act in throwing the hammer in no sense furthered the purpose of his employment. It could not in any manner expedite or facilitate the work which was done or which was to be done. After the plate had been kicked off by plaintiff there was only one thing which could be done by Mr. Enloe to carry out the object of his employment and that was to replace the plate. Since Mr. Enloe's act in throwing the hammer

* Subsequent opinion 171 P.2d 5.

had no tendency to promote or further the interests of his employer, the act was outside and beyond the scope of his employment.

[2] As the law is settled that an employer is not liable for an assault committed by an employee when the act is without the scope of the employee's employment (*Yates v. Taft Lodge*, 6 Cal.App. 2d 389, 390, 44 P.2d 409), the trial court properly directed a verdict in favor of defendant in the instant case.

The following cases relied on by plaintiff are all factually distinguishable from the present case: *Haworth v. Elliott*, 67 Cal.App.2d 77, 153 P.2d 804; *Andrews v. Seidner*, 49 Cal.App.2d 427, 121 P.2d 863; *Johnson v. Monson*, 183 Cal. 149, 190 P. 635; *Deevy v. Tassi*, 21 Cal.2d 109, 130 P.2d 389; *Hiroshima v. Pacific Gas & Elec. Co.*, 18 Cal.App.2d 24, 63 P.2d 340. In each of these cases the injury inflicted by the employee was committed in the scope of the employee's employment and while he was furthering his employer's business.

Judgment affirmed.

MOORE, P. J., and WILSON, J., concur.



73 Cal.App.2d 377

HALL et al. v. REMP et al.

Civ. 15173.

District Court of Appeal, Second District,
Division 2, California.

March 1, 1946.

Rehearing Denied March 18, 1946.

Hearing Denied April 29, 1946.

1. Vendor and purchaser ⇐82

In action for damages for breach of contract to sell restaurant business and realty in which time was of the essence, evidence was insufficient to show a waiver of such provision.

2. Principal and agent ⇐123(1)

In action for damages for breach of contract to sell restaurant and realty in which time was of the essence, evidence did not show that attorney appointed by vendor

to receive part of escrow payment and cash payment had actual or ostensible authority to amend or waive time of payment or any other terms of the agreement, or that vendor intentionally or by want of ordinary care allowed attorney to believe he had actual authority to waive any provision of contract or led vendees to believe attorney to have such authority. Civ.Code, §§ 2315-2317.

3. Attorney and client ⇐81

Where attorney was appointed by vendor to prepare agreement of sale, in which time was expressly made of the essence and to prepare escrow instructions to bank, and to hold sum of \$5,000 for payment on behalf of vendors to any creditors presenting claim after notice of sale had been given, attorney had no authority further than the performance of these acts and could not waive or amend any part of the agreement. Civ.Code. § 3440.

4. Contracts ⇐238(1)

A contract in writing cannot be altered except by another contract in writing or by an executed oral agreement. Civ.Code, § 1698.

5. Trial ⇐105(5)

Since evidence of oral stipulations is not admissible to alter the terms of a contract in writing, fact that some of the evidence relating to the alleged oral understanding to extend time of payment under a contract of sale was not objected to by vendors cannot affect their right to insist upon the agreement as written. Civ.Code, § 1698.

6. Vendor and purchaser ⇐101

Where agreement of sale expressly made time the essence, the failure of purchasers to make the payment at the time provided therein worked a forfeiture without the necessity of the notice given by vendors indicating their election to cancel and rescind the contract.

7. Evidence ⇐397(2)

Where agreement of sale provided that it contained the entire agreement between the parties, and that no statement, promise, or inducement made by any party thereto, or agent of any party, not contained in the contract should be binding, the vendors were absolved from responsibility for anything not contained in the writing.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Claude C. Hall and another, copartners, doing business as Lloyd of Los Angeles, against Adolph Remp and another for breach of contract to sell a restaurant business and realty. From adverse judgment, defendants appeal.

Judgment reversed.

Paul Barksdale D'Orr and Frank H. Love, both of Los Angeles, for appellants.

Herbert Gall and Edward Fitzpatrick, both of Los Angeles, for respondents.

WILSON, Justice.

Appellants were the owners of a restaurant business and the real property on which it was located. On August 3, 1944, they entered into an agreement in writing whereby they agreed to sell and respondents agreed to buy said property. Of the purchase price \$15,000 in cash was to be paid by the purchasers "upon the execution of this agreement"—\$10,000 to be deposited in escrow with the Bank of America National Trust & Savings Association and \$5,000 with appellants' attorney, Frank H. Love. It was provided that "time is the essence of this agreement."

In the afternoon of August 3, the date of the agreement, appellants went with their attorney to the bank where they signed the agreement of sale and the escrow instructions. Telephone calls were made to respondent Rothenborg informing him that appellants had signed the contract and requesting him and respondent Hall to call at Mr. Love's office as soon as possible and sign it. Respondents did not appear at Mr. Love's office until after 6:30 o'clock in the afternoon. They signed the agreement but did not deposit any part of the sum of \$15,000 which was to be paid upon the execution of the agreement.

On August 4th Mr. Love, at the request of appellants, prepared a notice of cancellation and rescission of the escrow instructions which was delivered to the bank either on the fifth or seventh day of August. He also delivered a notice of cancellation to respondent Rothenborg on August 8th and on the same day mailed a copy of the notice to respondent Hall at San Diego. Respondents then brought this action for breach of contract and recovered a judgment for \$4,750, from which this appeal is taken.

[1-3] The court found that at all times mentioned in the pleadings Mr. Love was the actual and ostensible agent of appellants and that after the execution of the contract they, by and through their said agent, waived the time for making the cash payment that was required by the contract to be made upon its execution to and including August 8, 1944, and waived the provision that time was the essence of the agreement. This finding is not sustained by the evidence. There is no evidence that Mr. Love was the actual or ostensible agent of appellants or that he had actual or ostensible authority to act for them to the extent of amending the contract or of waiving time of payment or any other of its terms. "An agent has such authority as the principal, actually or ostensibly, confers upon him." Civ.Code, sec. 2315. The record is devoid of evidence that appellants intentionally, or by want of ordinary care, allowed Mr. Love to believe himself to possess actual authority to waive any part of the contract, Civ.Code, sec. 2316, or that appellants intentionally, or by want of ordinary care, or in any manner, caused or allowed respondents to believe Mr. Love to possess such authority. Civ.Code, sec. 2317. Mr. Love was employed by appellants to prepare the agreement of sale and the escrow instructions to the bank, and to hold the sum of \$5,000 and pay the same on behalf of appellants to any creditors whose claims might be presented against them after notice of sale had been given as required by section 3440 of the Civil Code. Mr. Love's authority extended no further than the performance of those acts.

Respondent Rothenborg testified that during his negotiations with appellants Mr. Remp informed him that "all transactions must be carried on through Mr. Love's office, or with his counsel and approval." And again, that he, Mr. Rothenborg, was informed that "until Mr. Love was brought into the picture, if that is the proper way of putting it, nothing definite could be arrived at; that it would be necessary to see Mr. Love in his office and get him to draw up papers before we would come to any final deal." A telephone call was made to Mr. Love, said the witness, "attempting to make an appointment with him so that we could go down and get his opinion as to what type of papers should be drawn to make the deal satisfactory to all parties." The foregoing is all of the testimony to

which we have been referred by respondents in support of their assertion that Mr. Love was the agent of appellants, authorized by them to waive or amend any portion of the agreement. This evidence is insufficient to show actual or ostensible authority in Mr. Love as found by the court. Other testimony of Mr. Rothenborg to the effect that Mr. Remp said that Mr. Love "would have full authority to handle the deal" on behalf of appellants is shown by the transcript to have reference to a previous transaction and was stricken out by the court. Mr. and Mrs. Remp and Mr. Love all testified that the latter was not given authority to waive any provision in the written contract.

[4,5] Respondents' contention that the time of payment was extended, even if Mr. Love's authority to act were admitted, is negated by the rule that a contract in writing cannot be altered except by another contract in writing or by an executed oral agreement. Civ.Code, sec. 1698; Rottman v. Hevener, 54 Cal.App. 474, 478, 202 P. 329; Harloe v. Lambie, 132 Cal. 133, 136, 64 P. 88; Henahan v. Hart, 127 Cal. 656, 658, 60 P. 426; United Iron Works v. Outer Harbor etc. Co., 168 Cal. 81, 84, 141 P. 917. Evidence of oral stipulations is not admissible to alter the terms of a contract in writing, and the fact that some of the evidence relating to the alleged oral understanding was not objected to by appellants cannot affect their right to insist upon the agreement as written. Rottman v. Hevener, supra.

[6] Since the time of payment was of the essence of the contract, the failure of respondents to make the payment at the time provided therein worked a forfeiture without the necessity of the notice given by appellants indicating their election to cancel and rescind the contract. Northern Assurance Co. v. Stout, 16 Cal.App. 548, 557, 117 P. 617; McAdams v. Felkner, 140 Cal. 354, 73 P. 1064; Commercial Bank v. Weldon, 148 Cal. 601, 608, 84 P. 171.

[7] The contract also provided that it contained the entire agreement between the parties, and that no statement, promise, or inducement made by any party thereto, or agent of any party, not contained in the contract should be binding or valid. Respondents and appellants were dealing at arm's length. Since respondents were informed by the contract that all of the terms and conditions pertaining to the sale were

contained therein, appellants were absolved from responsibility for anything not contained in the writing. Warner v. Taft Land & Dev. Co., 113 Cal.App. 71, 80, 297 P. 969; W. J. Latchford v. Southern Calif. Gas Co., 125 Cal.App. 112, 114, 13 P.2d 871; Gridley v. Tilson, 202 Cal. 748, 751, 262 P. 322.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.



73 Cal.App.2d 401

GRAY v. HARTMAN et al.
Civ. 3161.

District Court of Appeal, Fourth District,
California.

March 4, 1946.

1. Automobiles ⇐242(8), 244(51, 58)

Where there was evidence that deceased was walking on oiled portion of highway at night about one foot from left edge when struck by defendant's truck which approached from opposite direction and which met automobile with glaring headlights just prior to the impact, court was authorized to find that deceased was negligent, and that such negligence contributed proximately to the cause of death, as against the presumption that deceased was exercising due care. Vehicle Code, §§ 83, 564; Code Civ.Proc. § 1963, subd. 4.

2. Appeal and error ⇐1010(1)

In action for death of deceased who was walking on oiled portion of highway at night when struck by defendant's truck, where it could not be said that there was no substantial evidence supporting finding that deceased was guilty of contributory negligence proximately causing his death, judgment for defendant was required to be affirmed even though other evidence of plaintiff might have supported a contrary conclusion. Vehicle Code, §§ 83, 564; Code Civ.Proc. § 1963, subd. 4.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Delia Gray, administratrix of the estate of Berry Gray, deceased, against Harold Eugene Hartman and another, to recover for the wrongful death of deceased when struck by a truck. Trial was to the court without a jury, and from judgment for defendant, plaintiff appeals.

Affirmed.

John R. Locke, Jr., of Visalia, for appellant.

McFadzean & Crowe, of Visalia, for respondents.

GRIFFIN, Justice.

This is an action by Delia Gray, as administratrix, on behalf of herself and adult heirs, for damages for the death of Berry Gray, her husband. A jury trial was waived.

On December 23, 1943, at 7 p. m. Berry Gray was walking in a southerly direction upon the easterly edge of an 18-foot oiled surface highway near Farmersville. There was no white line indicating the center of the road. The shoulders of the road were "grassy". Defendant Harold Eugene Hartman was driving a flat-rack truck, 7 feet in width, owned by his father, H. S. Hartman, in a northerly direction upon the east one-half of said road. The truck collided with Berry Gray and as a result thereof, he was killed.

The court found that it was not true, as alleged, that the collision or the death of Gray was caused by any negligence whatsoever on the part of defendant Harold Eugene Hartman, and specifically found that Gray was himself negligent in the manner in which he conducted himself in walking upon the edge of the highway at the time, and that his death was the proximate result of his own negligence.

Plaintiff appealed and now argues that the evidence is insufficient to justify the findings and judgment.

Harold Eugene Hartman testified that he was driving the truck north on the oiled road; that there was a light fog; that his lights were on high beam; that just before the accident he saw lights from an approaching car several hundred feet down the road; that he was then traveling about 20 to 25 miles per hour; that as the other car approached he noticed that its headlights were glaring; that he dimmed his lights; that the on-coming car seemed to be crowding the center of the road; that he pulled over slightly to his right to

give room for safe passing; that instantly, after he passed him, he put his lights back on high beam; that practically at the same instant he felt an impact and his wife screamed and said: "Oh, you hit a man"; that he stopped immediately, backed up about 50 feet until he saw the body of a man lying by the side of the road in the grass about 3 or 4 feet east of the oiled pavement; that he did not see what he struck although he could see down the road as far as his headlights penetrated (probably 100 feet); that he did not have his windshield wiper working as there was no need for it; that the glare of the approaching headlights started to blind him at a distance of about 50 or 75 feet; that the place of impact with Mr. Gray was on the right front corner of the truck bed and head-board. The truck had dual wheels and the bed extended beyond them a few inches. He testified that he did not believe that his wheels left the main traveled portion of the highway.

Personal belongings of Mr. Gray were found 7 or 8 feet east of the oiled surface. There is testimony by defendants' witnesses that there were no tire marks off of the pavement. Plaintiff produced a witness who testified that dual tire marks were visible at the "side of the road" and a blood spot appeared on the ground in the grass near the personal belongings. Pieces of wood from the body of the truck were found in several different locations, some on the highway and others just east of it.

The autopsy disclosed that there had been a fracture of Mr. Gray's right hand, left shoulder and right thigh. Death was due to internal hemorrhage.

There was evidence that Mr. Gray had had a cataract removed from one eye, but he could read the papers and see without glasses. Two traffic officers testified that they arrived at the place of the accident about 20 minutes after the call and that they found some pieces of board in the middle of the road and threw them off to the east side; that they looked both off and on the highway for tracks of the truck but did not find any; that there was a light fog but it did not require the use of a windshield wiper; that there was some dust on the windshield but not enough to interfere with the vision; that the road and grass were wet from the fog; that the district permitted a 55-mile per hour prima facie speed limit; that they ex-

amined the brakes and lights on the truck and they were "good".

Mrs. Hartman, wife of Harold, testified that she was riding with Mr. Hartman; that she observed the approaching car with the bright lights on and that it was near the center of the highway; that she saw a man in the oiled portion of the highway about one foot from the east edge, facing the truck and walking south; that he "seemed to be walking with his head down"; that she supposed that the side of the truck hit him; that she did not think her husband got off of the oiled portion of the road.

Plaintiff argues first that defendant was negligent as a matter of law, under the undisputed evidence and that since there was no evidence of deceased's negligence, he was entitled to the presumption of due care under section 1963, subdivision 4 of the Code of Civil Procedure, and cites sections 564 and 83 of the Vehicle Code; *Buchignoni v. DeHaven*, 23 Cal.App.2d 76, 72 P.2d 159; *Scaif v. Eicher*, 11 Cal.App.2d 44, 53 P.2d 368; and *Hatzakorjian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027.

In the last-cited case the pedestrian was proceeding in the same direction as the car and was apparently walking 2 or 3 feet off of the paved portion of the highway. That case was decided before section 564 of the Vehicle Code was enacted. *Scaif v. Eicher*, supra, held that a violation of section 150½ of the California Vehicle Act, Stats.1929, chap. 253, sec. 66, p. 546, containing a similar provision as section 564 of the Vehicle Code, was unlawful and constituted negligence on the part of the pedestrian. See *Barry v. Maddalena*, 63 Cal.App.2d 302, 146 P.2d 974.

[1] The question of the negligence of defendant Harold Eugene Hartman in the instant case was a factual question under all of the circumstances presented, and the evidence might well have supported a finding of negligence, but even assuming, but not deciding, that defendant was negligent, we are still confronted with the finding of negligence on the part of deceased, which negligence, it is found, contributed proximately to the cause of his death. Let us then examine the evidence with that

thought in mind and with the aid of the presumption of due care on the part of deceased. The night was foggy; the roadway and grass were wet. A proper inference would be that the deceased was walking on the oiled portion of the highway which was only 18 feet in width. This left but 9 feet on defendant's half of the roadway for his car when passing other vehicles. The body of the rack of the truck was 7 feet in width. It would be highly dangerous to continue to walk on the oiled portion of the roadway under these conditions. Although there is a conflict in the evidence, it would not be unreasonable to believe that deceased was still on the oiled roadway at the time he was struck. Under these circumstances, there were reciprocal rights and duties on the part of the driver and the pedestrian to exercise reasonable and ordinary care for their own safety. *Scaif v. Eicher*, supra; *Conness v. McCarty*, 216 Cal. 415, 420, 14 P.2d 507. There is testimony that deceased was walking toward defendant's truck on the oiled roadway about one foot from the east edge thereof and that deceased "seemed to be walking with his head down". The presumption relied upon by plaintiff constitutes, at most, a mere conflict in the evidence. In such a case the relative weight of the evidence was for the trier of facts. *Cornell v. Hearst Sunical etc. Corp.*, 55 Cal.App.2d 708, 131 P.2d 404.

[2] Assuming the truth of the evidence in support of the findings and judgment of the trial court, which we must do, and the circumstances surrounding the accident, it cannot be said that there is no substantial evidence supporting the finding that deceased was guilty of contributory negligence proximately causing his death. Under these circumstances, the judgment must be affirmed, even though other evidence produced by plaintiff might well have supported a contrary conclusion. *Macaulay v. Booth*, 53 Cal.App.2d 757, 761, 128 P.2d 386; *Tanner v. Sherman*, 67 Cal. App.2d 586, 154 P.2d 906.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

HERBERT v. CASSINELLI et al.

Civ. 7158.

District Court of Appeal, Third District,
California.

Feb. 26, 1946.

Rehearing Denied March 27, 1946.

Hearing Denied April 25, 1946.

1. Automobiles ⇨192(7)

Where owner permitted another to use pick-up truck to try out, with thought of selling vehicle to him, and such person thereafter permitted a third person to drive truck, evidence tending to show that owner had instructed permittee not to permit others to drive truck could not relieve owner from imputation of negligence where collision arose from negligence of another driver who borrowed truck from permittee since owner had committed the general use of the truck to permittee, which use was not converted into a special one because the permission may have been accompanied by an express admonition not to permit any one else to drive the truck.

2. Appeal and error ⇨1099(7)

In action for injuries sustained by plaintiff when his automobile was struck by a truck which defendant had loaned to another who permitted a third party to drive it that borrower on first trial testified that he never consulted the owner about allowing other people to drive the truck, and on second trial testified that the owner had told the borrower no one else was to drive or use the truck did not establish that the decision on the first appeal was no longer applicable as the law of the case where the evidence remained essentially the same and still showed a general permissive use without restriction.

3. Appeal and error ⇨1099(7)

In action for injuries arising out of an automobile collision, appellate court's decision on the first appeal that the evidence as a whole was insufficient to justify trial court's finding that use or operation of truck by driver thereof at time of accident was without permission of owner was a ruling on a question of law which was binding on the appellate court on a subsequent appeal. Vehicle Code, § 402.

4. Automobiles ⇨244(25)

Where plaintiff relying on permissive use statute in action against owner of truck

for negligence of driver who had borrowed truck from one who had possession under permission of owner, made out a prima facie case, testimony that secret restrictions had been placed upon the use of the truck by permittee of owner did not rebut the prima facie case since proof of such fact was immaterial and could not constitute a defense. Vehicle Code, § 402.

5. Appeal and error ⇨1062(3)

In action for injuries sustained by plaintiff when his automobile was struck by a truck which defendant had loaned to borrower who permitted another to drive it at time of collision, where plaintiff's testimony made out a prima facie case of a general permissive use and other testimony tended to establish secret limitations on such use, withdrawing from the jury the issue of permissive use did not constitute prejudicial error. Vehicle Code, § 402.

6. Appeal and error ⇨1061(4)

Refusal to direct a verdict in favor of appellant could not be prejudicial where jury returned a verdict favorable to appellant.

7. Automobiles ⇨245(81)

Evidence that a collision occurred between defendant's truck and plaintiff's automobile when driver of defendant's truck sought to pass another automobile going in the same direction on a two-lane highway and struck plaintiff's automobile which was approaching from the opposite direction and that plaintiff did nothing affirmatively that could be said to have brought on the collision, established that plaintiff was not guilty of contributory negligence as a matter of law.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Otto Harry Herbert against P. L. Cassinelli, George Sausmon and Curtis Morris for personal injuries arising out of truck collision. From an order granting a new trial after verdict by jury in defendant Sausmon's favor, Sausmon appeals.

Affirmed.

Van Dyke & Harris, of Sacramento, for appellant.

Henry & Bedeau, of Sacramento, and Frank E. Kilpatrick, of Oakland, for respondent.

PEEK, Justice.

This is an appeal by the defendant Sausmon from an order of the trial court granting a new trial after verdict by the jury in defendant's favor.

The action, which was one for personal injuries arising out of a collision between a car operated by plaintiff and one owned by said defendant but driven by the defendant Morris, was before this court on a previous occasion. *Herbert v. Cassinelli*, 61 Cal.App.2d 661, 143 P.2d 752.

At the outset of the first trial the action was dismissed as to the defendant Cassinelli; service of process on the defendant Morris could not be made within the state of California; and the action proceeded against Sausmon alone. The evidence at that hearing disclosed that one Smith had his car stolen and wrecked and was in need of another car; that he talked with Sausmon, who operated a garage, and as an outgrowth of such conversation borrowed a Chevrolet pickup from him. According to Sausmon's testimony he gave the pickup to Smith for the latter's personal use to try out with the thought of selling the vehicle to him. Smith testified to the same general effect: that the pickup was for his personal use and also for transporting personal supplies to and from the sawmill where he worked, and that if the car proved satisfactory he would buy it. No specific instructions were given by Sausmon limiting the use of the car by Smith, although it was inferable that the parties assumed that the pickup was to be used only by him. While Morris was driving the car with the permission of Smith, the accident occurred.

The case was tried by the court, which found that the accident was due solely to the negligent operation of the car by Morris, and that plaintiff's operation of his car contributed in no way to the accident. The court further found that the defendant Sausmon did not know of the use of the car by Morris, and that such use was without his express or implied permission. Judgment was rendered for the defendant.

On appeal the judgment was reversed by this court (61 Cal.App.2d 661, 143 P.2d 752), it being held that under section 402 of the Vehicle Code, as interpreted by the Supreme Court in the cases of *Souza v. Corti*, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861, and *Hobbs v. Transport Motor Co.*, 22 Cal.2d 773, 141 P.2d 738, and decisions cited therein with approval, the negligence of Morris, the operator of the

vehicle, must be imputed to the owner, Sausmon, appellant herein. Appellant's petition for a hearing in the Supreme Court was denied.

At the second trial, which was before a jury, Smith somewhat changed his testimony by stating in effect that appellant had told him not to let any one else use or drive the car. Appellant did not specifically corroborate this statement. He went no further than to testify that he had not expressly authorized Smith to loan the pickup to any one.

Before the case was submitted to the jury, appellant made a motion for a directed verdict, which was denied. Respondent then requested that the court limit the issues which the jury might consider, and accordingly the court charged the jury that there were only two issues of fact to be determined: negligence on the part of the operator of the car, and contributory negligence on the part of the plaintiff. With respect to the legal responsibility of appellant for the negligence of Morris, the court carefully explained the effect of the previous ruling by this court, and the reasons why that question was no longer an issue for the jury's consideration. The jury returned a verdict for appellant. Respondent moved for a new trial on the grounds, among others, that the evidence was insufficient to justify the verdict and that the verdict was against law. The motion was granted for the reason, as stated by the trial court, that "the weight of the evidence is against the finding of the jury that the Plaintiff was guilty of contributory negligence."

[1] Appellant now contends that the evidence on the second trial is materially different from that on the first, that the doctrine of the law of the case is therefore inapplicable, and that the trial court should have recognized the change in the situation by directing a verdict for appellant and refusing to grant respondent's motion for a new trial.

This contention is based principally on the altered character of the testimony given by the witness, Smith. On the first trial he testified that he had never consulted appellant about letting other people drive the pickup. On the second trial he testified to the effect that appellant had told him no one else was to drive or use the car. The testimony of appellant was virtually the same on both trials.

From this circumstance, appellant argues that our decision on the former appeal is no longer applicable. In support of this contention he points to certain language of our opinion on said appeal, to wit: "The lending appears to have been for a general use by the borrower for an indefinite time coupled with an assumption or intentment that only he would use it." 61 Cal.App.2d at page 665, 143 P.2d at page 754. Therefore, he concludes, what was heretofore only an assumption has become a proven fact, and that which appeared to be only an intentment is now shown to be a specific restriction.

We are of the opinion that appellant's contention is based on too narrow a view of the purport and effect of our decision on the former appeal. Therein, in addition to the observation above quoted, we stated: "Assuming that Smith violated the restrictions placed upon the use and operation of the pickup by the owner Sausmon in allowing Morris to use it, under the rule in the Souza case, it was, nevertheless, the use which was contemplated by the owner with his permission, and a violation of such restrictions could not cause a revocation of such permission." 61 Cal.App.2d at page 665, 143 P.2d at page 754.

This ruling presupposes the imposition of such restrictions and declares the immateriality thereof. It is founded on the principles enunciated and applied in the cases of Souza v. Corti, supra, Hobbs v. Transport Motor Co., supra, and Bayless v. Mull, 50 Cal.App.2d 66, 122 P.2d 608.

It therefore appears that in this class of cases the significant factor is the fact that the owner has committed the general use of the car to the permittee, and this use is not converted into a special one because the permission may have been accompanied by an express admonition not to permit any one else to drive the car. Souza v. Corti, supra, 22 Cal.2d at page 460, 139 P.2d 645, 147 A.L.R. 861; Haggard v. Frick, 6 Cal. App.2d 392, 44 P.2d 447; Herbert v. Cassinelli, supra, 61 Cal.App.2d at page 665, 143 P.2d 752. See, also, Burgess v. Cahill, 26 Cal.2d 320, 324, 158 P.2d 393, 159 A.L.R. 1304.

It is in the light of these principles that the question of the materiality of the change in Smith's testimony on the second trial must be appraised. As thus viewed, the evidence remains essentially the same. It still shows a general permissive use, with-

out restriction as to time or place—in other words, a situation squarely within the purview of the rule of the cases above cited.

[2] It follows that the evidence on the second trial has not changed materially, essentially, or vitally, and that the law of the case laid down in the first appeal still applies. In re Estate of Baird, 193 Cal. 225, 236, 237, 244, 245, 223 P. 974; Swarzwald v. Cooley, 39 Cal.App.2d 306, 320, 103 P.2d 580; Sischo v. City of Los Banos, 37 Cal.App.2d 717, 718, 719, 100 P.2d 305; Coulter v. Howard, 113 Cal.App. 208, 214, 298 P. 140; Merchants' Nat. Bank. v. Carmichael, 50 Cal.App. 749, 755, 756, 196 P. 76.

[3] In further support of his argument on this phase of the case, appellant advances the proposition that to apply the rule of the law of the case to the instant proceedings would be to apply it erroneously to a question of fact rather than law. We believe this to be a misconception of the effect of our prior decision and of the nature of the doctrine of the law of the case when applied to a case involving the sufficiency of the evidence. Our decision on the former appeal was to the effect that the evidence as a whole was insufficient to justify the finding of the trial court that the use or operation of the vehicle by the driver thereof at the time of the accident was without the permission of the owner, as defined by section 402 of the Vehicle Code. Under the authorities, this was a ruling on a question of law, and it is binding on the trial court and on the appellate courts as well. In re Estate of Baird, supra, 193 Cal. at pages 234-236, 223 P. 974; Wells v. Lloyd, 21 Cal.2d 452, 455, 456, 132 P.2d 471.

[4] In his oral argument, counsel for appellant takes the further position that the case at bar involves a distinguishing feature that removes it from the rule of the cases heretofore decided. His contention is that the inference of permissive use was conclusively rebutted by the plaintiff's own witness, Smith, not by one of defendant's witnesses, and therefore the inference was dispelled at its inception and never reached the dignity of a prima facie case. No authority is cited in support of this unique theory, other than the cases of Smellie v. Southern Pacific Company, 212 Cal. 540, 299 P. 529, and Hoffman v. Southern Pacific Company, 215 Cal. 454, 11 P.2d 387, which appear to be used by

way of analogy rather than as direct precedent on the point.

We are substantially in agreement with the statement made by counsel for appellant that: "Where a plaintiff in a case of this character is relying on the permissive use statute and makes out a prima facie case of permissive use the defendant will not be permitted to come in by way of defense and establish the fact he had placed secret restrictions or limitations upon the power of use." We are not, however, in accord with the further observation that "it is a rule which obviously can have no application to this case because here we have a very different evidentiary situation." On the contrary, the rule seems to cover the very situation herein presented. Plaintiff's witness made out a prima facie case of a general permissive use. Other testimony of the same witness and the testimony of one of defendant's witnesses tend to establish the fact that secret restrictions or limitations had been placed upon the power of use. Since the fact of the placing of such restrictions or limitations is immaterial under the circumstances, as we have shown heretofore, the prima facie case made by plaintiff's witness has never been rebutted.

The case of *Smellie v. Southern Pacific Company*, supra, deals with presumptions and the effect of the testimony of a witness called under section 2055 of the Code of Civil Procedure. The Hoffman case has no apparent bearing on the question before us.

[5] From what we have said, it is evident that the action of the trial court herein in withdrawing from the jury the issue of permissive use did not constitute prejudicial error. *Lally v. Kuster*, 48 Cal. App. 355, 358, 359, 192 P. 78; *Clayton v. Schultz*, 18 Cal.2d 328, 332, 333, 115 P.2d 446.

[6] Likewise, the refusal of said court to direct a verdict in favor of appellant could not in any event have resulted in prejudice, since the jury returned a verdict favorable to appellant. *Cliff v. California Spray Chemical Co.*, 83 Cal.App. 424, 429, 430, 257 P. 99; 2 Cal.Jur., p. 1026, sec. 611.

Finally, the question arises whether there was sufficient evidence of want of contributory negligence to justify the trial court in granting a new trial.

[7] On this issue, the record discloses that the accident in question resulted from a collision which occurred when Morris,

driving appellant's pickup, sought to pass a Ford car going in the same direction on a two-lane highway and struck respondent's car which was approaching from the opposite direction. The evidence shows that respondent was driving his car at a lawful rate of speed, that he was watching the road and saw the approaching cars, and that, while he made no substantial move to avoid the accident, neither did he do any affirmative act that could properly be said to have brought on the collision. In this state of the case, it must be concluded that the trial court was justified in determining that respondent was not guilty of contributory negligence (2 Cal.Jur.Supp., pp. 309, 310, sec. 203), and, therefore, in granting a new trial. *Green v. County of Merced*, 62 Cal.App.2d 570, 575, 144 P.2d 874; *Woods v. Walker*, 57 Cal.App.2d 968, 971, 972, 136 P.2d 72; *Ogando v. Carquinez Grammar School District*, 24 Cal.App.2d 567, 569, 75 P.2d 641.

The order is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; TRAYNOR, J., dissenting.



73 Cal.App.2d 271

FLEMMER et ux. v. MONCKTON et al.
BERRETH et al. v. MONCKTON et al.

Civ. 7157.

District Court of Appeal, Third District,
California.

Feb. 26, 1946.

1. Appeal and error ⇐662(4)

A statement of facts, predicated on evidence most favorable to appellant, in his opening brief, may not be accepted without question as basis for determining whether there is any substantial evidence supporting trial court's finding, though such statement is not directly challenged by respondent.

2. Automobiles ⇐244(26)

Evidence that truck was owned by employer and being driven by his employee when it collided with automobile was sufficient, together with evidence of other fac-

tors, to warrant trial court's finding that truck was being driven with employer's permission at such time, so as to render him liable for resulting injuries to occupants of automobile. Vehicle Code, § 402.

3. Evidence ⇨589

Defendants' interest in result of case and contradictions, discrepancies and inconsistencies in their testimony warranted trial court in refusing to give full credence thereto.

4. Witnesses ⇨317(1)

Where one defendant's testimony contained such discrepancies, inconsistencies, contradictions and inherently improbable statements that court concluded that part of such testimony was false, court had not merely privilege, but owed duty, to view such defendant's testimony on decisive issue in case with suspicion. Code Civ.Proc. § 2061(3).

5. Automobiles ⇨244(26)

Evidence that employee, driving his employer's truck in alleged disobedience of employer's order when truck collided with automobile, was not subsequently discharged, but retained in owner's employ, constituted substantial evidence of owner's tacit permission, originally given such employee, to drive truck irrespective of question of ratification. Vehicle Code, § 402.

6. Appeal and error ⇨996

Where evidence does not show that trial court acted arbitrarily in drawing certain inference, and contrary evidence is not clear, positive, uncontradicted, and such that it cannot rationally be disbelieved, appellate court must affirm judgment rendered thereon.

Appeals from Superior Court, Yolo County; C. C. McDonald, Judge.

Consolidated actions by Harlan Flemmer and wife and by Hulda Berreth and husband against S. Y. Monckton and another for injuries sustained in a collision between an automobile, in which plaintiffs were riding, and named defendant's truck driven by codefendant. Judgments for plaintiffs, and named defendant appeals.

Affirmed.

Neal Chalmers & Robert M. Cole, of Woodland, for appellant.

A. G. Bailey, of Woodland, for respondents.

PEEK, Justice.

The present controversy arose out of a collision between a Studebaker pickup truck owned by the defendant Monckton, which was then being driven by his employee, the defendant LaLonde, and a car driven by the plaintiff Albert E. Berreth, with whom his wife, Hulda Berreth, and Harlan Flemmer and Eleanor Flemmer, his wife, were riding. By stipulation of the parties, the separate actions filed by the Berreths and Flemmers against Monckton and LaLonde were consolidated for the purposes of trial and appeal. The trial court, sitting without a jury, made findings in favor of plaintiffs on all the issues, including a finding that LaLonde was driving said pickup automobile with the implied permission of the owner, Monckton, and rendered judgments against the two defendants jointly and severally. Defendant Monckton alone has appealed.

The sole contention of the appellant is the alleged complete lack of any evidence upon which the trial court based its finding that "the said defendant M. R. LaLonde was then and there driving the said pickup automobile with the implied permission of the owner, the defendant S. Y. Monckton."

[1] While the statement of facts contained in appellant's opening brief is not directly challenged by respondent, it is predicated on the evidence most favorable to appellant, and therefore such summary may not be accepted without question as the basis for a determination whether there is any substantial evidence to support the previously quoted finding of the trial court. See *Hicks v. Reis*, 21 Cal.2d 654, 657, 134 P.2d 788.

Further examination of the record discloses that appellant was a farmer living on the ranch which he owned in Yolo County. At the time of the accident and for approximately two months prior thereto he had been confined in a hospital. LaLonde, together with his wife and child, likewise lived on the ranch. His employment was variously described as that of maintenance man, general hired man, repair man, mechanic, or caretaker, and his duties were said to be servicing farm equipment and machinery, including repairing and welding. The only other employee on

the ranch at that time was one described as a pump man. He left appellant's employ two or three weeks after the accident, and at the time of the trial his whereabouts were unknown to LaLonde. LaLonde had been in the employ of Monckton for a year prior to the accident, and was still so employed at the time of the trial, a year afterward.

The automotive equipment on the ranch included a pleasure car, an International truck, and the Studebaker pickup truck, all of which were owned by appellant, and a pleasure car and Dodge truck, owned by LaLonde. Both appellant and LaLonde testified that the Studebaker truck was unlicensed and uninsured for the year 1943, because it was not to be used off the ranch, and that LaLonde had been so instructed from the start. Appellant's testimony to the effect that said truck was not to be used by LaLonde even on the ranch was less certain. Both defendants spoke of the International truck as being "assigned" for LaLonde's use.

On the evening of June 8, 1943, LaLonde decided to drive to Knights Landing, a distance of about ten miles. LaLonde's wife was using their own car (whether the Dodge truck or the pleasure car does not appear), and the International truck was loaded with a disc on which he had just been working. According to LaLonde's testimony, without giving the matter any special thought he took the Studebaker pickup truck, and, with the pump man as companion drove to town. On their return trip the accident occurred.

The asserted liability of appellant is based on section 402 of the Vehicle Code, which provides in part: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

Appellant urges that the undisputed evidence shows that, in operating the Studebaker pickup on the highway, LaLonde was violating the express instructions of the owner, particularly the restriction as to place of use, and that therefore the doctrine of nonliability exemplified in cases

such as *Engstrom v. Auburn Auto. Sales Corporation*, 11 Cal.2d 64, 77 P.2d 1059, and *Henrietta v. Evans*, 10 Cal.2d 526, 75 P.2d 1051, should have been applied herein as a matter of law.

However, this view fails to take into consideration two important features of the instant case that were not present in the cases cited: (1) The existence of the relationship of employer and employee as noted in the case of *Burgess v. Cahill*, 26 Cal.2d 320, 324, 158 P.2d 393, 159 A.L.R. 1304; and (2) the fact that the trial court with apparent reason refused to give credence to much of the testimony of the defendants relative to the imposition of restrictions on the general use of the pickup. *Hicks v. Reis*, supra, 21 Cal.2d at page 661, 134 P.2d at page 791; *Blank v. Coffin*, 20 Cal.2d 457, 461, 126 P.2d 868.

[2] Since in the case at bar the existence of the relationship of master and servant is conceded, we have a situation which falls squarely within the principles of the recent decisions of the Supreme Court embodied in the cases of *Burgess v. Cahill*, supra, *Hicks v. Reis*, supra, and *Blank v. Coffin*, supra.

From these decisions it clearly appears that, in a situation such as this, the fact that the car was owned by appellant and was being driven by his employee, together with other factors (hereinafter mentioned), was sufficient to permit the trial court to infer that the vehicle was being driven with the permission of the appellant owner.

The circumstance that in the present case this inference involved the rejection by the trial court of much of the testimony of the only witnesses who testified to the fact is immaterial, if there was a tenable basis for such a rejection. *Hicks v. Reis*, supra, 21 Cal.2d at pages 659, 660, 134 P.2d at page 790; *Blank v. Coffin*, supra, 20 Cal.2d at page 461, 126 P.2d at page 870.

[3] The facts which warranted the trial court in refusing to give full credence to the testimony of defendants are: (1) that both witnesses had an interest in the result of the case. *Hicks v. Reis*, supra, 21 Cal.2d at page 659, 134 P.2d at page 790; *Blank v. Coffin*, supra, 20 Cal.2d at page 462, 126 P.2d at page 871. See, also, cases collected in 27 Cal.Jur. 180, § 154; and (2) that there were contradictions, discrepancies and inconsistencies in the testimony of both defendants which could have been

deemed to detract from its credibility. *Hicks v. Reis*, supra, 21 Cal.2d at page 659, 134 P.2d at page 790; *Blank v. Coffin*, supra, 20 Cal.2d at page 462, 126 P.2d at page 871.

For instance, appellant at first merely denied that he had given LaLonde express permission to use the pickup on the ranch, but later he was positive that he had expressly forbidden such use. Again, LaLonde in his deposition stated positively that his only purpose in driving to town was to telephone his mother's home, while on the trial there was evidence that he had two other minor reasons for making the trip, one connected with the delivery of some laundry, the other to afford his passenger, the pump man, an opportunity to purchase tobacco.

In addition, the testimony of both defendants reflects what might be termed an apparent effort to create the impression that LaLonde was but one of a rather large group of ranch hands who were allowed to use a wide assortment of ranch vehicles, whereas further examination of the facts disclosed that there was only one other employee on the ranch and that the vehicle taken that evening was the only empty commercial car available. Thus, appellant referred several times to "one of the men," and LaLonde spoke of a "crew" which turned out to be a man working in the rice fields who "works on a percentage basis of the crop. He has nothing to do with us. * * * He leases the rice."

[4] Finally, the view taken by the trial court of the testimony of the witness, LaLonde, presented a further element tending to support the conclusion reached herein. With respect to the testimony of said witness given on the trial as well as in a deposition introduced into evidence, and particularly that part which dealt with the happening of the accident, it is apparent from the emphasis which the trial court in its written opinion placed on the discrepancies, inconsistencies, contradictions and inherently improbable statements which such testimony contained, that said court concluded that such witness was false in a part of his testimony. This being so, it was not merely the privilege of said court, but indeed his duty, to view with suspicion the testimony of said witness on the issue of permissive use. Code Civ.Proc. § 2061 (3); *Blank v. Coffin*, supra, 20 Cal.2d at page 462, 126 P.2d at page 871.

The record contains additional evidence of a number of factors which affirmatively tended to show that the use by LaLonde of the Studebaker pickup that night was with the implied permission of appellant:

The circumstance that the key was left in the car during appellant's absence, and the fact that no check was made upon the oil or gas or mileage to determine whether or not the car had been used (see *Burgess v. Cahill*, supra, 26 Cal.2d at page 324, 158 P.2d 393, 159 A.L.R. 1304; *Blank v. Coffin*, supra, 20 Cal.2d at page 462, 126 P.2d at page 871);

The fact that said car had been used on the highways before, inferably during the year 1943 while it was unlicensed, having been so driven by appellant himself in company with LaLonde;

The fact that LaLonde took the car and drove it upon the highway without hesitation and without apparent consciousness of disobeying instructions or violating the law; and

[5] The fact that LaLonde was not discharged from his employment after his alleged disobedience of orders, but was retained in appellant's employ as before. This was substantial evidence of a tacit permission originally given (*Blank v. Coffin*, supra, 20 Cal.2d at page 462, 126 P.2d at page 871), irrespective of the question of ratification. Compare: *Jameson v. Gavett*, 22 Cal.App.2d 646, 651, 652, 71 P.2d 937; *Sullivan v. People's Ice Corporation*, 92 Cal.App. 740, 744-746, 268 P. 934.

[6] Since the evidence herein is such that it could not properly be said that the trial court acted "arbitrarily" or was "running away with the case" in drawing the inference of permissive use (*Hicks v. Reis*, supra, 21 Cal.2d at pages 659, 660, 134 P.2d at page 791), and since the evidence to the contrary is not "clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved" (*Blank v. Coffin*, supra, 20 Cal.2d at page 461, 126 P.2d at page 870), we have no alternative but to affirm the judgment thereon rendered. *DeYoung v. DeYoung*, Cal., 165 P. 2d 457; *Estate of Bristol*, 23 Cal.2d 221, 222-224, 143 P.2d 689.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J.,
concur.

73 Cal.App.2d 295

HUBBELL v. CLINK et al.

Civ. 14940.

District Court of Appeal, Second District,
Division 3, California.

Feb. 27, 1946.

1. Automobiles ⇨245(72)

Evidence, including conflicting testimony as to whether pedestrian had reached street car passenger loading zone in center of boulevard or whether he was still several feet therefrom when struck by automobile, presented question for jury as to whether pedestrian was guilty of contributory negligence in undertaking to cross street at place where there was no marked pedestrian crosswalk without yielding right of way to defendants' automobile.

2. Appeal and error ⇨996

The question of contributory negligence of a plaintiff is ordinarily one for determination of trial court as trier of facts, and it becomes a question of law only when evidence is of such a character that it will support no other legitimate inference.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Monroe R. Hubbell against Robert Eugene Clink and others, for injuries sustained by plaintiff as result of being struck by defendants' automobile. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Richard H. Cantillon and John E. Glover, both of Los Angeles, for appellants.

A. Wm. Christlieb, of Hollywood, for respondent.

DESMOND, Presiding Justice.

In an action for damages for personal injuries sustained as a result of being struck by defendant Robert Clink's automobile, plaintiff recovered from him and his parents a judgment in the sum of \$3,661, together with costs in the sum of \$32.90. The action was tried by a court sitting without a jury. At the time of the accident Robert was a minor, 20 years of age, living with his father and mother who had signed his application for a driver's license. The appeal is from the judgment and the only assignment of error is that the trial court's

finding that plaintiff was not contributively negligent is unsupported by the evidence. It is claimed that the evidence establishes as a matter of law that he was contributively negligent.

The accident occurred in Los Angeles on Glendale Boulevard, July 12, 1940, about 8 o'clock p. m., just north of the point where the Sunset Avenue viaduct crosses that boulevard near Reservoir Street and approximately opposite an alley opening upon it. Glendale Boulevard passes under the viaduct in a northeasterly direction, but opposite the alley curves and extends in a northerly direction. At this point the boulevard is divided into two distinct halves by a Pacific Electric right-of-way. We are concerned only with that portion of Glendale Boulevard which lies east of the private right-of-way, and for purposes of this opinion shall refer to the easterly half as Glendale Boulevard. It is 43 feet, 6 inches in width. On the easterly portion of its right-of-way the Pacific Electric maintains a paved street car passenger loading zone for traffic going in a northerly direction. There is no marked pedestrian crosswalk on Glendale Boulevard at the place where respondent undertook to cross. This is a 25-mile speed limit zone and at the time of the accident it was a poorly lighted section, there being but one light over the passenger loading zone "high above a pole." Robert Clink, at the time of the accident, was driving his Ford automobile in a northerly direction on Glendale Boulevard. The plaintiff, the court found, "was at or near the streetcar loading zone" approximately opposite No. 1316 on said Glendale Boulevard, and that "the defendant Robert Eugene Clink did so negligently, recklessly and carelessly drive, propel, operate and control said Ford automobile as to cause the same to jump the curb, travel upon said streetcar loading zone, and to strike the plaintiff and knock him to the street thereby inflicting injuries upon the plaintiff. * * *

After the accident the automobile came to rest with its right front wheel in the gutter and its left front wheel "upon the curb of the Pacific Electric right-of-way safety zone." It was headed in a northerly direction. There were but two eye witnesses to the accident, the plaintiff and the driver defendant, and their testimony as to how and where the accident occurred presented a sharp conflict, as hereinafter appears.

Plaintiff testified that at the time of the accident he was 69 years of age; that he

had transferred from the Sunset street car line and was to take a Glendale Boulevard car; that he had walked through the alley, which leads from Sunset Boulevard to Glendale Boulevard, and when he reached the sidewalk there he "looked up the street," and saw two cars coming from the south, headed in a northerly direction, and waited for them to pass; that he then started to walk across the street toward the Pacific Electric passenger loading zone; that he "could see the traffic going across [a street south of the viaduct], and the headlights that were waiting on Glendale Avenue. * * * there were cars lined up waiting for the traffic signal to change. * * I walked across the street and stepped up on the pavement, and turned to look at the bench to see if any one was waiting there, and immediately I heard a screech of brakes, whistle of rubber on the pavement" and was then struck on the left by defendant's automobile. "I was thrown, pitched forward, and it seemed like I was caught somewhere, because I lay on my back on the top of the pavement. A jerk on my feet gave me a turn, and I went off into the street." On cross-examination, he stated that he had just stepped up on the top of the drain [located in the passenger loading zone] when he was struck, and the following questions were asked by defendants' attorney:

"Q. How long had you been standing there before you were struck? A. I just stepped up there.

"Q. You had both feet up there? A. Yes.

"Q. You recall that distinctly? A. I stepped up there and turned to look at the benches. * * *

"Q. * * * do you remember whether or not you had both feet on the drain? A. Yes. * * *

"Q. And the benches, I take it, were north of the drain. So that after you stepped up on the drain and had both feet there, you turned in a northerly direction and looked at the benches, and right after that you turned and were struck? * * * A. Yes.

"Q. Now, can you tell me how far in feet that drain cover is north of where the curb curves there? A. 12 or 13 feet; something like that. * * *

"Q. Was there a car coming at the time you crossed the street? I mean, street car? A. There was not. * * *

"Q. Any people seated on the benches? A. No.

"Q. Now, when you crossed the street there, did you walk at an ordinary pace or did you run? A. I did, just an ordinary walk. * * *

"Q. Well, when you had gotten about across the street, which way were you looking? A. Well, I looked to my left. I saw the cars coming until they came to the bridge, and I was practically across the street then, before they entered underneath the Sunset bridge.

"Q. When you were out, partly out in the street, you looked down to the left and saw some cars coming through or waiting at the bridge? A. They were below the bridge. * * *

"Q. Then after that did you see any cars after they were south of the bridge? A. Just as they were coming through under the bridge.

"Q. So that the last you saw of any cars was when they were under the bridge? A. When they were there, I stepped up on the curb."

When the cause was reopened for further testimony, the plaintiff was asked by the court:

"Mr. Hubbell, do you remember where you were when he struck you? I mean, were you in the street or on the curb? A. I had stepped up on the curb.

"Q. Were both feet on the curb? A. Yes, sir.

"Q. Both feet? A. Quite sure. I turned to look at the bench where the people stopped and waited for cars if there had been one there.

"Q. Do you remember testifying in the other hearing that at the time the car struck you you were nearly across the street when you were struck? A. I don't remember having said that at any time. I was nearly across the street when I saw the cars coming through under the bridge. * * * and as they came under the bridge I was nearly across the street, one step or two to take, and I stepped up on the curb."

Defendant Robert E. Clink testified that he was travelling north on Glendale Boulevard at approximately "20 or 25, or 30" miles an hour, "not over that"; that just ahead of him and to the right was a Chevrolet Coupe going approximately the same speed as he; that he first saw plaintiff when

he "passed the front end of this Chevrolet"; that he "was to the left of the Chevy, just a foot or so—I couldn't say exactly, but just to the left, to the left of the Chevy"; that he started to apply his brakes, swung his car to the left and hit the plaintiff who was "running" at the time he first saw him. This witness stated further that when his car struck the plaintiff the latter "was about five or six feet to the right of the center curb * * * where the P. E. right-of-way and loading zone starts." He further stated that only his right fender and right headlight were damaged and that after the accident he drove his car home. On cross-examination he stated that plaintiff was approximately 45 feet away from him when he first observed him; that some time after the accident he examined his skid marks and they were "approximately 45 feet."

Officer Orin E. Slafter, assigned by the Traffic Enforcement Bureau to investigate traffic accidents, testified that he arrived at the scene at 8:40 p. m.; that he observed plaintiff lying in the street, being 10 feet east of the east curb line of the Pacific Electric right-of-way, i. e. the westerly curb line of Glendale Boulevard; that the automobile had its right front wheel in the gutter and the left front wheel over the curb on the passenger loading zone; that he noticed a skid mark—one skid mark made by the right rear wheel and that it was "49 feet * * * from the point where the wheel started to skid until the car came to rest on the curb; 14 feet, the length of the car to the rear wheels, and from there back 49 feet." This witness further testified that although he did not talk to the driver of the car, he overheard a conversation between his partner and the driver. "My partner asked him how far away he was when he first saw this pedestrian. He said he was approximately 80, around 70 to 80 feet. My partner asked him to point out where it was that he saw this man for the first time, and he walked back towards the over-post at Sunset Boulevard, and stood at the point, which we measured to the approximate point, and it measured 84 feet. We asked him how fast he was traveling, and he said he was traveling between 20 and 25 miles per hour; that he had just started up from the traffic signal at Park Avenue, there at the corner of Angelus Temple, and that the person he struck ran out towards him, ran diagonally across the street to catch the street car that was coming from behind him; that as soon

as the man entered the street he started to apply his brakes and that he swerved his car to the left to avoid hitting the pedestrian, and that the right front wheel of the car struck the pedestrian." This officer testified that as a result of his experience as a traffic investigator, he was able to determine from the length of the skid mark that the automobile was traveling "in excess of 32 miles per hour." On cross-examination this witness denied that the plaintiff had said at one time that "he was running across the street; he said he was crossing the street to catch a street car." In fixing the point of impact, the witness placed it "to the right and forward of where the car was standing," and that plaintiff was "lying 10 feet to the right of the front wheel * * * in a northerly direction on Glendale Boulevard." On redirect examination, the witness was asked, "By point of impact, you mean where the car stopped; is that what you referred to? A. No, sir, the point of impact was determined by the debris in the street; that is, the mud and dirt from the bottom of the fender, and the headlight glass. * * * That point was 10 feet to the east of the Pacific Electric right-of-way curb line, and 14 feet to the north."

[1,2] In our opinion there is sufficient substantial evidence furnished by the record to support the court's finding that plaintiff was not contributively negligent, without reviewing other evidence introduced at the trial by both sides, which is merely cumulative. The question of contributory negligence of a plaintiff is ordinarily one for the determination of the trial court as a trier of fact. It becomes a question of law "only when the evidence is of such a character that it will support no other legitimate inference." *Couchman v. Snelling*, 1931, 111 Cal.App. 192, 195, 295 P. 845, 847; *Fuentes v. Ling*, 1942, 21 Cal.2d 59, 61, 62, 130 P.2d 121; *Lang v. Barry*, Cal.App., 161 P.2d 949. If, however, "evidence is introduced relative to the degree of requisite vigilance, and the inferences therefrom are honestly debatable, it becomes a question of fact". *Lang v. Barry*, supra, 161 P.2d 949, 951. The most that can be said in the instant case is that the evidence is in such a state that reasonable minds might differ upon the question of plaintiff's contributory negligence. There was a conflict in the evidence upon the exact point of impact. Plaintiff testified that he already had both feet on the passenger loading zone when the automobile struck

him; defendant driver testified that when his car struck plaintiff he was 5 or 6 feet from the right-of-way curb; the investigating officer, not an eye witness, placed the point of impact as approximately 10 feet east of the right-of-way. From these different versions the court was justified in finding that the plaintiff was "at or near" the streetcar loading zone when he was struck. Whether respondent, having made a survey of approaching traffic before he attempted to cross Glendale Boulevard and having yielded the right of way to two vehicles approaching from the south, and being aware that other oncoming traffic was held back by traffic signals, acted as a reasonable man would under the circumstances and exercised reasonable care in keeping a proper outlook, were questions of fact for the court to determine and the same having been resolved in favor of the respondent, we are without authority to disturb the judgment.

Judgment affirmed.

SHINN and WOOD, JJ., concur.



73 Cal.App.2d 437

CUBBISON v. CUBBISON.

Civ. 15063.

District Court of Appeal, Second District,
Division 1, California.

March 7, 1946.

Hearing Denied April 29, 1946.

Husband and wife ⇐205(2)

Wife could not maintain action against husband for damages in tort arising out of an automobile accident, although parties had separated.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Lorayne Violet Cubbison against Ben Cubbison to recover damages resulting from an automobile accident. From an adverse judgment, plaintiff appeals.

Affirmed.

John A. Jorgenson, of Los Angeles, for appellant.

Parker, Stanbury & Reese and Harry D. Parker, all of Los Angeles, for respondent.

DORAN, Justice.

A demurrer to the complaint in the within action was sustained without leave to amend and from the judgment that followed plaintiff appeals. The only question raised is whether one spouse may sue the other for damages in tort. The plaintiff herein seeks to recover damages resulting from an automobile accident.

The complaint alleges in substance that plaintiff and defendant were husband and wife but had recently separated.

Appellant concedes that no case has been presented since the decision of the Supreme Court in *Peters v. Peters*, 156 Cal. 32, 103 P. 219, 23 L.R.A.,N.S., 699, which denies the wife's right to maintain such an action. Appellant argues that, "There is no such *express* declaration in any California statute, but there are cases in other jurisdictions in which this married woman's right has been affirmed though the local statutes make no such *express* declaration."

Respondent argues, on the other hand, that,

"* * * more than thirty-six years ago the Supreme Court of this state held that if a spouse should be permitted by the laws of this state to sue the other spouse in a tort action, such change in our law should be made by the Legislature and not by the courts. No such legislation has ever been passed since that time nor has the decision in the case of *Peters v. Peters*, supra, ever been distinguished or criticized by the appellate courts of this state. In fact the doctrine therein enunciated has been so universally adopted as sound law that the citation of this decision does not even appear in *Shepard's California Citations*.

"Consequently there is no dispute as to what the established law of this state is on the question under discussion."

Although some jurisdictions may, at least in part, uphold appellant's contention, the weight of authority appears to hold definitely to the contrary. The judgment therefore is affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; CARTER, J., dissenting.

73 Cal.App.2d 352

Ex parte DYE.

Cr. 1927.

District Court of Appeal, Third District,
California.

Feb. 28, 1946.

Criminal law ¶273

An accused's plea of guilty to charge of indecent exposure and his sentence of six months to county jail were not vitiated by alleged misrepresentations of his attorney that attorney had matters "fixed" with responsible officials and that accused in pleading guilty to charge of disturbing the peace would receive only a fine, where accused was aware of the nature of the morals charge which was read to him and to which his guilty plea was personally entered. Pen.Code, § 311.

Proceeding in the matter of the application of Arthur De Beau Carr, on behalf of Denzil Dye, for writ of error coram nobis, writ of error coram vobis and writ of habeas corpus.

Writs denied.

Arthur DeBeau Carr, of Sacramento, for petitioner.

Robert W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

PER CURIAM.

This proceeding, in the nature of an application for a writ of error coram nobis, was instituted on behalf of Denzil Dye who previously had been convicted of a violation of section 311 of the Penal Code, and at the time of the filing of the petition was confined in the Sacramento County Road Camp at Folsom.

The petition alleges among other things:

That the imprisonment of said petitioner is contrary to law and in violation of the guarantee of due process of law as contained in the Constitutions of the United States Amend. 14 and the State of California, art. 1, § 13, in the following particulars, to wit: That he pleaded guilty to and was convicted of the violation of section 311 of the Penal Code of the State of California in the Municipal Court of the City of Sacramento on the 19th day of April, 1945; that

said Penal Code section among other things covers indecent exposure of the person, and procuring or counseling and assisting another so to expose himself in a public place; that said conviction and/or confession had been and was obtained through fraud, duress, mistake of fact, misrepresentation, and against the free will of the defendant; that said confession and/or plea was not voluntary; that said defendant, Denzil Dye, was and is hard of hearing, and though until five days prior to the filing of said application that he had pleaded guilty to the misdemeanor of disturbing the peace; that his counsel had represented to him that he had the case "fixed" and that upon his, the petitioner's plea of guilty to disturbing the peace, he would be fined only and not sentenced to any term of imprisonment nor charged with an offense involving immorality, since he was particularly concerned that such a charge should not be made because it would jeopardize his position as a federal employee.

The petition then sets out in detail the alleged facts on which these averments are based, stating in one paragraph which the referee has referred to as paragraph 1, page 7, and has found to be untrue: "That defendant has a mastoid on his ear and is hard of hearing; that after the case was called, and while defendant stood alongside counsel, 'something' was read that defendant did not hear or listen to or pay attention to, but which 'something' was afterwards learned by your petitioner to have been a complaint charging violation of section 311 of the Penal Code; that said defendant was then asked whether he pleaded guilty or not guilty; that said defendant did not hear the question the first time and when asked again made no response, although he heard the question asked the second time; that he did not for a short space of time enter any kind of plea when counsel turned and said, 'say, guilty', at which time, defendant continued to demur, and then when nudged, said 'guilty'." The petition concludes with a prayer that this court determine the questions involved and "that said Denzil Dye, be restored to his liberty, and granted a fair trial upon the merits and/or for any, all and such other relief as to this Honorable Court may seem meet and proper in the circumstances."

The Sheriff of Sacramento County filed an answer and return to said petition, de-

nying that the imprisonment of petitioner was illegal or without authority of law, and reciting the steps taken in the proceedings leading to such imprisonment.

On June 4, 1945, this court issued an order to show cause why the writ should not issue, and set a time for hearing the matter. The Honorable Warren Steel, Judge of the Superior Court of Yuba County, was appointed as a referee to take the testimony of all the witnesses in the matter, said testimony to be directed to the issues of fact raised by the petition and answer filed herein, and at the conclusion thereof to prepare and file in this court findings of fact upon said issues, based on the testimony so taken.

The hearing was had as ordered, and the referee filed his findings and conclusions of fact, as follows:

"I. That on January 13, 1945, the petitioner, Denzil Dye, was arrested by a State Police Officer in Capitol Park in the City of Sacramento; that petitioner was placed in the City Jail of the City of Sacramento and on January 16, 1945, he was formally charged by complaint filed in the Municipal Court of the City of Sacramento with the crime of contributing to the delinquency of a minor, in that he persuaded and encouraged one Robert Ingle, a minor child of the age of fourteen years, to masturbate himself in the presence of said Denzil Dye; that thereafter, a preliminary examination was held and said Denzil Dye was held by the magistrate, to answer to the Juvenile Court of the County of Sacramento; thereafter an Information was filed in said Juvenile Court charging petitioner with the crime of contributing to the delinquency of a minor; thereafter petitioner entered a plea of not guilty to said charge and the cause was transferred to Department One of the Superior Court of the State of California in and for the County of Sacramento, for jury trial; thereafter petitioner was put on trial before a jury which, on March 19, 1945, was discharged without having reached a verdict; thereafter retrial of said cause was duly set for April 19, 1945;

"That during all of the aforementioned proceedings, George E. Foote, attorney at law, represented said Denzil Dye as his attorney;

"II. That subsequent to the trial in the Superior Court aforementioned and prior

to the date set for the retrial of said cause, said George E. Foote continued to represent said petitioner as his attorney;

"III. That during said last mentioned period of time, said attorney, George E. Foote, on numerous occasions contacted Deputy District Attorney, Edward McDonell, in charge of the prosecution of said case, for the purpose of securing the office of the District Attorney, to consent to the reduction of the charge of contributing to the delinquency of a minor then pending against said petitioner in consideration of the petitioner entering a plea of guilty to a charge of disturbing the peace; that Deputy District Attorney Edward McDonell on each of these occasions advised Attorney Foote that such a proposition was out of the question insofar as he, Deputy District Attorney Edward McDonell, was concerned, and further advised Attorney Foote that any such reduction of the charge would have to be authorized by John Quincy Brown, the District Attorney, or by Albert H. Mundt, the Chief Deputy District Attorney;

"IV. That thereafter and during said aforementioned period Attorney Foote contacted Albert H. Mundt, the Chief Deputy District Attorney, and repeated the same offer to Mr. Mundt that had been made to Mr. McDonell; that Mr. Mundt rejected said proposal and then made a counter proposal that if the petitioner would enter a plea of guilty to a charge of indecent exposure as defined in Subdivision 2 of Section 311 of the Penal Code of the State of California, that the District Attorney's Office would move to dismiss the Information pending in the Superior Court wherein the petitioner was charged with the crime of contributing to the delinquency of a minor; that Attorney Foote thereupon announced to Mr. Mundt that said proposal would probably be satisfactory;

"V. That thereafter Attorney Foote advised Deputy District Attorney McDonell that the petitioner would enter a plea of guilty to the charge of indecent exposure; that thereafter Deputy District Attorney McDonell was instructed by Chief Deputy District Attorney Mundt to prepare and file a Complaint against the petitioner charging petitioner with a Violation of Subdivision 2 of Section 311 of the Penal Code of the State of California; that thereafter, and on April 17, 1945, Deputy District Attorney McDonell prepared and

caused to be filed the Complaint, a copy of which is marked Respondents' Exhibit No. 1;

"VI. That thereafter and on April 19, 1945, the petitioner was arraigned in the Municipal Court of the City of Sacramento upon the charge contained in the Complaint mentioned in Paragraph V hereinabove; that at the time of said arraignment petitioner was present as was his attorney George E. Foote; that the petitioner at that time answered his true name to be Denzil Dye and that he was represented in said matter by his attorney George E. Foote; that petitioner was then advised that he was charged with the crime of Violation of Section 311 of the Penal Code of the State of California; that the charging language of said Complaint was then read to said defendant by Deputy District Attorney McDonell; that after the reading of said charging language, petitioner was asked whether he pleaded guilty or not guilty; whereupon defendant personally entered a plea of guilty to the charge contained in said Complaint; that immediately after said plea of guilty had been entered by petitioner, Deputy District Attorney McDonell made a full and complete statement to the Judge of said Municipal Court, James M. McDonnell, of the facts upon which said Complaint was based; that immediately thereafter Deputy District Attorney McDonell, Attorney Foote and petitioner proceeded to the Superior Court where the Information charging petitioner with the crime of contributing to the delinquency of a minor was then pending; that at that time Deputy District Attorney McDonell made a motion to the Judge of said Superior Court Raymond T. Coughlin to dismiss the Information against petitioner upon the grounds that the entry by petitioner of the plea of guilty to the aforementioned charge of Violation of Section 311 of the Penal Code and the acceptance of such plea by the District Attorney's Office was res adjudicata as to any further prosecution of petitioner on the charge of contributing to the delinquency of a minor; that at the time of making said motion Deputy District Attorney McDonell advised the Judge of the Superior Court of the charging language of the Complaint to which petitioner had entered a plea of guilty; that said motion was made in the presence of and within the hearing of said petitioner;

"VII. That thereafter, and at 2:00 o'clock P.M. on the 19th day of April, 1945, the petitioner was sentenced by James M. McDonnell, Judge of the Municipal Court of the City of Sacramento to serve 6 months in the County Jail, the last 4 months to be suspended upon the condition of defendant's good behavior for a period of two years;

"VIII. That during the period in which Attorney Foote carried on negotiations with the District Attorney's Office, said Attorney Foote advised his client that he thought he could get the District Attorney's Office to consent to accepting a plea of guilty to a charge of disturbing the peace; that on and shortly prior to April 19th, 1945, said Attorney Foote represented to said petitioner that he, Attorney Foote, had it all 'fixed' with the Judge and the District Attorney's Office whereby petitioner would plead guilty to a charge of disturbing the peace, and receive as punishment therefor only a fine of from \$100.00 to \$200.00;

"IX. That petitioner entered a plea of guilty in reliance upon the representation of Attorney Foote that he, Attorney Foote, had it all 'fixed' with the Judge and District Attorney's Office that he, petitioner, would suffer no imprisonment by reason of his plea of guilty, but would only pay a fine of \$100.00 to \$200.00

"X. That at no time did any member of the District Attorney's staff or any Judge connected with any of the Courts mentioned herein intentionally or unintentionally, or otherwise, say anything or do any act or commit any suggestion to the defendant, or in the presence of the defendant, that could have been relied upon by the defendant as substantial corroboration of the representation made by his attorney that the state or a responsible officer thereof had entered into a bargain purporting to commit the state to give the defendant a reward in the form of immunity or a lesser punishment that he might otherwise receive in exchange for a plea of guilty.

"XI. That the allegation of the Petition contained in Paragraph 1 on Page 7 of the Petition is not true; that defendant heard the proceedings had and taken at the time of his arraignment in the Municipal Court on the charge of Violation of Section 311 of the Penal Code of the State of California; that petitioner heard the charge read

to him at that time and was aware of the nature and character of the charge itself.

"Wherefore, your Referee concludes as follows, to-wit:

"1. That petitioner received the advice and assurance of his attorney that responsible officers of the state had entered into a bargain to commit the state to give the defendant a reward in the form of immunity or lesser punishment that he might otherwise have received in exchange for a plea of guilty;

"2. That the representation made by Attorney Foote, as stated in Conclusion No. One above, was untrue;

"3. That there was no act or statement of any responsible state officer, innocent or otherwise, which was in good faith, relied on by defendant, and which apparently substantially corroborated the representation made by Attorney Foote and which actually operated to preclude the exercise by petitioner of his free will and judgment."

After having made a careful examination of the transcript of the testimony herein taken, we are of the opinion that the said findings are amply justified by the evidence, and they are therefore adopted as our own.

Likewise, from such examination of the evidence it is readily apparent that the main question for this court must concern a determination of whether or not the misrepresentation of petitioner's attorney was apparently corroborated in a substantial manner by acts or statements of responsible officials and was in good faith relied upon by petitioner and actually did operate to preclude the exercise of his free will and judgment. It was this particular question which the Supreme Court had in mind when it stated in the case of *People v. Gilbert*, 25 Cal.2d 422, 443, 154 P.2d 657, 668: "The most critical point is substantial deprivation of the exercise of the free will and judgment of the party through an act participated in by the state. Mere advice and persuasion or the expression of matters of opinion by his own attorney will not suffice to vitiate the plea. Neither will unwarranted or even wilfully false statements of factual matters by his attorney suffice. The private attorney is selected by the party and is his agent. But if the representation of the private attorney presents a purported commitment by a responsible state officer which if actually made would vitiate the plea and

if the acts or statements of such state officer, although innocently done or made, apparently corroborate the representation, are in good faith and without negligence relied upon by the defendant, and in truth operate to prevent the exercise of his free will and judgment, then the state in its solicitude for fairness will not accept the benefit of a plea so given." See, also, *Ex parte*, Hough, 24 Cal.2d 522, 527 150 P.2d 448; *People v. Schwarz*, 201 Cal. 309, 314, 315, 257 P. 71; *People v. Lewis*, 64 Cal. App.2d 564, 565, 149 P.2d 27; *People v. Lyle*, 21 Cal.App.2d 132, 137, 68 P.2d 378.

While the referee found that petitioner placed reliance upon the misrepresentations of his counsel that he had matters fixed with the responsible officials and that petitioner, in pleading guilty to a charge of disturbing the peace only, would receive nothing more than a fine, it does not follow that petitioner at the time of entering his plea was unaware of and did not understand the nature of the charge as read and thought he was only pleading guilty to a charge of disturbance of the peace. On the contrary, the evidence and the subsequent findings alike sustain the conclusion that petitioner was aware of the nature of the morals charge which was read to him and to which his plea of guilty was personally entered.

There is no testimony of any kind to refute the statement of the judge of the municipal court and that of the prosecuting attorney that before petitioner entered his plea of guilty to the crime of a violation of section 311 of the Penal Code of the State of California, said prosecuting attorney, standing within a few feet of the petitioner, read aloud, in an ordinary voice and the usual tempo, the charging part of the complaint to the effect that petitioner "did then and there, before the filing of his complaint, and within one year prior thereto, willfully and unlawfully and lewdly procure, counsel and assist one Robert Ingle, a human being, to expose himself, the said Robert Ingle, in a manner offensive to decency. * * *" It is clear that the representatives of the state intended that petitioner should hear and fully comprehend the nature of the complaint filed against him. It must further be noted that, after petitioner had entered his plea and before he was sentenced, a statement of the facts of the case was made to the judge in petitioner's presence by a member of the district attorney's office.

This circumstance likewise should have made petitioner aware of the precise nature of the situation, at a time when he might still have indicated a desire to withdraw his plea of guilty had he desired so to do. A similar opportunity was presented when petitioner appeared in the Superior Court in the company of his attorney and the prosecuting attorney for the purpose of dismissing the original charge, at which time the court, in the presence of petitioner, was advised of the charging language of the complaint to which petitioner had pleaded guilty in the municipal court.

The instant case is in many respects similar to the previously cited case of *People v. Gilbert*, supra. Doubtless the pattern of the petition, and the proof herein, were fashioned with this decision in mind. In that case, as in the present one, there was evidence that the defendant had been led by his attorney to believe that he would be given a lesser punishment in exchange for a plea of guilty. And in that case as in this, statements of the prosecuting attorney and the trial judge, while entirely proper and innocent in themselves, were nevertheless misquoted and misstated by petitioner's attorney so as to make it appear that they were tantamount to a guarantee of lesser punishment. It therefore is not difficult to apply the principles of that decision to this case. There is, however, this vital distinction between the two cases: In the *Gilbert* case, the record before the Supreme Court was such that said court could not determine whether or not there was a sufficient showing of the critical extrinsic factors. The findings were not drawn with a view to the determination of the issue of the validity of the plea or pleas in question. Thus the court observed, at pages 442, 443, of 25 Cal. 2d, at page 667 of 154 P.2d:

"The findings of fact herein were evidently drawn with the view of modifying the original judgments but were not drawn in respect to all of the factual issues with which the court would have been concerned if a clear cut issue as to the validity of the defendants' pleas had been before it. We are, therefore, unable to determine satisfactorily upon this record that the pleas are either necessarily valid or necessarily invalid.

* * * * *

"As previously stated the record contains evidence tending to show such a situation.

It also contains evidence tending to negative some, if not all, of its elements."

In the case at bar, the petition, return and findings were directed to the clear-cut issue of the validity of petitioner's plea. The findings, following the language of the Supreme Court in the *Gilbert* case, declare the existence of the factual elements which support the validity of said plea and the nonexistence of the factual elements which would invalidate the plea, which findings are amply sustained by the record.

The writ is denied.



73 Cal.App.2d 103

**BRAWLEY et al. v. CROSBY RESEARCH
FOUNDATION, Inc., et al.**

Civ. 15039.

District Court of Appeal, Second District,
Division I, California.

Feb. 18, 1946.

Rehearing Denied March 11, 1946.

Hearing Denied April 18, 1946.

1. Contracts ⇨10(1)

Fixed minimum monthly royalties to be paid licensor regardless of sales pending development and sale of invention afforded good consideration for contract granting exclusive license to develop, manufacture, exploit and sell invention, so that contract was not invalid as lacking mutuality of obligation because of absence of express provision as to what licensee undertook to do by way of developing, exploiting, and commercializing the invention. Civ.Code, § 1605.

2. Contracts ⇨53

The law does not weigh the amount of the consideration in determining whether it constitutes good consideration for a contract. Civ.Code, § 1605.

3. Contracts ⇨168

Every contract contains an implied covenant of good faith and fair dealing, that neither party will do anything that would result in injuring or destroying right of the other to enjoy fruits of agreement. Civ.Code, §§ 1655, 1656.

4. Patents ⇨211(1)

A contract granting exclusive license to develop, exploit and commercialize an invention impliedly obligated licensee in good faith and by its reasonable and best efforts, to develop, exploit, produce and sell the invention. Civ.Code, §§ 1655, 1656.

5. Contracts ⇨10(1)

Lack of mutuality is tantamount to want of consideration and where sufficient consideration is otherwise apparent, mutuality is not essential, becoming essential only when its absence would leave a party without a valid or available consideration for his promise. Civ.Code, § 1605.

6. Contracts ⇨10(1)

Provision reserving to licensee right at its option to terminate contract granting exclusive license to develop, exploit and commercialize an invention did not render contract unenforceable as lacking mutuality of obligation as an executory contract, where contract required licensee to give 60 days' written notice of intention to terminate, pay during 60 day period royalties provided for in contract and at expiration of period restore to licensor all right, title and interest in invention, patent thereon and pending application for patent.

7. Contracts ⇨217

A provision that contract shall terminate at option of one or either of the parties, when fairly entered into, will be enforced if not contrary to equity and good conscience, and such provision does not affect the binding obligations of contract so long as parties continue to act under contract before terminating it.

8. Contracts ⇨65(2)

A provision giving to one party to contract an option to terminate on substantial notice need not be supported by a consideration different from consideration supporting the entire agreement, since one valid consideration supports all of the obligations of the contract.

mercialization of a rotary pump. From a judgment holding the contract to be void and unenforceable, and granting other relief, defendants appeal.

Judgment reversed, and cause remanded with directions.

Conroy & Conroy and Edward L. Conroy, all of Los Angeles, and Chambers & Lyman and Robert Chambers, all of Hollywood, for appellants.

LeRoy B. Lorenz, of Los Angeles, for respondents.

WHITE, Justice.

Defendants appeal from an adverse judgment rendered against them in an action for declaratory relief under section 1060 of the Code of Civil Procedure, construing a contract for the development, exploitation and commercialization of a rotary pump.

By their amended complaint plaintiffs in substance alleged that on and for some time prior to May 15, 1944, they were the owners of a valuable invention, being an original design of a rotary pump; that prior to the last-mentioned date defendant Crosby Research Foundation, Inc., represented itself to be and was widely reputed to be engaged in the business of developing, exploiting and commercializing inventions for the mutual benefit of inventors and said defendant corporation. It was then alleged that for some time prior to May 15, 1944, plaintiffs had been negotiating with defendant Foundation for a contract under the terms of which the latter should undertake "to do certain things by way of developing, exploiting and commercializing the said newly invented rotary pump; that one of the essential elements of such projected contract was, and still is, the nature and extent of the acts that the said defendant Foundation was to perform by way of effecting and accomplishing such development, exploitation and commercialization of said invention; that another essential element of said projected contract was, and is, the nature and extent of the obligation, on the part of the defendant Foundation, to prosecute, defend, protect and improve any and all patent rights obtained or obtainable in connection with the said invention."

It was then averred that on or about May 15, 1944, plaintiffs and defendant Foundation "did agree upon certain elements of such proposed contract and re-

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Clyde H. Brawley and others against Crosby Research Foundation, Inc., a Nevada corporation, and others for a declaratory judgment construing a contract for the development, exploitation and com-

duced said matter to the form of a written instrument." A copy of such written contract was attached to the amended complaint, marked "Exhibit A." Plaintiffs then alleged that "said purported contract is not valid, binding or enforceable; that it is not a contract."

By their answer defendants denied that the aforesaid contract did not contain all of the details agreed upon between the parties; denied that the contract was not valid, binding or enforceable, and denied that there was an actual controversy between the parties thereto relating to their legal rights and duties under such contract. As a separate defense, defendants alleged that since the execution of the written agreement, and relying thereon, the defendants had in good faith vigorously prosecuted the development, exploitation and commercialization of the invention; had promptly paid to plaintiffs all the royalties provided for in said contract, and that in addition to the minimum royalties reserved in the contract defendants had expended in developing, exploiting and commercializing said invention more than \$4,000.

The contract in question, denominated an "exclusive license agreement," was entered into by plaintiff Clyde H. Brawley as party of the first part and defendant Foundation as party of the second part. The agreement set forth that plaintiff Brawley had assigned to the other plaintiffs herein an undivided one-fourth interest in and to any and all proceeds, earnings or accruals derived by him by virtue of said invention. Although plaintiff Brawley appears as party of the first part in said agreement, the same is signed by all of the plaintiffs. After reciting the respective interests of plaintiffs in and to the rotary pump invention and that defendant Foundation was engaged in the business of "research, development, production and commercialization of new articles of commerce" and was desirous of acquiring commercial rights to the aforesaid invention "for the purpose of introducing said invention as a new and useful product," the pertinent provisions of the contract provided that for and in consideration of the payment of the sum of one dollar by second party and "further sums and considerations as hereinafter set forth, the mutual covenants of the parties hereto herein made, and the faithful performance thereof," the first party, with the knowledge and consent of his associates, granted

to second party "an exclusive license for the use of said inventions together with any improvements thereon made or to be made, and benefit of disclosures or other claims to novelty made or to be made by said first party, together with any application or applications for letters patent thereon made or to be made in the United States or countries foreign thereto." It was further provided that the term of said license should be for the "full life of any patent or patents to be issued to first party on said inventions, any improvements thereon, developments thereof, or anything pertaining thereto."

After granting to second party the right to file application or applications for letters patent on said invention or any improvements thereof, and to defend against any interference or infringement proceedings, as well as to file infringement proceedings, and plaintiff Brawley agreeing to make himself available for consultation or assistance in matters relating to tests, development and improvements in connection with the invention and in connection with applications for letters patent it was provided that the second party should pay to the first party a royalty based upon the total net sales, which it was provided should be construed to mean the "gross sales less returns, allowances and normal trade discounts," said royalty to be computed upon the following basis: (1) up to and including net sales in the amount of \$500,000, a royalty of six per cent of the net billing thereof; (2) upon net sales in excess of \$500,000, a royalty of five per cent of the net billing thereof. The agreement provided that "the aforesaid royalty payments shall be based upon the total net sales of said inventions made each respective calendar month throughout the life of this license, and payment therefor shall be made to first party by second party each calendar month on or before the twentieth (20th) day thereof." The agreement then provided that the party of the second part was to pay to the party of the first part a minimum monthly royalty of \$100 each calendar month, commencing with July, 1944, and continue the payment of such minimum royalty for a period of six months; that commencing with January, 1945, a minimum royalty of \$200 should be paid each calendar month thereafter.

The contract further provided that in the event of a dispute between the parties thereto involving their respective rights, such dis-

pute should be submitted to arbitration for decision; that such arbitration was to be conducted in accordance with the provisions of Title X, Part III, of the Code of Civil Procedure of the State of California, each party selecting one arbitrator and the arbitrators so chosen should select a third, and the three arbitrators so selected should constitute the board of arbitration, "whose decision shall be final."

It was further provided that in the event of default of either party in the faithful performance of the terms and conditions of the contract and the failure of the party in default to cure the same within thirty days after notice from the other party, "this license may, at the option of the party not in default, be terminated by a notice in writing served upon the party so in default. Such cancellation and termination shall become effective thirty days from and after the day of such notice."

It was then provided that "second party may at its option terminate this license upon sixty days' written notice served upon first party and in accordance with the conditions and limitations hereinafter set forth." These conditions and limitations provided that in the event of such cancellation by the second party the latter should fully release to the first party all "claim, right, title and interest in and to said inventions, letters patent thereon or applications therefor, and no claim or obligation shall be made or allowed by either party hereto against the other in any manner whatsoever except as may relate to the aforesaid royalty payments which second party shall be required to make in full to the first party as of the last day of sales and account therefor as hereinbefore defined."

The cause proceeded to trial before the court sitting without a jury, at which time the plaintiffs produced one witness, L. P. Gibford, himself a plaintiff, who testified as to the signing and execution of the contract. The contract was then offered in evidence and the plaintiff rested.

The testimony offered by the defendants was equally meager, consisting of that given by Laurence E. Crosby, one of the defendants, who testified that he was president of the defendant Foundation; that "pursuant to the contract, plaintiffs' Exhibit No. 1, Crosby Research Foundation expended moneys for the development of the pump and payment of royalties. By payment of royalties I mean the royalties

provided for in plaintiffs' Exhibit 1. * * * The moneys were paid out for salaries, sample pumps, royalties, including the payments on Mr. Gibford's home, which he was about to lose, which was \$250. The balance of over \$4,000 was expended on the pump and its development plus the royalties."

It was conceded at the trial that when this action was commenced plaintiffs "refused to accept the royalties because they had disaffirmed the contract." The defendants thereupon rested.

The court found that all of the allegations contained in plaintiffs' amended complaint were true, and that "there was some evidence that a substantial sum of money was spent by, or on behalf of, the answering defendants; but that there was no evidence as to how much was spent by the Crosby Research Foundation, Inc., nor by any of the other answering defendants, and no evidence as to what any such sums were spent for; that there was no evidence tending to prove any other allegation of the 'Further, Separate and complete Defense to the Amended Complaint', and, therefore, that the allegations of said affirmative defenses are found to be untrue."

The conclusions of law filed by the court recite that the prime purpose of plaintiffs in entering into the contract with defendant Foundation was to secure from the latter a promise and obligation to "develop, exploit and commercialize" the plaintiff Brawley's invention; that the contract which was prepared by defendant Foundation gave the latter an "option" to develop, exploit and commercialize said invention, but did not "require" defendant Foundation "to do anything by way of developing, exploiting or commercializing said invention"; that one of the considerations which induced plaintiffs to contract away the exclusive right to use the said patent "was the promise of said Foundation to pay the inventor 6% of net sales up to one-half million dollars; but that there was no obligation to do *anything* in the direction of producing or inducing or making any sales; that there was no 'meeting of the minds' " between the parties.

As a further conclusion of law the court determined that while plaintiffs were dependent upon the promise of defendant corporation to pay percentage royalties "if there were any sales," and to pay a minimum royalty irrespective of sales, that de-

fendant Foundation "reserved the unrestricted and arbitrary right to cancel the entire contract at its option; that, if this were a valid 'meeting of the minds' at its inception, it had no 'mutuality of consideration' as an executory contract." The court further concluded that "if this instrument constituted a valid contract at its inception, it furnished only a basis upon which the parties might deal so long as it was mutually agreeable, with no obligation upon either party requiring a continuance of the relation."

With reference to defendants' affirmative defense, the court as a conclusion of law determined that the matters therein set forth, "if proved, could not operate to estop the plaintiffs' asking the court to declare the contract unenforceable"; that because at its inception the contract lacked "mutuality of obligation" or consideration, the facts set forth in defendants' affirmative defense could not supply such requisites; and that for the recovery of anything of value furnished by defendant Foundation to plaintiffs at the latter's request which in law they were required to restore to defendant Foundation, that the latter had an adequate remedy at law.

By its judgment the court decreed the agreement in question to be void and unenforceable; that defendant Foundation had no right, title or interest thereunder in and to the patents therein referred to; that defendant Foundation be enjoined from exercising any of the rights purportedly conferred upon it by said agreement, and that it deliver to plaintiffs drawings, designs, plans, specifications, test-models, patent-applications and any other papers or documents received pursuant to the agreement in question.

Since the court decreed that the contract is void and unenforceable, we shall first test the same for validity. By its terms the first party granted to second party the exclusive license to exploit, manufacture, sell, use or license the invention for the life of any patents issued or to be issued thereon. First party, Brawley, agreed to make himself available at the expense of second party for consultation and assistance relative to any improvements and applications for patents. The second party was granted the right to file applications for letters patent on the invention or on any improvements or development thereof and to defend the same against infringement; all

such applications and actions to be in the name of the first party.

In return for the grant of the right to develop, manufacture, exploit and sell the rotary pump, the second party agreed to at all times acknowledge the invention and the first party's right thereto; agreed not to contest the validity of any patent covering the invention in question, and to pay the first party, in consideration of the rights conveyed, a royalty upon the net sales of the pumps made and sold under the license. The term "net sales" was defined in the agreement. The amount of the royalties and the basis for computation thereof was clearly set forth, as hereinbefore narrated, as were the dates of such royalty payments. It was provided that a statement of sales made should accompany each royalty payment. A minimum royalty of \$100 per month during the year 1944 was provided for, with a monthly royalty of \$200 per month commencing with January, 1945, regardless of the amount of sales made. Provision was made for arbitration in the event of dispute, but plaintiffs did not resort thereto. Should either party default the other was authorized to terminate the contract by giving thirty days' notice in writing to the defaulting party. The second party was empowered to terminate the contract at its option upon giving sixty days' written notice of such intention to first party, provided, however, that should second party exercise its right of termination, it would release to first party all rights under the contract and surrender all inventions, applications or improvements thereon made or held by second party, and would continue to pay royalties in accordance with the agreement during the aforementioned sixty days.

[1,2] We perceive no invalidity in this contract. Respondents, however, first contend that the contract is incomplete and therefore void because the parties thereto failed to agree upon an element which was essential to the agreement and therefore there was no "meeting of the minds." The "essential element" to which respondents refer is the claimed absence in the agreement of "any expression of what the Foundation undertook to do by way of developing, exploiting and/or commercializing the invention." While it is true that the contract contains no express provisions as to when the second party should commence the production and sales of the

rotary pump, there is contained in the agreement a provision that at all times, whether or not pumps were produced or sold, second party should pay first party a minimum royalty commencing forty-five days after the execution of the agreement, and the minimum royalty was doubled effective January, 1945. Thus it seems obvious from these provisions that the parties had in mind that sales might not be made immediately and that during the period of development, production and exploitation of the pump by second party, the latter was to pay a fixed royalty. Had the parties contemplated that production and sale of the pump should commence within a specified time they could easily have so provided. By the very terms of the contract it was provided that the first party "is now desirous of securing further development, exploitation and commercialization of said inventions." That certain development work would have to be done was obviously in contemplation of the parties, because in paragraph 1 of the agreement it is further provided that the license granted to second party in the agreement "shall be the right to develop, exploit, manufacture, sell, use, license or sublicense said invention or any rights thereto, to the sole benefit and use of said second party, *except for the payment of royalties* and the performance of any other obligations on the part of the second party as hereinafter set forth." (Emphasis added.) The admitted payment of the royalties conferred upon the first party a benefit which constituted a good consideration within the meaning of section 1605 of the Civil Code, and consideration supplies mutuality of obligation to the contract. If the amount of the minimum royalties was not adequate, respondents should have so determined in their own minds before signing the contract, but having signed it, they must live up to their agreement. The law does not weigh the quantum of the consideration. 6 Cal.Jur., p. 169.

[3,4] Contrary to the finding of the trial court, the contract with which we are here concerned does require that appellant Foundation manufacture and sell the pump. The terms of the contract, instead of relieving appellant, as claimed by respondents, from exploiting, manufacturing and selling the pump, on the contrary require just that. In this, as in every contract, there is the implied covenant of good faith and fair dealing; that neither party will

do anything that would result in injuring or destroying the right of the other to enjoy the fruits of the agreement. *Universal Sales Corp. v. Calif. Press Mfg. Co.*, 20 Cal.2d 751, 771, 128 P.2d 665; *Silva v. Providence Hospital*, 14 Cal.2d 762, 773, 97 P.2d 798; *Long Beach Drug Co. v. United Drug Co.*, 13 Cal.2d 158, 164, 88 P.2d 698, 89 P.2d 386; *Citron v. Franklin*, 23 Cal.2d 47, 56, 142 P.2d 16; *Civ.Code*, secs. 1655, 1656. The law will therefore imply that under its agreement appellant was obligated in good faith and by its reasonable and best efforts to develop, exploit, produce and make sales of the rotary pump in question. That appellant did not do so was not alleged in the pleadings or proved at the trial.

[5] The cases cited by respondents in support of their claim that the contract before us is incomplete are distinguishable, in that the cited cases present situations wherein the contract was incomplete on its face and the deficiencies of the contract were in relation to matters treated in the contract, while in the case at bar, as admitted by respondents, the matters now claimed to be necessary to a "complete" contract are not mentioned in the agreement. In the instant case the agreement reflects a complete mutuality between the parties wherein the first party granted to second party a license to improve upon, develop, exploit, produce and sell a certain rotary pump invented by the former, in consideration of the payment of certain minimum royalties pending development and sale of the product, with percentage royalties thereafter, but in any event and regardless of the amount of sales, the first party was at all times to receive the minimum royalty provided. Lack of mutuality is tantamount to want of consideration, and where, as in this case, sufficient consideration is otherwise present, mutuality is not essential. It becomes essential only when its absence would leave a party without a valid or available consideration for his promise. *Clarey v. Security Portland Cement Co., Inc.*, 99 Cal.App. 783, 786, 279 P. 483; 17 C.J.S. Contracts, § 100, p. 444; 12 Am.Jur. § 13, p. 509.

Respondents next insist that the judgment must be affirmed because the defendant Foundation's arbitrary right of cancellation destroys the mutuality. While it is true the contract provided that the second party might at its option terminate the same upon sixty days' written notice served

upon first party, the exercise of such option was required to be, as provided in the contract, "in accordance with the conditions and limitations hereinafter set forth." These conditions and limitations were declared in the contract to be as follows: "In the event of cancellation and termination of this license as hereinbefore provided second party shall fully release to first party all claim, right, title and interest in and to said inventions, Letters Patent thereon or Applications therefor and no claim or obligation shall be made or held by either party hereto against the other in any manner whatsoever, except as may relate to the aforesaid royalty payments which second party shall be required to make in full to first party as of the last day of sales and account therefor as hereinbefore defined." It was upon this provision of the contract that the court concluded as a matter of law that "the Foundation reserved the unrestricted and arbitrary right to cancel the entire contract at its option; that, if this were a valid 'meeting of the minds' at its inception, it had no 'mutuality of obligation' or 'mutuality of consideration' as an executory contract; that, if this instrument constituted a valid contract at its inception, it furnished only a basis upon which the parties might deal so long as it was mutually agreeable, with no obligation upon either party requiring a continuance of the relation."

[6] We are constrained to hold that the weight of authority in California is to the effect that a provision in a contract that it shall come to an end at the option of one of the parties under the terms, conditions and limitations embodied in the agreement before us, does not render such contract unenforceable. That a contract containing an option that it may be cancelled by one of the parties by written notice is a valid provision and is supported by the original consideration was the holding in *Thomas v. Anthony*, 30 Cal.App. 217, 157 P. 823, where, at page 222 of 30 Cal.App. at page 823 of 157 P. we find the following: "The contract also reserved to the defendant the right to cancel it upon 15 days' notice, unused deposits to be thereupon returned. We do not think, as urged by the appellant, that this provision of the contract makes it void for lack of mutuality. In *Page on Contracts*, § 306, the author in treating of this phase of the law, says: 'If A. and B. make mutual promises to each other, and A. is to have the right

at his election to withdraw from the contract and relieve himself from all liability thereunder at his pleasure, some courts hold that such contract is without consideration. * * * If, however, A. must give notice for a substantial period of time before ending his liability under the contract, and such liability is to last until the end of time for which the notice is given, A.'s promise is a consideration. *Thus if A. has the right to end the contract at the end of any year, or on ten days' notice, or on two weeks' notice, A.'s promise is a consideration.*" (Emphasis added.)

And in the case of *Associated Oil Co. v. Myers*, 217 Cal. 297, 301, 18 P.2d 668, 670, which involved a lease terminable upon ninety days' notice by the lessee, the court said: "First of all it is argued that the agreements lack mutuality of remedy and obligation. The argument advanced by respondents to support this assertion is based upon the proposition that the lease granted appellant the right to cancel upon giving a ninety days' written notice. The authorities are unanimous to the effect that, when the contract is terminable at the will of the plaintiff, he may not have relief against the defendant. *But to assert, as a matter of equity, that a lease for a three months' period is of no value and entitled to no protection is, we think, going further than the doctrine warrants.* Furthermore, it is a recognized rule of equity that where, as here, 'the reciprocal obligations of the parties to the contract in question are concurrent, the continuance of the obligation of each to perform his part being dependent upon continued performance by the other, any material injury which otherwise might be sustained by the defendant, of whom performance is required in consequence of his not having an efficient remedy for coercing future performance by the plaintiff, is effectually avoided by making the defendant's obligation to continue performance dependent upon a continuance of performance by the plaintiff.'" (Emphasis added.)

In the instant case we are impressed that to assert as a matter of equity where one of the parties to the contract may terminate the same provided he gives sixty days' written notice, during which interim he is obligated to pay the royalties provided for in the agreement, and at the expiration of which notice he is required to restore to the other party all right, title and interest in and to the inventions,

letters patent thereon and pending applications for patents—that such sixty days' contract is without value and not entitled to protection, goes further than the doctrine relied upon by respondents' warrants.

[7] Volume 12 Am.Jur., § 434, p. 1014, reads in part: "The assent of both parties to a rescission is sometimes expressed in the original contract, as where an option to rescind is given to one or both of the parties. One of the parties to a contract may end it if the contract so provides." In 17 C.J.S., Contracts, § 399, page 888, it is said: "A contract may provide that it shall come to an end at the option of one or either of the parties, and such a stipulation when fairly entered into will be enforced if not contrary to equity and good conscience. The presence of such a provision has no effect on the binding obligations of the contract as long as the parties continue to act under it before revoking or terminating it."

The cases relied upon by respondents are readily distinguishable from the case at bar. In *Brown & Sons v. White Lunch Co.*, 92 Cal.App. 457, 268 P. 490, 491, there was involved an executory contract whereby a corporation engaged in operating a chain of restaurants agreed, in consideration of the purchase by another corporation engaged in the hardware business of shares of stock in the restaurant corporation, to purchase in the future from said hardware corporation such wares as it needed and that the hardware corporation could supply. The court held that the contract was not binding for want of mutuality as it imposed no burdens, promises or restrictions upon the hardware corporation and the latter was free to terminate the contract at will at any time. The court therein stated: "Had plaintiff discontinued its business or refused to sell its wares to defendant, defendant would have been without a remedy. A contract which can be terminated at the will of one of the parties *without liability for damages*, so far as it remains executory is not binding for want of mutuality." (Emphasis added.) In the cited case the promise made by defendant was a promise to enter into future contracts for the purchase of supplies from plaintiff which defendant might from time to time be in need of and which plaintiff could supply. The court quoted in part from 1 Elliott on Contracts, § 175, as follows: "Unless an agreement to *make a future contract* is definite and certain upon the subjects to be em-

braced therein, it is nugatory. Consequently, the acceptance of a proposition to make a contract, the terms of which are to be subsequently fixed, does not constitute a binding obligation." (Emphasis added.) Neither the facts nor the legal issues presented therein are at all similar to the ones confronting us.

In *Shortell v. Evans-Ferguson Corp.*, 98 Cal.App. 650, 277 P. 519, 523, the contract was one containing a promise by one of the parties to enter into a future contract for the purchase of certain lots by reference to an unrecorded map. The holding was that the contract was void *ab initio* and unenforceable because it contravened the mandate of a statute, that the making of the contract was a misdemeanor, and the vendee might recover the money paid on such a contract. Stats. 1907, p. 290, now incorporated in sections 11538 and 11541 of the Business and Professions Code. While upholding appellant's further contention that the contract being void there was a failure of consideration and hence it was lacking in mutuality, the court definitely stated, "A brief analysis of the document in question demonstrates that it bound respondents to nothing"; that it contained a reservation authorizing the owner of the property "to return the above money" paid on account of the contract at any time "before a contract of sale is signed and approved by the owner," thereby giving to one of the parties the election to perform. Such is not the situation in the case at bar, where in the right of second party to terminate the contract was conditioned upon the performance of the terms thereof by the payment of royalties during the interim between giving the notice and the effective date thereof.

Respondents place great reliance upon *County of Alameda v. Ross*, 32 Cal.App.2d 135, 89 P.2d 460, 462, wherein the petitioner sought by means of a writ of mandamus to compel respondent as county auditor to issue a warrant in payment for materials ordered by the board of supervisors of Alameda County with which to repair a part of the Fruitvale Avenue Bridge across the Oakland Estuary, which portion of the bridge was used exclusively for the benefit of the Southern Pacific Railroad Company. It appears that the United States, through its Secretary of War, issued to the County of Alameda a license, *revocable at will*, to use, maintain and

operate the bridge in question across navigable waters. The license required the maintenance of the bridge in question by the county. The main, if not the sole question necessary to the decision was whether or not the board of supervisors could expend public money for maintaining or repairing that portion of the bridge used exclusively for the benefit of a private corporation. In that regard the court held that "the particular indebtedness which is involved in this proceeding constitutes a gift of public funds to a private corporation in conflict with article 4, section 31, of the Constitution of California." It is true the court further held that the expenditure was unauthorized "for the reason that the license is revocable at will by the secretary of war and therefore lacks mutuality of obligation and consideration, which renders it void." Though it be conceded that such last-mentioned holding was necessary to the decision, it must, however, be borne in mind that the court treated the document in question as a 'license issued by sovereign authority, revocable at will and without notice. The same court, in *Rosenblatt v. Calif. State Board of Pharmacy*, Cal. App., 158 P.2d 199, 203, held that a license issued by a sovereign "has none of the elements of a contract and does not confer an absolute right but a personal privilege to be exercised under existing restrictions and such as may thereafter be reasonably imposed." In the instant case we are not confronted with a "license" issued by a sovereignty, but with a contract between private persons, terminable by one of them only upon sixty days' written notice and subject to obligations and limitations imposed upon the party vested with the right of termination. In the Alameda County case the court recognizes that an option to terminate a contract on notice does not void every such contract. Quoting from 1 Williston on Contracts, page 365, § 105, the court says: "Since the courts, however, do not favor arbitrary cancellation clauses, the tendency is to interpret even a slight restriction on the exercise of the right of cancellation as constituting such legal detriment as will satisfy the requirement of sufficient consideration; for example, where the reservation of right to cancel is for cause, or by written notice, or after a definite period of notice, or upon the occurrence of some extrinsic event, or other objective standard." (Emphasis added.)

In commenting upon the provisions of the license in the Alameda County case, the court at page 145 of 32 Cal.App.2d, at page 464 of 89 P.2d, says: "A careful reading of the document leaves no doubt it was the intention of the government, clearly expressed in unequivocal language, that it reserves the absolute right to revoke the license at will with or without cause. It contains no limitation whatever upon that arbitrary power. It is therefore void for lack of mutuality and for lack of consideration." No such situation exists in the contract now engaging our attention, and our examination of the Alameda County case does not impress us that it supports the ruling of the trial court that a cancellation clause of the nature and character contained in the contract here involved renders the agreement void.

[8] It is not necessary that the provision giving to one party an option to terminate on substantial notice shall be supported by a consideration different from considerations supporting the entire agreement. One valid consideration supports each and all of the obligations of the contract. In this regard, the court in *Tennant v. Wilde*, 98 Cal.App. 437, 442, 277 P. 137, 139, said: "On this point it may be said that, where there is consideration for any of the agreements specified in a contract the contract as a whole cannot be said to lack mutuality or consideration, nor can any particular promise or agreement contained therein be singled out and deemed inoperative because no special or particular consideration appears to have been given or promised for it. Mr. Page in his 'Law of Contracts' thus states the rule: * * * 'While a consideration is a necessary element of every contract, it is not necessary that each separate promise or covenant should have a distinct consideration. If there is but one consideration offered in return for several promises, and it is accepted for them together, it will support them. This principle is often invoked in questions of mutuality of obligation. If A gives value for two or more promises from B, B cannot claim that one of such promises was not supported by consideration, though the parties have not apportioned the consideration to the separate promises. * * *'"

As to defendants Laurence E. Crosby, J. Rex Davis and Major Pump Corporation, there is no evidence whatever connecting

them with the contract in question or with any issue raised by the pleadings or made by evidence before the court.

In view of the foregoing conclusions at which we have arrived concerning the validity of the contract, it becomes unnecessary to give consideration to other grounds presented on this appeal.

The judgment is reversed and the cause remanded with directions to the court below to enter judgment declaring the contract valid.

YORK, P. J., and DORAN, J., concur.

Hearing denied; CARTER, J., dissenting.



73 Cal.App.2d 442

NORTHWESTERN NAT. INS. CO. OF MILWAUKEE, WIS., et al. v. ROGERS PATTERN & ALUMINUM FOUNDRY et al.

Civ. 14956.

District Court of Appeal, Second District,
Division 2, California.

March 7, 1946.

Hearing Denied April 29, 1946.

1. Explosives ⇌

Negligence of foundry in including magnesium as well as aluminum castings in shipment to customer to which it customarily sent only aluminum castings which shipment was accompanied by purchase order stating castings were aluminum alloy and containing numbers signifying foundry expected castings to be immersed in molten salt bath was a concurrent and proximate cause of damage caused by explosion and fire resulting from immersion of magnesium castings in heated sodium nitrate bath and was not superseded by negligence of customer or its general manager in placing such castings in the bath as independent intervening cause of damage.

2. Negligence ⇌62(3)

Intervening act of a third person negligent in itself is not a superseding cause of injury to another which the actor's negligent conduct is a substantial factor in bringing about, if actor at time of his negligent conduct should have realized that a

third person might so act, or a reasonably prudent man knowing the existing situation when the act of the third person was done would not regard it as highly extraordinary that the third person should so act

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Northwestern National Insurance Company of Milwaukee, Wisconsin, and others against Rogers Pattern & Aluminum Foundry, a corporation, and another to recover for damages caused by a fire allegedly resulting from negligence of defendants. From judgments in favor of plaintiffs, defendants appeal.

Judgments affirmed.

J. Wesley Cupp and Forrest A. Betts, both of Los Angeles, for appellants.

Sidney A. Moss and Jean Wunderlich, both of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal by defendants from a judgment in favor of plaintiff, Northwestern National Insurance Company, of Milwaukee, Wisconsin, a corporation, in the sum of \$3,000, and from a judgment in favor of John E. Carson, Cornelius Prugh Harnish, trustees under the will of William S. Prugh, deceased, and Marion Wright in the sum of \$3,300. The action was to recover damages resulting from the alleged negligence of defendants and was tried without a jury.

The evidence being viewed in the light most favorable to the plaintiffs (respondents), and pursuant to the rules set forth in Re Estate of Isenberg, 63 Cal.App.2d 214, 216 et seq., 146 P.2d 424, the essential facts are:

Shortly prior to April 19, 1943, defendants sent to North American Metals Company ten sacks of metal alloy castings. Accompanying them in accordance with their established practice was a purchase order stating the castings were aluminum alloy castings heat-treat 195. North American Metals Company's general manager, Mr. Leidig, had previously received similar shipments from defendants accompanied by similar purchase orders and had been orally assured by defendants that aluminum castings heat-treat 195 would be the only type of castings that would be sent to him. The number on the pur-

chase order signified that defendants expected the castings to be immersed in a molten salt bath at between 925 and 970 degrees for a period of 12 hours. Before immersing a portion of the shipment in question Mr. Leidig saw that the color of some of the castings differed slightly from the color of other castings in the same shipment and noticed a difference in the weight of the castings from those previously received. He thereupon rechecked the purchase order and examined certain test-bars which accompanied the shipment, and upon satisfying himself that the shipment was represented to be aluminum and was to receive heat-treat 195, he lowered the castings into a salt bath consisting of sodium nitrate heated to 900 degrees Fahrenheit. In fact, however, the shipment consisted of six sacks of aluminum castings and four sacks of magnesium castings. When the magnesium came in contact with the sodium nitrate bath a violent explosion took place resulting in a conflagration which caused damages to the plaintiffs in the sum of \$6,300.

Defendants admit that they were negligent but contend that *their concurrent negligence was the remote and not a proximate cause of the fire which caused damage to plaintiffs, in that the negligence of Mr. Leidig and the North American Metals Company was an independent intervening cause of the conflagration.*

[1,2] This proposition is untenable since the law is settled in California that an intervening act of a third person, negligent in itself, is not a superseding cause of injury to another which the actor's negligent conduct is a substantial factor in bringing about, if (1) the actor at the time of his negligent conduct should have realized that a third person might so act, or (2) a reasonably prudent man knowing the existing situation when the act of the third person was done would not regard it as highly extraordinary that the third person should so act. (*Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 219, 157 P.2d 372, 158 A.L.R. 872. See also *Lacy v. Pacific Gas & Elec. Co.*, 220 Cal. 97, 98, 29 P.2d 781; *Herron v. Smith Brothers, Inc.*, 116 Cal.App. 518, 521, 2 P.2d 1012; *Restatement of the Law, vol. II, Torts (Negligence)*, [1934] p. 1196, sec. 447.)

Applying the foregoing rule to the facts in the instant case it is apparent that de-

fendants, when they delivered to the North American Metals Company the magnesium castings, should have realized that a third person might assume that such castings were aluminum in view of their appearance and the fact the purchase order stated that they were aluminum and that on previous occasions they had delivered to the same parties aluminum castings; and defendants should have further realized that such third person might immerse the castings in a sodium nitrate bath with a resulting fire. Likewise defendants, exercising reasonable prudence and knowing the foregoing facts, should not have regarded it as highly extraordinary that the North American Metals Company would immerse the castings in a heated sodium nitrate bath. It thus appears that defendants' negligence was a concurrent and a proximate cause of the damages suffered by plaintiffs.

Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 62 A.L.R. 825, is not here in point for the reason the case was decided on demurrer, and in reversing the judgment in favor of the defendant the Supreme Court merely held that it was a question of fact whether the acts alleged to be intervening causes were in fact such or constituted concurring, proximate causes of the injury, which question of fact should be left to the decision of the jury.

Schwartz v. California Gas, etc., Co., 163 Cal. 398, 125 P. 1044, relied on by defendants, was expressly overruled by our Supreme Court in the case of *Mosley v. Arden Farms Co.*, supra, 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872.

There is nothing in *Berry v. San Francisco & North Pacific Railroad Co.*, 50 Cal. 435, which bears upon the present issue.

In *Catlin v. Union Oil Company*, 31 Cal. App. 597, 161 P. 29, and in *Stultz v. Benson Lumber Co.*, 6 Cal.2d 688, 59 P.2d 100, the actors whose negligence was held to constitute an independent intervening cause had knowledge of the dangerous character of the instrumentality which they used negligently. In the *Catlin* case the grocer who sold kerosene mixed with gasoline knew that he was dealing with a highly inflammable fuel at the time he sold it. Likewise in the *Stultz* case the plaintiff's employer knew that the planks which he permitted his employees to use were full of knots and were crossgrained and not

suitable for the purpose of supporting a scaffolding. In the present case Mr. Leidig denied he had ever visited defendants' plant or received any instructions from defendants relative to the difference between magnesium and aluminum castings.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.



73 Cal.App.2d 480

BASLER v. SHARP & FELLOWS CO.
Civ. 3419.

District Court of Appeal, Fourth District,
California.

March 8, 1946.

Rehearing Denied March 28, 1946.

Hearing Denied May 6, 1946.

1. War ☞4

Where plaintiff made out a prima facie case of right to recover rental for road-building equipment, defendant must produce requisite evidence to support its contention that amount claimed by plaintiff was in excess of maximum charges allowed by O.P.A. regulations.

2. War ☞4

Evidence that plaintiff made earnest attempt to comply with O.P.A. regulations in renting his road-building equipment and that he received at least implied approval of his charges from O.P.A. office supported finding that plaintiff was entitled to recover amount claimed as rental, as against contention that rental charged was in excess of maximum allowed by O.P.A. regulations.

3. Appeal and error ☞221

Question whether item included in judgment for amount of rental for road-building equipment as a charge for loading and unloading equipment when it was shipped to scene of operations was properly allowed could not be raised for first time on appeal.

4. Appeal and error ☞1036(1)

Where original contract for rental of road-building equipment was made be-

tween plaintiff and defendant, and there was no showing that subsequent written authorization directing defendant to pay rental due on equipment to partnership was still in force, and partner who signed the written authorization on behalf of partnership testified that it was satisfactory to have action for the rental prosecuted in plaintiff's name, no possible prejudice appeared in permitting plaintiff to maintain the action, since defendant would be protected in making payment to plaintiff.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by F. P. Basler against Sharp & Fellows Company to recover the rental on road building equipment used by defendant. From a judgment for plaintiff, the defendant appeals.

Judgment modified, and as so modified, affirmed.

Walter E. Bennett, of Los Angeles, for appellant.

Jos. H. Huberty, of Los Angeles, for respondent.

H. Eugene Breitenbach, Wm. U. Handy, Wm. H. Buckingham, and Arthur Lasher, all of Los Angeles, amici curiae in behalf of appellant.

BARNARD, Presiding Justice.

This is an action to recover the rental for some road-building equipment used by the defendant on a certain job between about November 1, 1942, and February 15, 1943. Thereafter, the defendant paid part of the rental charged but refused to pay the balance, claiming it was in excess of the maximum charges allowed by O. P. A. regulations, and stating that "O. P. A. rates would govern." The plaintiff presented the matter to the O. P. A. officials, it was referred by the Washington office to its San Francisco office, some sort of a hearing was there had, and the plaintiff again presented his bill for the balance of the rental to the defendant, claiming that the same had been approved by the O. P. A. authorities. The defendant refused to pay and this action followed.

The complaint alleged a written agreement for the leasing of the equipment at stated prices per hour, all to be fully operated and maintained by the plaintiff;

that the agreement was thereafter modified by mutual consent to meet the requirements and regulations of the O. P. A. by reducing the price per hour on some of the equipment and adding a monthly rental on one machine; that the equipment was furnished for certain times at the reduced rental; and that \$20,596.78 was thus earned, of which only \$8,388.19 had been paid. Separate counts were set up based on quantum meruit and on an account stated, and the prayer was for the balance of \$12,208.59.

In its answer the defendant denied the plaintiff's ownership of the equipment, disputed the number of hours it had used the equipment, and as a separate and affirmative defense alleged that the amounts as charged by the plaintiff are in excess of and in violation of Maximum Price Regulation No. 134 of the Office of Price Administration. This regulation will be referred to as the Regulation.

The court found in all respects in favor of the plaintiff, finding that the rental contract had been executed; that it had been modified by mutual consent in order to meet with the approval, requirements and regulations of the O. P. A.; that the equipment had been furnished to and used by the defendant; and that there was a balance of \$12,208.59 owing to the plaintiff. Judgment was entered for that amount and the defendant has appealed.

The court's findings with respect to the length of time during which the various pieces of equipment were used are fully sustained by the evidence and are not seriously questioned by the appellant. Appellant's main contention is that the respondent's charges for the rental of this equipment, having been set forth on a per-hour basis, are in excess of the maximum prices established by the Regulation and permitted thereunder. A copy of the Regulation was introduced in evidence. Section 1399.1 thereof contains a prohibition against renting such machinery or supplying such services at higher than the maximum prices established by the Regulation. Section 1399.2 fixes rental prices in accordance with an attached schedule on what may be called a bare basis, being the rental of machinery where it is to be maintained and operated by the lessee. It provides for the rental of such machinery on a daily, weekly or monthly basis depending on the number of hours per day it is used, the number of days or weeks and

other facts depending upon whether the use was continuous or not. Section 1399.5 provides that rental for equipment leased on a per-hour basis shall be determined under the provisions of section 1399.2 under varying conditions. Section 1399.6 covers the matter of maximum charges for operating or maintenance services. This is material here as this equipment was leased to be fully operated by the respondent, that is, the respondent was to furnish the operators and maintain the equipment, including repairs, fuel and lubrication. Subd. (b) of that section provides for the fixing of maximum prices for such operating services in cases where the lessor had no established charge for that purpose on March 31, 1942, and is the part applicable to this respondent. It provides for an application by the lessor, in such a case, to the O. P. A. and provides that the charge may not be made unless it has been approved by the O. P. A. or has not been disapproved within thirty days after receipt of the report. Section 1399.7 provides that where equipment is leased on a fully operated basis the combined rental shall not exceed the maximum bare rental for the equipment plus the maximum charges for operation and maintenance allowed under the Regulation.

The appellant contends that the bill rendered by the respondent which separately charged for the rental of the equipment and for the operation and maintenance thereof, each at so much per hour, resulted in a total figure which is in excess of that permitted by the Regulation for these combined charges. It may be observed in passing that the appellant, in his opening brief, admitted that under its interpretation of the Regulation \$3611.90 is still due to the respondent. In its closing brief there is what amounts to, by simple computation, an admission that \$8663.12 is due. The administrator of the Office of Price Administration, who appears as *amicus curiae*, makes the tentative suggestion that the amount due is \$6038.99. These variations are understandable in view of the prolixity and uncertainty of the language used in the Regulation, the many fields and conditions it was attempting to cover, and the conflicts, inconsistencies and uncertainties which more or less naturally result.

There is practically no difference between the parties with respect to the charges for operations and maintenance. The respondent charged \$8860.12 for this

item. In the calculations made by the administrator of the O. P. A. \$8828.65 is given as the correct amount for this item, and this is approved by the appellant in its final brief. The difference of \$31.47 appears to be due to a mathematical error on the part of the respondent, and that amount should be deducted from the judgment.

The real difference between the parties is with respect to the amounts charged for the bare rentals on the equipment and the controlling question here is whether the court's findings in that regard are sufficiently supported by the evidence. The Regulation provides that such equipment, when leased on a per-hour basis, shall be figured on a daily, weekly or monthly basis as provided by another section, and that the combined charge for rental and for operation and maintenance shall not exceed the maximum amounts allowed for the respective items. It also provides, in section 1399.11, for the making of modifications, adjustments or exceptions on proper application therefor. The complaint alleged that the original agreement was modified to meet the approval, requirements and regulations of the O. P. A., and that the rates for the charges were reduced accordingly. The court found that this was true and that the amount thus agreed upon was not in excess of the maximum rental prices established. The appellant argues that the approval admittedly given by the O. P. A. was given under section 1399.6 of the Regulation and applied only to the operation and maintenance charges. However, no facts were brought out at the trial to show that proper proceedings were not had under section 1399.11, which would permit a modification of both kinds of charges here involved. The respondent testified that the entire matter, including the bill which was finally presented to the appellant, was submitted to the O. P. A. for approval; that the Washington office of the O. P. A. referred the matter to the San Francisco office; that this office went into the matter fully and gave its oral approval to the full claim as it now appears in the judgment; and that no disapproval was ever expressed by the O. P. A. at any time. This testimony that oral approval was given was stricken, and later on this witness testified that the O. P. A. official in the San Francisco office who was handling the matter told him all items of this bill were to be approved,

and that "if it had been disapproved, he would have written me a letter." There is no evidence to the contrary. The appellant set up, in its answer, as an affirmative defense that the charges as reflected in the complaint were in excess of the maximum amounts allowable under the Regulation. While it relies upon the Regulation, which was introduced in evidence, it failed to introduce evidence with respect to many important facts which were necessary to sustain its claimed defense under that regulation and there was a complete failure of proof in that regard. As a result, it is forced to rely in its briefs on assumptions and inferences which are without support in the evidence.

The situation is frankly and honestly recognized by the administrator of the O. P. A. in his briefs. In his first brief, he argued in general that the Regulation was controlling, that the charges as reflected in the judgment were in excess of those allowed by the Regulation, and certain other matters which need not be considered here. This brief in no way attempted to show how the amounts allowed in the judgment exceeded the amounts permitted by the Regulation, and no attempt was made to set forth what was claimed to be a proper charge for the rental and services found by the court to have been furnished to the appellant. At the oral argument it appeared that such figures had not been furnished to the trial court and counsel for the administrator stated that he was unable at that time to furnish such figures, and that it would be necessary to have the matter gone over by experts in the O. P. A. in order to ascertain what charges were deemed permissible under the Regulation. The matter was continued and seventy days were allowed the administrator in which to furnish such figures to the court. This was done and calculations were filed which agreed with the respondent's charges on the item of operation and maintenance, with the slight exception noted. However, the amounts for bare rental were materially reduced, based on several assumptions, and it was suggested that the total balance recoverable is \$6038.99, instead of \$12,208.59 allowed by the court. Not only was this a matter which should have been, and was not, presented in the trial court but the calculations thus furnished frankly admit that in order to make a correct calculation it would be necessary to know a number of facts which appear neither in the findings

nor in the evidence. The conclusion noted is thus reached in the calculation furnished by the administrator, after clearly stating several times that a correct solution of the problem is impossible on the facts shown by the record, and that the calculation is necessarily based on inferences and assumption.

[1,2] The respondent made out at least a prima facie case, if any burden rested upon him in this regard, and it was incumbent upon the appellant to produce the requisite evidence to support its contentions that the amount claimed was in excess of that permitted. This was not done in the trial court and it is here admitted, at least by the administrator of the O. P. A., that a number of facts which are essential to the appellant's main defense are absent from the record. Not only was an issue presented which should have been met in the trial court, and not months after judgment was rendered, but it does not certainly appear, even now, that the judgment should or could have been different. The respondent made an earnest attempt to comply with the Regulation, and received at least implied approval of his charges. Under these circumstances, it cannot be held that the essential findings are not supported by the evidence.

[3] The appellant also contends that an item of \$201.92, which was included in the judgment and which was a charge for loading and unloading this equipment when it was shipped to the scene of the operations, is forbidden by section 1399.9 of the Regulation which forbids effecting a price increase above the applicable maximum "by way of commission, service, or other charge or requirement or by way of premium or other privilege or in any other manner." It is argued that a loading and unloading charge is a "service or other charge" and that there is no authority in the Regulation for such an extra charge. That same section forbids the making of a charge for transportation of such equipment to or from the job "on a basis not heretofore customarily used." The matter is raised for the first time on appeal and there is no evidence in the record that the amount thus charged was not on a basis theretofore customarily used.

[4] Some contention is made by the appellant that the respondent may not recover anything because any amount that may be due belongs to Stagan Mining Co.

A written authorization dated February 19, 1943, signed by the respondent and by Stagan Mining Co. by "Roy Stacy, Partner," and directing the appellant to pay anything due on this equipment to Stagan Mining Co., was introduced in evidence. The original contract was made between the appellant and this respondent and there is no evidence that this authorization of February 19, 1943, was still in force. There is evidence that the respondent and Stacy were partners and were working together on this deal. Stacy was on the stand and testified that it was satisfactory to have this action prosecuted in respondent's name. The appellant had not acted on the written authorization beyond the payments which are duly credited. It will be protected if it pays the judgment to the respondent, and no possible prejudice appears.

The judgment is modified by deducting therefrom the sum of \$31.47 and, as so modified, is affirmed. The respondent to recover his costs.

MARKS and GRIFFIN, JJ., concur.



PULCIFER et al. v. ALAMEDA COUNTY
et al.*

Civ. 12983.

District Court of Appeal, First District,
Division 1, California.

March 1, 1946.

As Modified on Denial of Rehearing

March 30, 1946.

Hearing Granted April 29, 1946.

1. Counties ⇨3

Provision in county charter was to be treated as any other legislative enactment, in determining its validity.

2. Constitutional law ⇨24

The validity of provision in county charter requiring that salaries of officers be fixed six months prior to their election was to be tested by the Constitution as it read at time provision was approved, and, if void at that time as in conflict with self-executing provision of constitution then in effect, subsequent amendment of the Con-

*Subsequent opinion 175 P.2d 1.

stitution could not validate the provision. St.1927, pp. 2032, 2033, § 12(b); Const. art. 11, § 7½, amended in 1908 and 1914; art. 11, § 9, as amended in 1924.

3. Constitutional law ⇨32
Municipal corporations ⇨164
Officers ⇨100(1)

Constitutional provision that the compensation of any city, county, town, or municipal officer should not be increased after his election or during his term of office was mandatory rather than directory, was self-executing in that it did not require a supplemental effort by any law creating body to make it enforceable, and occupied the entire field with reference to increase in compensation of elective officers. Const. art. 11, § 9, as amended in 1924.

4. Constitutional law ⇨38

Where the Constitution prescribes limitations or qualifications, no other law may require additional limitations or qualifications that may jeopardize the constitutional provisions.

5. Courts ⇨1

The judicial source of power is conferred by the Constitution.

6. Municipal corporations ⇨164
Officers ⇨100(1)

The constitutional provision that the compensation of any city, county, town, or municipal officer shall not be increased after his election or during his term of office negatively confers the right to have the salary increased prior to the election. Const. art. 11, § 9, as amended in 1924.

7. Counties ⇨38

A county charter may impose, upon officers, duties which are in addition to those prescribed by general laws but which are not inconsistent with constitutional provisions. Const. art. 11, §§ 4, 5, as in force in 1927.

8. Counties ⇨3

Ordinarily a county charter which must receive state legislative approval may not be more inclusive in its provisions than a constitutional limitation.

9. Municipal corporations ⇨164
Officers ⇨100(1)

Constitutional provision that compensation of any city, county, town, or municipal officer shall not be increased after his

election or during his term of office, permits the Legislature to make any increase applicable to future terms. Const. art. 11, § 9, as amended in 1924.

10. Officers ⇨100(1)

Any restriction which it might be assumed that county charter could impose supplementing constitutional provision that compensation of any city, county, town, or municipal officer shall not be increased after his election or during his term of office, would have to be reasonable. Const. art. 11, § 9, as amended in 1924.

11. Officers ⇨100(1)

County charter provision that compensation of elective officers shall be fixed at least six months prior to the election of such officers, was invalid under constitutional provision that compensation of any city, county, town, or municipal officer shall not be increased after his election or during his term of office and also because selecting an arbitrary date that was unreasonable in its application. St.1927, pp. 2032, 2033, § 12 (b); Const. art. 11, § 9, as amended in 1924.

12. Constitutional law ⇨32

Constitutional language which is prohibitory is self-executing.

Appeal from Superior Court, Alameda County; Benjamin C. Jones, Judge.

Mandamus proceeding by Harry W. Pulcifer and others against the County of Alameda and others, to compel the payment of increased salaries fixed by ordinance. From a judgment of dismissal, the plaintiffs appeal.

Reversed.

J. Paul St. Sure, of Oakland, for appellants.

Robert W. Kenny, Atty. Gen., and Robert E. Reed, Deputy Atty. Gen. for respondents.

WARD, Justice.

This is an appeal by the justices of the peace of Alameda County and the representative of a deceased justice from a judgment of dismissal following an order sustaining a demurrer to an amended petition for a writ of mandate to compel the supervisors of the county to pay increased salaries for the term commencing January

1, 1943, the salaries having been fixed by ordinance on May 28, 1942.

Section 12, subd. (b), of the charter of the County of Alameda, Stats. 1927, pp. 2032, 2033, provides: "It shall be the duty of the Board of Supervisors: * * * To provide, by ordinance, for the compensation of elective and appointive officers, assistants, deputies, clerks, attaches and employees unless such compensation is otherwise fixed by this Charter. *The compensation of elective officers shall be fixed at least six months prior to the election of such officer. The compensation of elective officers shall not be increased or diminished after the election of such officer or during his term of office:* provided, however, that the Board of Supervisors may allow such additional deputies or assistants as may be necessary and proper, to elective and appointive officers during their terms of office, and that the Board of Supervisors may also increase the compensation of such deputies or assistants during the term of office of such officers." (Italics added)

The Alameda County charter was framed in accordance with art. XI, sec. 7½, of the Constitution of the State of California. Appellants contend that the italicized portion of the above quoted section of the charter is unconstitutional as contravening art. XI, sec. 9 of the Constitution. At the time of the ratification of the charter in 1926, art. XI, sec. 9, read: "The compensation of any city, county, town or municipal officer shall not be increased after his election or during his term of office." (Note that the provision applies to increases only—not to decreases.) The respondents make two contentions in respect to the effect of art. XI, sec. 9, of the charter provision. First, they contend that the amendment to sec. 5 of art. XI, and the repeal of sec. 9, art. XI in 1933, validated the charter provision in the event it was unconstitutional. The amendment to sec. 5 after incorporating the above-quoted provisions of sec. 9, art. XI, contains the following: "The provisions of this section shall not be construed to abridge, modify or otherwise affect the provisions of sections 7½, 7½a and 8½ of this article, relating to county or city and county charters."

[1,2] If that portion of the charter provision requiring that the salaries of officers be fixed six months prior to their election was void as in conflict with the self-executing provision in sec. 9, the sub-

sequent amendment in 1933 could not breathe additional life into the provisions of a charter which was approved in 1927. It is clear that such charter provision is to be treated as any other legislative enactment. By the terms of sec. 7½, it must be framed "consistent with and subject to the Constitution." The validity of the charter provision must be tested by the Constitution as it read in 1928. "An after-acquired power cannot, ex proprio vigore, validate a statute void when enacted. See Sutherland, Stat.Constr. (2d Ed.) vol. 1, § 107." *Newberry v. United States*, 256 U.S. 232, 254, 41 S.Ct. 469, 65 L.Ed. 913, 920; see, also, *State ex rel. Stevenson v. Tuffy*, 20 Nev. 427, 22 P. 1054, 19 Am.St.Rep. 374; *Comstock Mill & Min. Co. v. Allen*, 21 Nev. 325, 31 P. 434, 435; *State v. O'Malley*, 342 Mo. 641, 117 S.W.2d 319, 324. "If void from the beginning, the amendment to section 6, art. 11 [of the constitution] in 1896, did not give life to such provisions. That would give the amendment the effect of enacting laws instead of merely authorizing the legislature to do so, and it would be to enact a law to which no reference was made, and which the people in adopting the amendment could not have had in mind. Such is not the ordinary function of a constitutional provision, and such effect will not be given to it unless it is expressly so provided." *Banaz v. Smith*, 133 Cal. 102, 104, 65 P. 309, 310; see, also, *Newberry v. United States*, supra; *Fleming v. Hance*, 153 Cal. 162, 94 P. 620; *Ex parte Sparks*, 120 Cal. 395, 52 P. 715. The *Banaz* case has recently received consideration from the Supreme Court in *Busch v. Turner*, 26 Cal.2d 817, 161 P.2d 456, a petition for a writ of mandate to compel the auditor of Lake County to pay an increased salary to the incumbent district attorney under the provisions of sec. 5 of art. XI of the Constitution which provided that the constitutional provision prohibiting the increase of the compensation of county, township or municipal officers after their election or during their term of office could be suspended by the legislature for the period of the war and for one year thereafter. There is nothing said in the *Busch* case contrary to the conclusions reached herein.

[3] Assuming that the exact provisions of the Constitution in effect at the time the charter was approved control the constitutionality of the charter provision, the respondents contend, secondly, that the amendment to the Constitution, adopted subsequently, indicates the intent of the

framers of the original provision—that art. XI, sec. 9, was not intended to occupy the entire field with respect to times and possibilities of *increases* in compensation of public officers. Section 9 of art. XI of the Constitution is mandatory and not directory. It is a self-executing constitutional provision and does not require a supplemental effort by any law creating body to make it enforceable. It occupied the entire field with reference to increase in compensation of elective officers at the time of the adoption of the charter. If the framers of the Constitution desired that the compensation of a city, county, town or municipal officer should not be increased for a specified period prior to the election of such officer, it would have been an easy matter to place such additional limitation in the constitutional provision and thereby adopt a uniform method of fixing the amount of salary.

[4-6] There is no law superior to the Constitution. No other law may disregard its provisions as written. Not only doing that which is prohibited, but doing that which is permitted “in any other manner than that prescribed,” is invalid. 11 Am. Jur., 651, 652, § 44; *Travelers’ Insurance Co. v. Marshall*, 124 Tex. 45, 76 S.W. 2d 1007, 96 A.L.R. 802. If the Constitution prescribes limitations or qualifications, no other law may require additional limitations or qualifications that may jeopardize the constitutional provisions. *Uhl v. Collins*, 217 Cal. 1, 17 P.2d 99, 85 A.L.R. 1370. The judicial source of power is conferred by the Constitution. The provision that the salary shall not be increased after his election or during his term of office negatively confers the right to have the salary increased prior to the election. Secs. 5, 4 and 7½ of art. XI, as they stood at the time of the adoption of the charter, all indicate that sec. 9 of art. XI was meant to limit the field of legislative discretion with respect to *increases* in salary of public officers. It is necessary again to emphasize that sec. 9 is silent as to decreases, and, therefore, this court holds only that art. XI occupies the entire field with respect to *increases in salary*.

[7,8] At the date the charter was approved, sec. 4 of art. XI of the Constitution provided that “The legislature shall establish a system of county governments, which shall be uniform throughout the state.” Section 5 of art. XI provided in 1928, and provides now, that “The legislature, by

general and uniform laws, shall provide for the election or appointment, in the several counties, of * * * county, township, and municipal officers * * *.” The same section now provides that the “compensation of any county, township or municipal officer shall not be increased after his election or during his term of office * * *.” Sections 7½, 7½a, 8, 8a, 8½ of the same article provide for the creation of charters and the adoption of the borough form government, etc. The Legislature, pursuant to these provisions, may establish a system of county governments and provide for township organization. These governmental units must be uniform unless the Constitution itself provides for a varied or diversified method of government particularly applicable to the locality. Such an instance appears when the Constitution itself sanctions a departure from the rule as in the case of county charter created in accordance with the provisions of secs. 7½ and 7½a of the same article. The charter directs the board of supervisors to fix the compensation of justices of the peace “consistent with and subject to the constitution.” Sec. 7½, subd. 3. A charter may impose duties upon officers in addition to those prescribed by general laws that are not inconsistent with constitutional provisions. *Wilkinson v. Lund*, 102 Cal.App. 767, 283 P. 385. Ordinarily a charter which must receive state legislative approval may not be more inclusive in its provisions than a constitutional limitation. 5 Cal.Jur., p. 570, sec. 16.

Respondents urge that the following cases support the conclusion that the charter provision is valid: *Chesney v. Byram*, 15 Cal.2d 460, 101 P.2d 1106; *Kaysser v. McNaughton*, 6 Cal.2d 248, 57 P.2d 927, and a few others cited of less importance. In the *Chesney* case the constitutional provision in question was self-executing. Section 1¼ of art. XIII of the Constitution of California provides certain tax exemptions for those who have served in military, etc. service in the time of war. Section 3612 of the Political Code provided for the *method* of obtaining the exemption as a matter of convenience and protection of veterans and assessors. The prescribed *method* did not abridge or extend the self-executing constitutional provision. In the present case the constitutional inhibition forbidding the raise in salary was extended in time beyond that period provided for in

the constitution, which extension is inconsistent with the constitutional provision. In the *Kayser v. McNaughton* case, *supra*, 6 Cal.2d at pages 254, 255, 57 P.2d at page 930, the court merely said: "This conclusion follows from several different premises. In the first place, there is no prohibition in the Constitution, nor is there any general principle of law, which would prevent the Legislature from passing a statute imposing the same liability as is imposed by a self-executing provision of the Constitution, so long as the statute is consistent with the Constitution." The provision of the Alameda charter is not a duplication of the constitutional prohibition. *Boyarsky v. Ross*, 123 Cal.App. 267, 11 P.2d 641, had reference to a clerk in a justices' court of Oakland township in Alameda County, one of the townships involved in the present proceeding. The opinion states (123 Cal. App. at pages 268, 269, 11 P.2d at page 642): "The sole question presented for determination is whether the power of fixing the number and compensation of justices' deputy clerks, of the justice's court of Oakland township, county of Alameda, rests with the board of supervisors of that county or with the legislature of the state of California." The court there held (123 Cal.App. at page 275, 11 P.2d at page 645): "When a charter is involved, general enactments are specially limited by construction in such manner as to protect the charter. *Wood v. Board of Election Com'rs*, 58 Cal. 561, 564. Therefore the petitioner has obtained no rights under section 11a of article 6 of the Constitution or the statutes enacted thereunder. That he has no rights under general laws enacted under sections 4 and 5 of article 11 is expressly stated in section 7½ of article 11." The attention of the court was called specifically to sec. 7½ of art. XI, but there is no mention of sec. 9 of art. XI. The point raised here was not raised in the *Boyarsky* case. In *McAuliffe v. Kane*, 54 Cal.App.2d 288, 291, 128 P.2d 932, 934, it was said: "The state Constitution and the Charter of the county of San Mateo prohibit any increase in the salary of a township officer after he is elected and during his term of office." The opinion shows that sec. 9 of art. XI could not have been considered. At page 289 of 54 Cal.App.2d, at page 933 of 128 P.2d, the court said: "The facts are not disputed, and for all the purposes of the appeal may be stated as follows: San Mateo County is governed by a freeholders' charter, adopted

pursuant to section 7½ of article XI of the state Constitution." *Cornell v. Harris*, 15 Cal.App.2d 144, 59 P.2d 570, also cited by respondents, involved a charter provision providing a plan for civil service administration. Art. XI, sec. 9, is not mentioned in the opinion. None of the cases cited by respondents are controlling on the particular point involved on this appeal. A case not cited is *Cline v. Lewis*, 175 Cal. 315, 165 P. 915, which enforced a ninety day provision in the Los Angeles County charter similar to the one here involved. In that case, although art. XI, sec. 9, was mentioned, it was not claimed that art. XI, sec. 9, was controlling. On the contrary, the opinion was written upon the assumption that (175 Cal. page 317, 165 P. at page 916): "The authority for county charters is derived from section 7½, article 11, of the state Constitution" and that the charter provision controlled the facts.

[9] Standing against the position that respondents take, it has been held that the Constitution, art. XI, sec. 9, prohibiting increases of salary after election or during the term, permits the Legislature to make any increase applicable to future terms. In the present case the provision in the charter purporting to abridge such right is unconstitutional. Self government by charter must be consistent with the Constitution at the time of the approval and ratification of the charter. County governments should be uniform except where the Legislature sanctions a departure as in the instance of the adoption of charters "in accordance with the provisions of sections 7½ or 7½a of article 11 of the Constitution." *Coulter v. Pool*, 187 Cal. 181, 190, 201 P. 120, 124.

A departure from the general rule may be sanctioned when the constitutional rule, covering the period in question, is abrogated or suspended. In *Busch v. Turner*, *supra*, the applicability of a constitutional provision in effect at the time of the approval or ratification of a charter was not involved, but the case indicates the broad view to be applied to the war period legislation in reference to compensation of county, township and municipal officers. The court said (26 Cal.2d at page —, 161 P.2d at page 458): "A statute purporting, in general terms, to *increase* salaries would ordinarily be construed to include incumbents, and but for the constitutional bar it would do so. When the prohibition of the Constitution ceases to operate, there is no

longer any reason to limit the statute, and its literal meaning may be carried out in full. The reason why the prohibition ceases to operate is entirely immaterial, whether it is because of expiration of the period designated in the Constitution or because of an amendment changing the Constitution. We hold, therefore, that the 1943 act *increasing* the salary of the District Attorney of Lake County was intended to take effect as soon as it lawfully could, including the contingency of a constitutional amendment permitting an operative date earlier than would have been permissible under the Constitution as it existed in 1943." (*Italics added*)

[10] Assuming that the county charter could provide a restriction supplementing the constitutional provision in art. XI, sec. 9, such restriction must be reasonable. The ordinance provides that the compensation of elective officers shall be fixed at least six months prior to the election of such officers. Assuming that an office should be created by the Constitution or by legislative enactment or by the will of the people of a specific area, in the form of a charter provision which would permit the supervisors to fix the compensation for the office, if the supervisors neglected to fix the compensation at least six months prior to an election, the officer would be without compensation. It is a well known fact that township elections are generally held in August, Elections Code, sec. 951, and November, Election Code, sec. 950. Municipal preliminary budgets enumerating salaries are generally fixed within a reasonable but short period before the beginning of a fiscal year in July, sec. 57, Alameda County charter, and the passage of the annual appropriation ordinance in September, sec. 52, Alameda County charter. Under the budget arrangement as provided in the present charter, the six months would necessarily grow into a period of approximately fifteen months or more. In other words, the ordinance would have to be passed fifteen months before the officer should take office. It is possible that a special ordinance fixing compensation might be passed during some other period and the salary taken from a special or general fund. Sec. 55, Alameda County charter. In the present case the compensation was fixed by ordinance on May 28, and the primary election held on August 25th. The general election is in the early part of No-

vember. If the ordinance had been passed in the early part of May in a township of two justices of the peace, if one had been elected at the primary in August he would not be entitled under respondents' theory to the compensation fixed, whereas the other candidate, if he was forced to run not only in the primary but also in the general election, might be entitled to the increased compensation. *Harrison v. Colgan*, 148 Cal. 69, 82 P. 674; California Constitution, art. VI, sec. 17.

[11, 12] The ordinance is not only in conflict with sec. 9 of art. XI of the Constitution, but the charter provision selects an arbitrary date that is unreasonable in its application. Section 9 is in the form of a prohibition. When the language is prohibitory it is self-executing. *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 P. 3. As to the right of legislative bodies to legislate against a constitutional provision, see *People ex rel. Benwell v. Foutz*, Cal., 162 P. 2d 1.

In view of the conclusion reached it is not necessary to consider additional points raised by appellants.

The judgment is reversed.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.



73 Cal.App.2d Supp. 990

DUFFY et al. v. HOWELL et al.
Civ. A. 6120.

Superior Court, Appellate Department,
Los Angeles County, California.
Feb. 19, 1945.

I. Sales ↪396
War ↪4

Where buyers in first cause of action sought rescission of contract to purchase used automobile for fraud and recovery of price, and in second cause of action sought to recover penalty under Emergency Price Control Act, the second cause of action was not one for damages for fraud pleaded in first cause of action, and complaint was not objectionable on ground that buyers were

in effect both rescinding and affirming the contract. Emergency Price Control Act of 1942, § 1 et seq., as amended, 50 U.S.C.A. Appendix, § 901 et seq.

2. Sales ⇐397

War ⇐4

In buyers' action to rescind for fraud and recover purchase price paid for used automobile and to recover penalty for sale in excess of lawful ceiling price, evidence supported finding that sellers knowingly and fraudulently misrepresented mechanical condition of automobile, and that sellers charged buyers a sum \$70 above the lawful ceiling price. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A. Appendix, § 901 et seq.

3. War ⇐4

Where buyer sought to recover penalty of amount three times the sum claimed to have been charged in excess of lawful ceiling price for used automobile, to avoid penalty, burden was on sellers to show that violation of price regulation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Emergency Price Control Act of 1942, § 205(e), as amended by Stabilization Extension Act of 1944, § 108(b), 50 U.S.C.A. Appendix, § 925(e).

4. War ⇐4

In buyers' action to recover penalty of three times amount of overcharge for used automobile, sellers' evidence was insufficient to sustain burden of showing that violation of price regulation was neither willful nor result of failure to take practicable precautions against occurrence of violation. Emergency Price Control Act of 1942, § 205(e), as amended by Stabilization Extension Act of 1944, § 108(b), 50 U.S.C.A. Appendix, § 925(e).

5. War ⇐4

In buyers' action to rescind purchase of used automobile for fraud and to recover penalty of three times amount of charge in excess of lawful ceiling price, findings that sellers knowingly, falsely, fraudulently and untruly misrepresented mechanical condition of automobile, were sufficient to include facts of both willfulness and failure to take precautions against occurrence of violation of price regulation without necessity of so stating in actual words of statute. Emergency Price Control Act of 1942,

§ 205(e), as amended by Stabilization Extension Act of 1944, § 108(b), 50 U.S.C.A. Appendix, § 925(e).

6. War ⇐4

The Emergency Price Control Act discloses a legislative intent to penalize the making of a contract for sale in excess of ceiling price regardless of whether amount paid thereon was in full, or in a sum, by way of partial payment, less than proper ceiling price. Emergency Price Control Act of 1942, §§ 4, 302(a, b), and § 205(e), as amended by Stabilization Extension Act of 1944, § 108(b), 50 U.S.C.A. Appendix, §§ 904, 925(e), 942(a, b).

7. War ⇐4

Where price charged for used automobile was a sum amounting to \$70 over lawful maximum price chargeable, fact that amount actually paid by buyers was less than amount found by court to be proper ceiling price did not preclude buyers from recovering penalty under Emergency Price Control Act. Emergency Price Control Act of 1942, §§ 4, 302(a, b), and § 205(e), as amended by Stabilization Extension Act of 1944, § 108(b), 50 U.S.C.A. Appendix, §§ 904, 925(e), 942(a, b).

8. War ⇐4

Under the Emergency Price Control Act, penalty for making sale at price in excess of lawful ceiling price accrues when overcharge on price of commodity is exacted, not when it is paid. Emergency Price Control Act of 1942, §§ 4, 302(a, b), and § 205(e), as amended by Stabilization Extension Act of 1944, § 108(b), 50 U.S.C.A. Appendix, §§ 904, 925(e), 942(a, b).

Appeal from Municipal Court of City of Los Angeles; Charles P. Johnson, Judge.

Action by Frank E. Duffy and others against J. Howell and others for rescission of contract to purchase a used automobile and to recover penalty of three times sum claimed to have been paid in excess of the lawful ceiling price. From an adverse judgment, defendants appeal.

Affirmed.

A. J. Getz, of Los Angeles, and Stanley L. Avery, of San Francisco, for appellants.

A. Feldman and Daniel M. Potter, both of Los Angeles, for respondents.

KINCAID, Judge.

[1] Plaintiffs' first amended complaint is not of the character claimed for it by defendants, whereby they are, in effect, both rescinding and affirming the contract to purchase and sell the used automobile. Facts are sufficiently alleged in the first cause of action showing grounds of rescission for fraud, the election to rescind and notice of rescission accompanied by a return to defendants of everything of value received by plaintiffs, a demand for the return of the amount paid by plaintiffs on the contract and the refusal of defendants to comply.

The second cause of action of such complaint concerns itself with neither rescission nor affirmation of the contract to purchase and sell the used automobile, but is prosecuted under the provisions of the Emergency Price Control Act of 1942, as amended, 50 U.S.C.A. Appendix, § 901 et seq., to recover the penalty of an amount three times the sum claimed to have been paid in excess of the lawful ceiling price. Such a cause of action is not one for damages for the fraud pleaded in the first cause of action but to recover a sum to which they have a right under the federal statute apart from and regardless of whether they affirm or rescind the contract. That right arose when the unlawful sale was made by defendants.

[2] The evidence sufficiently supports the court's findings to the effect that defendants knowingly, falsely, fraudulently and untruly misrepresented the mechanical condition of the car to plaintiffs and that they charged the plaintiffs a sum of \$70 above the lawful ceiling price then in effect for said automobile, in violation of OPA Regulation 540, as amended.

[3-5] In order to avoid the penalty of an amount three times the amount of the overcharge, as claimed in the second cause of action, the burden of proof is on defendants to show that the violation of the regulation, order or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. Sec. 205(e) of the Emergency Price Control Act of 1942, as amended by Sec. 108(b) of the Stabilization Extension Act of 1944, 50 U.S.C.A. Appendix, § 925(e); *Bowles v. Leventhal*, D.C., 1945, 61 F.Supp. 144, 148. Defendants have failed to sustain such bur-

den of proof, and in addition to such penalty the court properly allowed plaintiffs, on the first cause of action, the sum of \$300 which represented the down payment. The court's findings that defendants knowingly, falsely, fraudulently and untruly misrepresented the mechanical condition of the automobile are sufficient to be deemed to include the facts of both wilfulness (68 C.J. 285 et seq.) and failure to take precautions against the occurrence of the violation without the necessity of so stating in the actual words of the statute.

In view of the fact that the amount actually paid by plaintiffs on the price of the automobile in question is less than the amount found by the trial court to be the proper ceiling price and hence they have not actually paid any overcharge on their purchase thereof, the question arises as to whether they may recover anything under the Emergency Price Control Act.

[6] A study of the amended Act as a whole convinces us of the legislative intent to penalize the making of a contract for a sale in excess of the ceiling price regardless of whether the amount paid thereon was in full, or in a sum, by way of partial payment, less than the proper ceiling price. As evidence of such intent the terms "sell" and "buy" are so defined by Section 942(a), 50 U.S.C.A. Appendix, as to include "sales, * * * and other transfers, and contracts and offers to do any of the foregoing." Section 904, 50 U.S.C.A. Appendix, to which such definitions are also applicable, makes it unlawful to "sell or deliver any commodity" in violation of any price fixing regulation or order, or to offer or attempt to do so. Section 925(e), 50 U.S.C.A. Appendix, under which this action is brought, also applies where any person "selling a commodity" violates such a regulation, order or price schedule. The term "price" is defined by Section 942(b) as meaning "the consideration demanded or received in connection with the sale of a commodity." Section 925(e) provides that "the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price."

The only case of appellate jurisdiction which has come to our attention would seem to indicate a negative answer to this query. It is *El Paso Furniture Co. v. Gardner*, Tex.Civ.App., July 13, 1944, 182 S.W.2d 818. A perusal of such case, however, discloses that the facts therein arose

in 1943 and the Act is there interpreted as it existed prior to the extensive amendments thereto of June 30, 1944. Following such amendments, we consider this case as no longer being of persuasive authority as to this subject.

[7,8] The price demanded was a sum amounting to a \$70 overcharge above the lawful maximum price chargeable, and it is immaterial, so far as the right of recovery under the Act is concerned, wheth-

er the amount actually paid by plaintiffs on the price of the automobile in question is less than the amount found by the trial court to be the proper ceiling price. The penalty accrues when the overcharge on the price of a commodity is exacted, not when it is paid.

The judgment is affirmed, respondents to recover their costs of appeal.

SHAW, P. J., and BISHOP, J., concur.

73 Cal.App.2d 446

WILSON v. FIRST NAT. TRUST & SAVINGS BANK OF SAN DIEGO et al.

FIRST NAT. TRUST & SAVINGS BANK OF SAN DIEGO v. WILSON et al.

Civ. 15075, 15076.

District Court of Appeal, Second District,
Division 2, California.

March 7, 1946.

Rehearing Denied March 15, 1946.

1. Courts ⇨99(1)

The law of the case was that a judgment for beneficiary suing for declaration of rights and duties of the parties with respect to a trust was an interlocutory judgment and not a final judgment, where the Supreme Court, in denying the trustee's application for writ of prohibition, referred to such judgment as an interlocutory judgment and not a final judgment. Code Civ. Proc. § 1060 et seq.

2. Trial ⇨2

Where trust beneficiary suing for declaration of rights with respect to the trust recovered an interlocutory judgment in a trial before one judge, and thereafter the trustee instituted a similar action and the two cases were subsequently consolidated for trial before another judge, the other judge had the duty to retry the action de novo, and after such trial the interlocutory judgment was of no effect. Code Civ.Proc. § 1060 et seq.

3. Trusts ⇨58

Where trust agreement expressly provided that the trustor might at any time and from time to time amend agreement provided that the trustee accepts such amendment, the trustor's amendments accepted by the trustee were valid and binding.

4. Pleading ⇨253

Where a plaintiff amends his complaint in a material matter, the defendant has a right to plead de novo to the amended complaint.

5. Pleading ⇨354(2)

Where amendment to complaint making trustor a party to the trustee's accounting was a material amendment, trial court's ruling denying beneficiary's motion to strike trustee's answer to the amended complaint was correct.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Sallyneil B. Wilson against the First National Trust & Savings Bank of San Diego, and Catherine C. Crose, individually and as administratrix of the estate of Edith W. Crose, deceased, and others, for a declaration of the rights and duties of the parties with respect to a trust, wherein Catherine C. Crose, individually and as administratrix of the estate of Edith W. Crose, deceased, and others filed a cross-complaint against the plaintiff and the first named defendant. Action by the First National Trust & Savings Bank of San Diego against Sallyneil B. Wilson, individually and as executrix of the last will and testament of F. Guthrie Wilson, deceased, and others, to determine the rights of the parties under such trust pursuant to three amendments of the declaration of trust. The two actions were consolidated for the purpose of trial. From the judgments, Sallyneil B. Wilson, individually and in her capacity as executrix, appeals.

Affirmed.

Romeyn B. Sammons, of Los Angeles, for appellant.

William G. Mirow, of San Diego, and Newlin, Holley, Sandmeyer & Coleman, of Los Angeles, for respondent bank.

Sheppard, Mullin & Richter and Cameron W. Cecil, all of Los Angeles, for respondents Crose and Stanley.

McCOMB, Justice.

Appellant Sallyneil B. Wilson brought an action under section 1060 et seq. of the Code of Civil Procedure against respondent, the First National Trust and Savings Bank of San Diego as trustee of a declaration of trust dated August 16, 1929, asking the court to declare the rights and duties of the parties thereto with respect to said trust as amended June 30, 1933.

Appellant recovered an interlocutory judgment in the action which was tried before Judge Gould. Thereafter the First National Trust and Savings Bank of San Diego instituted an action against Sallyneil B. Wilson for the purpose of having the parties' rights determined under the above mentioned trust pursuant to three amendments of the declaration of trust. The two cases were subsequently consolidated for the purpose of trial which trial took place before Judge Charles S. Burnell. In view

of the fact that the judgment entered by Judge Gould was merely *interlocutory*, Judge Burnell tried the first action de novo and entered a judgment in each action in favor of respondents. From these judgments the present appeals are prosecuted.

On or about August 16, 1929, Mrs. Crose created a declaration of trust naming the First National Trust and Savings Bank of San Diego as trustee. The trust instrument contained the following provision for distribution of the income from the corpus of the trust:

"The Trustee shall pay the net income derived by it from the trust estate of Juliet Guthrie Wilson, mother of the Trustor, for and during her lifetime.

"Upon the death of Juliet Guthrie Wilson, the Trustee shall pay the net income derived by it from the trust estate to the issue of Juliet Guthrie Wilson living at each income payment date until the termination of this trust, as hereinafter provided."

Paragraph six of the trust instrument reads as follows: "The Trustor, Edith W. Crose, during her life, upon thirty days' written notice to the Trustee, shall have the right to revoke this trust in whole or in part and to alter or amend the same at any time, and from time to time, by a memorandum in writing delivered to the Trustee, provided such alteration or amendment shall be accepted by the Trustee, and to authorize and direct the Trustee to convey, assign, transfer, pay over or deliver to her order all or any part of the trust estate in such form as it may then exist. Such direction to the Trustee, upon the making of such conveyance, assignment, transfer, payment or delivery shall operate as a revocation of the trust hereby created, as to the property so conveyed, assigned, transferred, paid over or delivered by the trustee."

The trust instrument was amended by Mrs. Crose pursuant to the power contained in paragraph six and a second amendment was made by her on June 30, 1933, which read thus:

"Pursuant to the power and authority reserved in the undersigned in that certain Declaration of Trust, dated August 16, 1929, and known for identification as trust No. 5186, said trust is amended as follows:

"F. Guthrie Wilson, my brother, is about to marry one Sallyneil Braden. In the event said marriage is consummated, and in case said Sallyneil Braden survives F.

Guthrie Wilson, then in that event, I direct the trustee shall pay to her for so long as she may live, all of the income to which the said F. Guthrie Wilson would have been entitled had he survived.

"In every other respect said trust is hereby approved, ratified and confirmed.

"Edith W. Crose."

At the time of the second amendment Sallyneil Braden (now Mrs. F. Guthrie Wilson) was contemplating marriage to Mr. Wilson. This she did on July 29, 1933. Thereafter Mr. Wilson died and on April 22, 1935, pursuant to the power contained in paragraph six Mrs. Crose again amended the trust so as to reduce Mrs. Wilson's income from one half to one third. On October 20, 1943, Mrs. Crose again amended the trust so as to deprive Mrs. Wilson of any income from the trust. This last amendment read as follows:

"Amendment No. IV

"To the First National Trust and Savings Bank of San Diego as Trustee under Trust No. 5186:

"Pursuant to the power and authority reserved to the undersigned in Declaration of Trust dated August 16, 1929, and known for identification as Trust No. 5186, those certain amendments thereto known as Amendment No. II dated June 30, 1933, and Amendment No. III dated April 22, 1935, are and each of them is hereby revoked and cancelled.

"It is my intention by this amendment, and I do hereby specifically exclude Sallyneil Braden Wilson, the widow of my brother, F. Guthrie Wilson, from any participation whatsoever in either the income or the corpus of the trust estate, and you are hereby directed henceforth to make no further payments whatsoever to the said Sallyneil Braden Wilson.

"In every other respect said trust and Amendment No. I, dated October 28, 1929, are hereby approved, ratified and confirmed.

"Dated: This 20th day of October, 1943.

"Edith W. Crose."

There are three questions presented for our determination which will be stated and answered seriatim:

First: *Was the judgment of Judge Gould an interlocutory judgment?*

[1,2] This question must be answered in the affirmative. In the first action instituted, that is, the action filed by appellant against the First National Trust and Sav-

ings Bank of San Diego in which Judge Gould subsequently entered an interlocutory judgment, the defendant First National Trust and Savings Bank of San Diego sought a writ of prohibition from the Supreme Court which the Supreme Court denied, referring to Judge Gould's judgment as an *interlocutory judgment* and not a final judgment. (First Nat., etc., Bank v. Superior Court, 19 Cal.2d 409, 413, 414 et seq., 121 P.2d 729.) Therefore it has become the law of the case that such judgment was an interlocutory judgment, and after Judge Burnell retried the action de novo, as it was his duty to do in view of the decision in *Hughes v. DeMund*, 96 Cal. App. 365, 368, 274 P. 405, Judge Gould's interlocutory judgment became of no force or effect. Hence there is no merit in appellant's contention that the interlocutory judgment of Judge Gould is *res judicata* of facts subsequently found by Judge Burnell.

Second: *Were the amendments to the trust valid and binding?*

[3] This question must be answered in the affirmative. Paragraph Six of the trust agreement expressly provided that the trustor might "at any time and from time to time" amend the trust agreement provided that the trustee accept such amendment. In the instant case the trustee accepted each of the amendments of the trustor. Therefore the trial court properly held that appellant was entitled to receive one third of the net income from the date of her husband's death, December 14, 1940, until October 21, 1943, at which time an amendment was made to the trust providing that appellant should receive no further income from the trust estate.

Third: *Did the trial court err in refusing to strike the answer of defendant First National Trust and Savings Bank of San Diego to plaintiff's complaint and supplemental complaint?*

[4,5] This question must be answered in the negative. Judge Gould on March 26, 1943 ordered a supplemental complaint to be filed by which Edith W. Crose, not a party to the original complaint, was made a party to the trustee's accounting. To the supplemental complaint and the complaint the defendant First National Trust and Savings Bank of San Diego filed an answer which appellant asked the trial court to strike from the file. This motion was denied. The ruling was not erroneous

since the law is established that when a plaintiff amends his complaint in a material matter defendant has a right to plead de novo to the amended complaint. (*Stack v. Welder*, 3 Cal.2d 71, 75 et seq., 43 P.2d 270.) Clearly the amendment making Mrs. Crose a party was a material amendment and the trial court's ruling was correct.

For the foregoing reasons the judgment and orders are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.



73 Cal.App.2d 427

DALLEY v. WILLIAMS.

Civ. 3183.

District Court of Appeal, Fourth District,
California.

March 6, 1946.

Rehearing Denied March 28, 1946.

Hearing Denied April 29, 1946.

1. Automobiles ⇨227(3)

The doctrine of "last clear chance" presupposes that both parties were negligent, that there was an opportunity, a clear chance, a situation established by substantial evidence, that the defendant saw or knew of plaintiff's perilous position and could have avoided the collision, but, having such opportunity, did not do so.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

2. Automobiles ⇨246(58)

Whether instruction on last clear chance was properly given depended on whether there was substantial evidence upon which the jury could have based a finding that defendant motorist saw or knew of plaintiff motorcyclist's perilous position immediately before accident in time to have a clear chance to have avoided it by exercising ordinary care.

3. Automobiles ⇨246(58)

In action for injuries sustained by police officer on motorcycle in collision with automobile at street intersection, whether instruction on last clear chance was properly given could not be based on automobile

occupant's testimony that she could see through trees and observe motorcyclist approaching about one half block from intersection, on theory that jury could conclude that motorist looked at the same time and saw the same thing.

4. Automobiles ⚡227(5)

The last clear chance doctrine was not applicable to motorist involved in collision at street intersection with motorcycle ridden by police officer until officer arrived at such a point as to be in peril from which he could no longer escape by ordinary care.

5. Negligence ⚡83

"Place of safety" ordinarily includes the position of plaintiff while he is merely approaching the place of danger, and, so long as he is only approaching but is not actually in a position of danger, plaintiff cannot invoke the doctrine of last clear chance.

See Words and Phrases, Permanent Edition, for all other definitions of "Place of Safety".

6. Negligence ⚡83

Exposure to injury without added element of inability to extricate by exercising ordinary care does not constitute a "position of danger" within the last clear chance doctrine.

See Words and Phrases, Permanent Edition, for all other definitions of "Position of Danger".

7. Automobiles ⚡227(1)

In action for injuries sustained by police officer on motorcycle in collision with automobile at street intersection, motorist could not be held liable under the last clear chance doctrine, upon the theory that he would have discovered officer's peril but for remissness on his part.

8. Automobiles ⚡246(58)

In action for injuries sustained by police officer on motorcycle in collision with automobile at street intersection, instruction on last clear chance doctrine was improper under evidence which showed that neither party had a clear unobstructed view as he approached intersection and failed to show that motorist could have stopped vehicle in distance traversed between time he first saw officer and time of impact.

9. Appeal and error ⚡1066

Where jury might well have found under the evidence that police officer on mo-

torcycle involved in collision at street intersection with automobile was guilty of contributory negligence contributing proximately to his own injury, giving of instruction on the last clear chance doctrine, without substantial evidence to support it, was prejudicial error.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by James A. Dalley against Elmer Charles Williams for injuries sustained in collision at street intersection between motorcycle operated by plaintiff and an automobile operated by defendant, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Reversed.

Harvey, Johnston, Baker & Palmer, of Bakersfield, for appellant.

West & Vizzard, of Bakersfield, for respondent.

GRIFFIN, Justice.

Defendant, cross-complainant and appellant Williams appeals from a judgment in favor of plaintiff, cross-defendant and respondent Dalley, after the jury awarded damages in the sum of \$6381.72.

The injury to plaintiff was the result of a collision between a motorcycle operated by plaintiff, a police officer, and a Dodge sedan operated by defendant, which accident occurred at the intersection of Sacramento and Pacific Streets in Bakersfield at about 7:30 a. m. on October 10, 1943. Sacramento Street is approximately 54 feet 6 inches wide and runs north and south. Pacific Street is 32 feet 6 inches wide and runs east and west. According to Williams' testimony, he was driving his car west on Pacific Street at a speed somewhere between 15 and 20 miles per hour and brought his car to an almost complete stop within a distance of 18 feet from the point of collision. This testimony is corroborated by the testimony of his wife and two other passengers in his car.

Plaintiff testified that Williams was driving his car at a speed of approximately 35 miles per hour and that he was operating his motorcycle south on Sacramento Street as "Traffic Safety Officer for Schools"; that he was in pursuit of a law violator who was speeding; that he accelerated his speed to overtake the speeder; that he was

traveling in a residential area across a blind intersection at 35 miles per hour; that his view was obstructed so that on approaching the intersection where the collision occurred he could not see 100 feet down Pacific Street until he was 35 feet from the corner; that the Dodge was about 10 or 15 feet from the intersection when he first saw it traveling at about 35 miles per hour; that he did not sound his siren nor turn on his red light; that after he saw Williams he tried to slow down and turn out ahead of him west on Pacific Street; that Williams put on his brakes and tried to stop, and that he did not swerve his car prior to the impact; that the right front part of the Dodge struck the motorcycle on its left side about the center; that he was knocked in the air and finally stopped about 50 feet from the impact; that the motorcycle ended up at the southwest corner of the intersection; that he was in the hospital about three months from a compound fracture of the left leg and concussion of the brain, and lost a little over one year's time from his employment.

The Dodge car came to a stop near the southwest corner of the intersection and was damaged to the extent of \$264.26. This was the basis of the cross-complaint.

Mrs. Williams testified that she looked to her right when her body was about 10 feet from the intersection and saw plaintiff about one-half block away from the intersection approaching at about 40 to 45 miles per hour; that she said nothing to her husband about what she saw then; that when plaintiff was about 40 feet from the intersection she could see that the motorcycle was going to hit them and that at that time she called Mr. Williams' attention to it; that the crash was almost simultaneous to her remark and that he applied the brakes and stopped the car; that Mrs. Dalley arrived on the scene and asked Mr. Dalley in her presence, what happened, and that he replied: "I wasn't looking." This statement was denied. There is evidence that the driver of the Dodge was approaching the intersection on the south half of Pacific Street just south of the hypothetical center line.

Defendant Williams testified that about 15 feet from the intersection he looked to his right; that from that point he could see approximately one-half block north on Sacramento Street; that there were shrubs and trees in the yard on the northeast corner of the intersection and that one would

have to be 15 to 20 feet from the intersection before he could see "into Sacramento Street"; that one could see north on Sacramento Street only through gaps in the trees; that Mr. Dalley could have been in that one-half block and still not be seen because of the trees and shrubs; that he did not see plaintiff; that after he looked to his right he then turned and looked to his left; that he saw plaintiff only "a second" before the accident happened, when his wife spoke up and said: "Look out"; that he was then about 18 feet in the intersection, near the center thereof, and that he then, for the first time, saw plaintiff about 35 feet north of Pacific Street traveling at about 35 miles per hour; that when he saw plaintiff he (defendant) was traveling about 15 miles per hour; that he applied his brakes and that his car traveled about 18 feet after the collision. He further stated that he had just gone around another car headed in the same direction and that was the reason he was traveling near the center of the street.

A witness, riding with defendant, testified that he did not see the officer until he was almost upon them, "possibly ten feet," and that they hit "almost simultaneously."

This is a resume of the evidence bearing on the main question here presented which is that the trial court committed prejudicial error in the giving of an instruction based on the doctrine of last clear chance.

It is argued by defendant that from the evidence produced certain conditions precedent to the application of the doctrine of last clear chance were lacking, and he cites several authorities to the effect that it is reversible error for the court to instruct the jury on the doctrine of last clear chance under such circumstances.

The rule in *Wallis v. Southern Pacific Company*, 184 Cal. 662, 195 P. 408, 15 A. L.R. 117, is cited to the effect that in order to make the defendant liable, notwithstanding the contributory negligence of the plaintiff, the defendant must not only be aware of the danger in time to avert it, but must also know, or have reason to believe, that the plaintiff is oblivious of the danger and is in a position where he cannot extricate himself from it. Negligence and the application of the doctrine of last clear chance are ordinarily questions for the determination of the jury. Where, however, there is no substantial evidence

in the record to support a judgment which is founded thereon, it cannot be upheld, and charging the jury upon that doctrine when there is no substantial evidence to support the theory is reversible error. *Giovannoni v. Union Ice Co.*, 108 Cal.App. 190, 291 P. 461.

In *Lasch v. Edgar*, 46 Cal.App.2d 726, 116 P.2d 949; *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 P. 651; *Johnson v. Sacramento Northern Railway*, 54 Cal.App. 2d 528, 129 P.2d 503; and *Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36, it was held that in order to invoke the last clear chance doctrine there must be evidence that the defendant saw or had knowledge of the fact that the plaintiff was in a situation of danger from which he could not escape by the exercise of ordinary care, and that the defendant was aware of his dangerous situation under such circumstances; that he realized plaintiff's inability to escape therefrom and that he *then* had a *clear chance* to avoid injuring him by the exercise of ordinary care and failed to do so. The doctrine presupposes time for effective action and is not applicable where the emergency is so sudden that there is no time to avoid the accident.

As to actual knowledge, the rule was stated in *Gillette v. City and County of San Francisco*, 58 Cal.App.2d 434, 136 P.2d 611, that it is a question of fact for the jury to determine from all the circumstances presented by the evidence whether the defendant actually knew of the plaintiff's peril, and that notwithstanding there may be a total absence of any positive testimony that the defendant actually knew of plaintiff's danger, and even though the defendant definitely denies seeing the plaintiff at all, the doctrine of the last clear chance may be invoked and applied where the facts and circumstances are such as would justify the jury in finding that despite the defendant's denial of knowledge or the absence of direct testimony on the subject, he was actually aware of plaintiff's danger in time to avert the accident; in other words, that he "must have known" of plaintiff's danger.

This holding was followed in *Paolini v. City and County of San Francisco*, Cal. App., 164 P.2d 916. The authorities cited to us here are, in the main, referred to and fully elaborated upon in that decision and in *Girdner v. Union Oil Company*, 216 Cal. 197, 13 P.2d 915. The only question here presented is whether or not there

is substantial evidence, under the circumstances of this case, to bring it within the rule stated.

The cases invariably predicate the last clear chance doctrine upon the proposition that the defendant actually knew that the plaintiff was in a position of danger.

Plaintiff argues that the evidence reveals that defendant Williams did have actual knowledge of the plaintiff's perilous position since defendant was traveling at a low rate of speed in the intersection and actually saw plaintiff in a perilous position of danger about 20 feet from him; that defendant was presumed to see what he was looking at and that after he looked at plaintiff he could see that he was turning his motorcycle to the west in order to avoid the accident, and that plaintiff could not escape from his perilous situation; that it may be reasonably inferred that if defendant saw plaintiff in a position of peril defendant had a clear opportunity to avoid the accident by swerving his car to the right side of the highway to avoid the accident; that the defendant failed to so exercise ordinary care and that therefore his negligent conduct was the proximate cause of the accident.

It is further argued, in this connection, that the jury might well conclude that Williams saw Dalley proceeding at a rapid rate of speed in the middle of the block and that plaintiff was unaware of the danger impending and was unable to escape therefrom through ordinary care; that in this connection defendant had ample opportunity to observe that plaintiff was a police officer and that another motor vehicle, which the officer was pursuing, was proceeding at an excessive rate of speed.

[1] The doctrine of last clear chance presupposes that both parties were guilty of negligence; that there must be an opportunity, a *clear chance*, a situation established by substantial evidence, that the defendant saw or knew of plaintiff's perilous position and could have avoided the collision but, having such opportunity, did not do so. *Palmer v. Tschudy*, *supra*; *Erwin v. Morris*, 10 Cal.App.2d 168, 51 P.2d 149.

[2] The question involved in this case is whether or not there is substantial evidence in the record upon which the jury could have based a finding that defendant Williams saw or knew of plaintiff's perilous position immediately before the accident in time to have a clear chance to have avoided

it by exercising ordinary care. We are convinced that the facts in the instant case are so different from the facts in the cases relied upon by plaintiff that those cases cannot be here considered as a complete guide.

In *Paolini v. City and County of San Francisco*, supra, upon which plaintiff so strongly relies, the operator of the street car admitted seeing the truck, on the running board of which plaintiff was standing with his back to the street car when the street car was about 200 feet from the point of impact, but denied seeing plaintiff until the street car was almost upon him. Plaintiff's position on the running board of the truck on which he was standing was in *clear view* of the motorman. Under these facts it was held that the jury might infer that the motorman saw plaintiff and knew that he was not aware of his peril.

In *Handley v. Lombardi*, 122 Cal.App. 22, 9 P.2d 867, the rule was held to be applicable. That was a case where a truck was proceeding slowly across an intersection. The defendant was seated at the wheel of his automobile which was approaching from the right of the truck and was driving at a high rate of speed and looking straight ahead. He ran into the right rear wheel of the truck. *There was no obstruction to his view.* The driver of the truck was helpless to avoid the collision, and during a period of time immediately preceding the accident it was possible for the defendant to have avoided it either by applying his brakes or by swerving to his left behind the truck.

[3] Here, it is apparent that neither party had a clear, unobstructed view as they approached the intersection, due to shrubbery and intermittent trees growing at the northeast corner thereof. Photographs in evidence corroborate this observation. Plaintiff himself testified that it was a "blind intersection" and that his view was obstructed so he could not see 100 feet down Pacific Street when he was 35 feet from the corner. The same condition must have confronted defendant. Defendant testified that he did not see plaintiff nor have any knowledge of his whereabouts until he (defendant) was 18 feet in the intersection when Mrs. Williams called his attention to the situation, and that at that time plaintiff was 35 feet north of Pacific Street traveling at 35 miles an hour. It is argued that by reason of the fact that Mrs. Williams testified that she could see

through the trees and observe plaintiff approaching about one-half block from the intersection traveling at 40 to 45 miles an hour, that the jury therefore had the right to conclude that Mr. Williams looked at the same time and saw the same thing. We do not believe this to be the true test. The jury must not only conclude, from substantial evidence, that defendant did see plaintiff, but must, in addition thereto, conclude that plaintiff was negligent, and as a result thereof was in a position of danger from which he could not escape by the exercise of ordinary care. Clearly, Mrs. Williams did not realize all of these conditions when she first saw plaintiff. It is inescapable that it was not until she screamed that she so realized these elements essential to the application of the rule. It is logical to believe that it was at that time that defendant first saw plaintiff and learned of the true situation with which he was presented.

[4-6] The last clear chance doctrine was not applicable until plaintiff arrived at such a point as to be in peril, and this was the point where he could no longer escape injury by exercising ordinary care. *Young v. Southern Pacific Co.*, 182 Cal. 369, 380, 190 P. 36; *Haber v. Pacific Electric R. Co.*, 78 Cal.App. 617, 633, 248 P. 741. In *Cady v. Sanford*, 57 Cal.App. 218, 224, 207 P. 45, 48, it was said:

"At some appreciable time prior to the crash plaintiff was in a position of peril. He was in a position of peril at the very instant that he arrived at that point where he no longer could avoid an accident by exercising ordinary care. Then, and not until then, was the last clear chance doctrine applicable."

It has been likewise held that the term "place of safety" ordinarily includes the position of the plaintiff while he is merely *approaching* the place of danger, and so long as he is only *approaching* but is not actually *in* a position of danger, the plaintiff cannot invoke the doctrine. *Green v. Los Angeles, etc., R. Co.*, 143 Cal. 31, 76 P. 719, 101 Am.St.Rep. 68; *McHugh v. Market St. R. Co.*, 29 Cal.App.2d 737, 85 P.2d 467; *Dull v. Atchison, T. & S. F. R. Co.*, 27 Cal.App.2d 473, 81 P.2d 158. While a person may be in danger or peril, i. e., while he may be simply exposed to injury, that is not enough to constitute a position of danger within the meaning of the last clear chance doctrine, and in order to com-

ply with the requirements of this element of the doctrine, his position of danger must not only be an exposure to injury but it must be one from which he cannot extricate himself by exercising ordinary care. *Sadler v. Benson*, 109 Cal.App. 405, 293 P. 126; *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 43, 297 P. 884; *Cady v. Sanford*, 57 Cal.App. 218, 207 P. 45. The fact that a defendant actually sees the plaintiff some considerable time before the accident, or at a time when either or both of them are a considerable distance away from the place of the accident, does not necessarily make the doctrine applicable. *Thompson v. Los Angeles, etc., Ry. Co.*, 165 Cal. 748, 134 P. 709; *Smith v. Aggola*, 27 Cal.App. 2d 750, 81 P.2d 997. It has been held, in certain class of cases, that if a defendant, while still a considerable distance away from the accident, sees the plaintiff approaching the place of danger, he has a right to assume, until the circumstances apprise him to the contrary, that the plaintiff will stop before reaching the place of danger. *Green v. Los Angeles, etc., R. Co.*, supra; *Thompson v. Los Angeles, etc., R. Co.*, supra, 165 Cal. at page 755, 134 P. 709; *Ellerman v. Pacific Elec. R. Co.*, 7 Cal.App.2d 385, 388, 47 P.2d 521; *McHugh v. Market St. R. Co.*, supra, 29 Cal.App.2d at page 743, 85 P.2d 467.

[7] There is no evidence that defendant could have stopped his vehicle in the distance traversed between the time he first saw the plaintiff and the time of the impact. Swerving to the left or right would not have avoided the collision. Plaintiff's motorcycle struck the Dodge on the right front fender. Both parties were continuously moving toward the point of impact. Defendant cannot be held liable, under the last clear chance rule, upon the theory that he would have discovered the peril but for remissness on his part. *New York Lub. Oil Co. v. United Railroads*, 191 Cal. 96, 215 P. 72, quoted in *Mangler v. Pacific Electric Ry. Co.*, Cal.App., 163 P.2d 774.

In *Bagwill v. Pacific Electric R. Co.*, 90 Cal.App. 114, at page 121, 265 P. 517, at page 519, it is said:

"Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. There seems still to be some misconception of this doctrine of last clear chance. It was not devised as

a last resort to fasten liability on defendants. Like the body of the law of negligence to which the doctrine is appended, the test remains as that of ordinary care under all of the circumstances. The law in many of its workings indicates great charity and solicitude for individual rights. It says to a negligent plaintiff that in spite of his lack of caution he will be protected against wanton, willful, or avoidable harm. But, on the other hand, it penalizes no innocent person. We are not to tear down the facts of a case and rebuild the same so that, by a trimming-down and tight-fitting operation, something can be constructed upon which may be fastened the claim of last clear chance. The words mean exactly as they indicate, namely, last clear chance, not possible chance. The Supreme Court has not left us to speculate on the application of the doctrine."

[8] We must therefore conclude that there was no substantial evidence which would justify the trial court in instructing the jury on the last clear chance doctrine.

The giving of an instruction submitting an issue on the last clear chance doctrine, where there is not sufficient evidence to justify the submission, is reversible error. *Wallis v. Southern Pacific Company*, supra; *Johnson v. Southwestern Engineering Co.*, 41 Cal.App.2d 623, 107 P.2d 417; *Erwin v. Morris*, supra; *Giovannoni v. Union Ice Co.*, supra.

[9] Plaintiff next argues that the giving of the instruction, if erroneous, was only "technical in nature," not prejudicial, and that the sole proximate cause of the accident was the negligence of defendant. With this we cannot agree. The instruction may have governed the jury in arriving at a verdict for the plaintiff, and, in the absence of evidence to support it, may have been prejudicial. The jury, under the evidence, might well have found the plaintiff guilty of contributory negligence contributing proximately to his own injury. *Wallis v. Southern Pacific Company*, supra.

Judgment reversed.

BARNARD, P. J., and MARKS, J., concur.

Hearing denied; CARTER, J., dissenting.

CHILDERS v. CHILDERS.*

Civ. 15214.

District Court of Appeal, Second District,
Division 2, California.

March 7, 1946.

Rehearing Granted April 1, 1946.

See 168 P.2d 218.

1. Appeal and error ⇨846(5)

Where parties waive fact findings and conclusions of law by trial court, appellate court will presume that every fact essential to support of judgment appealed from was proved and found by trial court.

2. Divorce ⇨184(4)

Where parties to divorce suit waive fact findings and conclusions of law, defendant, in view of presumption from such waiver, may not urge before District Court of Appeal that evidence is insufficient to support judgment for plaintiff.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action for divorce by Wilma Flora Childers against John E. Childers, who filed a cross-complaint for divorce. Judgment for plaintiff, and defendant appeals.

Affirmed.

Courtney A. Teel, of Los Angeles, for defendant-appellant.

Harvey W. Guthrie, of Los Angeles, for plaintiff-respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action for a divorce defendant appeals.

The essential facts are these:

After trial of the issues raised by plaintiff's complaint for divorce on the ground of cruelty, and the issues raised by defendant's cross-complaint for divorce on the same ground, findings of fact and conclusions of law were waived by the respective parties and an interlocutory decree of divorce awarded to plaintiff and denied to defendant. In addition to certain community property and attorney's fees, plaintiff was awarded \$100 per month for the support of herself and minor child.

Defendant urges reversal of the judgment on this proposition:

166 P.2d—38½

* Subsequent opinion 168 P.2d 218.

That there is not any substantial evidence to sustain the implied findings upon which the judgment is predicated.

[1] This proposition is untenable for the law is now established in California, in spite of language in certain earlier decisions to the contrary, that where findings of fact and conclusions of law are waived by the parties, on an appeal from the judgment an appellate court will presume that every fact essential to the support of the judgment was (1) proved and (2) found by the court.

In *Gordon v. Mount*, 1932, 125 Cal.App. 701, at page 708, 13 P.2d 932, at page 935, Mr. Justice Plummer speaking for the District Court of Appeal says:

"Where findings are waived, it is presumed that every fact essential to the support of the judgment was proved and found by the court. *Gray v. Gray*, 185 Cal. 598, 197 P. 945; 24 Cal.Jur., p. 956, and the cases there cited.

"In support of the judgment, there being no findings in this case, we must hold that the court, notwithstanding the record shows want of probable cause and lack of reliance upon advice of counsel, that the testimony introduced in the cause did not justify the charge of malice, and the existence of malice being a question of fact, we are bound by the judgment of the trial court."

In *Bekins Van Lines, Inc., v. Johnson*, 21 Cal.2d 135, 130 P.2d 421, 422, *Gordon v. Mount*, supra, is cited with approval, the Supreme Court saying in 21 Cal.2d, at page 136 et seq., 130 P.2d at page 422: "After the trial judge had ordered the judgment, findings of fact and conclusions of law were waived by written stipulation of counsel. On this state of the record every intendment is in favor of the judgment, and it is presumed that every fact essential to the support of the judgment was *proved* and *found* by the court. *Gray v. Gray*, 185 Cal. 598, 197 P. 945; *Miller v. Pacific Freight Lines*, 40 Cal.App.2d 451, 104 P.2d 1069; *Gordon v. Mount*, 125 Cal. App. 701, 13 P.2d 932; 24 Cal.Jur. p. 956, and cases there cited. The applicable rule requires *the assumption that the proof showed* and that the *court found* and concluded that the services out of which the disputed tax arose were so much a part of the business of the plaintiff, were so customarily rendered in that connection, and

so directly contributed to the transportation which was the plaintiff's principal business, that money derived therefrom must be regarded as part of the 'gross receipts from operations of said operator' and taxable as such." (*Italics added.*)

[2] Applying the foregoing rule to the facts in the instant case it is evident that since the parties waived findings of fact and conclusions of law, defendant may not urge before this court that the evidence is insufficient to support the judgment.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.



LOS ANGELES RY. CORPORATION et al.
v. DEPARTMENT OF EMPLOYMENT,
CALIFORNIA EMPLOYMENT COMMISSION et al. *

Civ. 14879.

District Court of Appeal, Second Appellate
District, Division 3, California.

Feb. 1, 1946.

Rehearing Granted March 1, 1946.

1. Internal revenue ☞1129

Motor coach system operated in and around Los Angeles was engaged in a distinct local operation as a separate entity, and not in connection with the transportation of passengers or property by railroad within federal railway social security statutes, notwithstanding that system was operated jointly by a railway company which was subject to the various federal statutes and another. Carriers Taxing Act of 1937, §§ 1-13, 45 U.S.C.A. §§ 261-273; 26 U.S.C.A. Int.Rev.Code, § 1500 et seq.; Railroad Unemployment Insurance Act of 1939, §§ 1-17, 45 U.S.C.A. §§ 351-367; Federal Unemployment Tax Act, 26 U.S.C.A. Int.Rev. Code, § 1600 et seq.

2. Courts ☞97(5)

Ruling of various federal administrative agencies regarding liability of employers under federal railway social security

* Subsequent opinion 183 P.2d 366.

statutes carried no weight in view of contrary federal court decision.

3. Internal revenue ☞1129 Taxation ☞59

Railway company which was subject to the various federal railway social security statutes was not an "employer" of individuals working for motor coach system operated jointly by railway and another in and around Los Angeles so as to be liable for contributions for motor coach employees under the Railroad Unemployment Insurance Act, but motor coach system itself as a separate entity was the employer and payments were properly made under the California Unemployment Insurance Act on basis of salaries paid to its employees. Railroad Unemployment Insurance Act of 1939, §§ 1-17, 45 U.S.C.A. §§ 351-367; St.1937, p. 2053, § 8.5; St.1939, p. 1408, § 7.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer".

4. Estoppel ☞53, 55

Equitable estoppel may not be invoked to defeat a just claim where each of the parties has acted in good faith and in the exercise of his own independent judgment.

5. Estoppel ☞62(2)

Failure of the California Department of Employment to assert rights of the State under the California Unemployment Insurance Act in opposition to those of the federal government under various federal railway social security statutes during years that taxpayers in reliance on their own judgments and affirmative action of federal agencies, acted under a mistaken view of the law, did not create an equitable estoppel against collection of contributions for the years of inactivity. St.1937, p. 2053, § 8.5; St.1939, p. 1408, § 7.5.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Consolidated actions by the Los Angeles Railway Corporation and another against the Department of Employment, California Employment Commission, and Unemployment Reserve Commission of California and others to recover contributions paid under protest to the California Department of Employment. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Frank Karr, C. W. Cornell, and E. L. H. Bissinger, all of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for respondents.

SHINN, Justice.

This is an appeal by plaintiffs Los Angeles Railway Corporation and Pacific Electric Railway Company from a judgment in favor of defendants in four consolidated actions brought to recover sums paid under protest to California Department of Employment. The amounts involved represent employer's and employees' contributions based upon wages paid to the employees of Los Angeles Motor Coach Lines, formerly Los Angeles Motor Coach Company, which is a system of motor coaches operated jointly by plaintiffs in and around Los Angeles. The service was inaugurated in 1923 and was set up under agreement between the plaintiffs, by the terms of which each of them was to furnish one-half of the equipment and capital necessary for the operation, and was to share equally in the ownership, profits and losses thereof.

The controversy has arisen in the following manner: Prior to July 1, 1939, plaintiffs made reports and payments as required by the California Unemployment Insurance Act of 1935, Stats.1935, chap. 352, p. 1226, to defendant Commission, each plaintiff reporting and paying upon one-half of the wages of the employees of the motor coach company. Pacific Electric Railway Company is a railroad corporation subject to Part I of the Interstate Commerce Act, 49 U.S.C.A. § 1 et seq., and is an "employer" within the definition of that term as contained in, and subject to the provisions of, the Railroad Retirement Act of 1937, Chapter 382, 50 Statutes 307, 45 U.S.C.A. §§ 228a-228s, the Carriers Taxing Act of 1937, Chapter 405, 50 Statutes 435, 45 U.S.C.A. §§ 261-273, now codified as Subchapter B, Chapter 9 of the Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code, § 1500 et seq., and Railroad Unemployment Insurance Act of 1939, Chapter 680, 52 Statutes 1094, 45 U.S.C.A. §§ 351-367. These acts set up a system of social security for the railroad industry. Los Angeles Railway Corporation is a street railway company and is not an "employer" as defined in the three mentioned Federal Acts but is subject to the

provisions of Subchapter C of Chapter 9 of the Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code, § 1600 et seq., Social Security Act and to the provisions of the California Unemployment Insurance Act. On July 1, 1939, the Railroad Unemployment Insurance Act went into effect and thereafter Pacific Electric Railway Company made its reports and contributions under that Act and ceased to make them under the California Act. The Railroad Unemployment Insurance Act relieved it of a duty to contribute further under the State Act or under Subchapter C of Chapter 9 of the Internal Revenue Code, designated Federal Unemployment Tax Act, formerly Title IX of the Federal Social Security Act of 1935, 42 U.S.C.A. §§ 1101-1110. In 1939, in order to conform to the Federal Act, section 7.5 was added to the California Unemployment Insurance Act, Stats.1939, Chap. 169, p. 1408, reading as follows: "The term employment does not include service performed after June 30, 1939, with respect to which unemployment compensation is payable under the Railroad Unemployment Insurance Act, and service with respect to which unemployment benefits are payable under an unemployment compensation system for maritime employees established by an act of Congress." Los Angeles Railway Corporation contributes under the Federal Social Security Act and made contributions to the California Unemployment Commission until March 31, 1942, when it ceased to make contributions on its share of wages paid to employees of the coach company. Defendant Commission did nothing about plaintiffs' discontinuance of contributions under the State Act until June, 1942. From that time on, both State and Federal agencies have laid claim to contributions based upon wages paid by both plaintiffs to employees of the motor coach company. They disagree as to the status of those employees, the Federal agencies having claimed from the beginning that they are the employees of both plaintiffs and that the motor coach system is engaged in transportation by railroad, and defendants insisting that their real employer is the Los Angeles Motor Coach Lines, an entity separate from plaintiffs. It was ruled by the Commissioner of Internal Revenue that Pacific Electric Railway Company's one-half of the wages was subject to the Carriers Taxing Act of 1937 and the Railroad Unemployment Insurance Act of 1939, and

not subject to the taxes imposed by Title VIII of the Social Security Act, 42 U.S.C.A. §§ 1001-1011, now codified as Subchapter A, Chapter 9 of the Internal Revenue Code and designated Federal Insurance Contributions Act, 26 U.S.C.A. Int. Rev.Code, § 1400 et seq. The significance of this ruling will be discussed later. Los Angeles Railway Corporation's half of the wages of the employees of the motor coach company was ruled to be subject to taxes under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act. The basis of the rulings was that the motor coach employees were employees of Pacific Electric and within the Federal system, and the effect of the rulings was to take both plaintiffs from under the operation of the California Unemployment Insurance Act with respect to compensation paid to employees of the motor coach company. Plaintiffs accepted the several rulings of the Federal agencies and complied therewith. In June, 1942, defendant Commission first made demands for contributions under the State Act dating from July 1, 1939, as to the Pacific Electric Railway's share, and from March 31, 1942, as to the share of Los Angeles Railway Corporation computed on compensation paid to employees of the Coach Company. Similar demands were made covering later periods. The amounts demanded were paid, with penalties and interest, and the present suits were instituted for the recovery thereof. The question for decision requires a consideration of the nature of the operation of the bus service. If it is a "service in connection with the transportation of passengers or property by railroad," its employees are to be considered employees of Pacific Electric and subject to the Federal Acts, and not the State Act. In the Railroad Unemployment Insurance Act, and also in the Carriers Taxing Act, the term "employer" is defined as follows: "The term 'employer' means any carrier (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, * * *." Each Act provides: "The term

'company' includes corporations, associations, and joint-stock companies."

In the trial of the present actions the principal facts were stipulated and the trial court concluded therefrom that plaintiffs are not employers of the employees of the motor coach company within the definitions of the Federal Acts, but that the motor coach company is a separate entity, is the employer of those who work for it, and that the amounts in question were properly paid to the State Commission. This holding is supported by the decisions of the Federal courts. Similar rulings have been made in other cases in the Superior Court of Los Angeles County and by the administrators of the State Act.

[1,2] Since the present appeal was taken, the District Court of the United States, Southern District of California, Honorable Paul J. McCormick, Judge, rendered a decision in consolidated actions brought by these same plaintiffs against the United States for the recovery of taxes paid under the Carriers Taxing Act and for a determination as to whether payments theretofore made by Pacific Electric Railway Company representing its half of employer's and wage earners' contributions upon compensation paid to the employees of Los Angeles Motor Coach Lines should have been made under the Social Security Act and not the Carriers Taxing Act. *Pacific Electric Railway Co. v. United States*, 64 F.Supp. 796. Judge McCormick delivered an oral opinion evidencing a studious and comprehensive analysis of the authorities, and he found that the Pacific Electric is not an employer within the Carriers Taxing Act, insofar as the operation of the Los Angeles Motor Coach Lines is concerned, and that the latter is a "company" and the employer of those who work for it. Plaintiffs had emphasized the fact, which they stress here, that in their contract they stipulated that their operation of the motor coach lines was not a partnership, but a mere agency. In the course of his opinion Judge McCormick stated: "In this case to find that the Pacific Electric Railway and the Los Angeles Motor Coach Lines are one and the same legal entity for the purpose of this legislation would not be in accord with the intention of Congress because such a finding would include within the separate and special social security system provided for the railroad industry, a motor carrier." One of the find-

ings in the actions read in part as follows: "That said operation is not directly or indirectly owned or controlled by plaintiff, Pacific Electric Railway Company, but is jointly owned and controlled by plaintiff, Pacific Electric Railway Company, with Los Angeles Railway Corporation. That said operation is engaged exclusively in the transportation of passengers by motor coach in intrastate commerce. That said operation does not operate any equipment or facility or perform any service in connection with the transportation of passengers or property by railroad or the receipt, delivery, elevation, transfer in transit, refrigeration, or icing, storage, or handling of property transported by railroad." A similar finding was made in the instant case. There is no controversy over the facts and we are satisfied that they establish that the business of the motor coach lines is a distinct local operation, entirely separate from the business of the Pacific Electric Railway, and that it does not embrace in any way the transportation of passengers or property by railroad. Judge McCormick's decision is directly in point for, as previously stated, the definition of the term "employer" in the Railroad Unemployment Insurance Act is identical with the definition of that term in the Carriers Taxing Act. In view of that decision, no weight can be accorded the rulings of the Federal Administrative Agencies to the effect that Pacific Electric and Los Angeles Railway are employers of those who work for the motor coach lines.

Earlier decisions of the Federal courts have recognized in the several enactments of Congress an intention to set up a system of social security for the railroad industry, from which other types of carriers would be excluded. In *Allen v. Ocean S. S. Co. of Savannah*, 5 Cir., 1941, 123 F.2d 469, the steamship company was allowed to recover taxes, which had been collected from it under the Carriers Taxing Act upon the erroneous theory that it was a company which performed services or handled property in connection with the transportation of passengers or property by railroad. The stock of the steamship company was owned by a railroad and its operations were much more closely connected with those of the railroad than are the operations of Los Angeles Motor Coach Lines with those of Pacific Electric Railway Company. In holding that the water carrier was not included within the Car-

riers Taxing Act, the court said (123 F.2d at page 471): "It is quite apparent that the construction appellant contends for will result in cutting across industrial lines and in absorbing into the special railroad insurance system, some parts of other industries because those parts happen to be owned by railroads, while that for which appellee contends, will have no such effect. That consideration alone should, we think, give us pause in construing, indeed should prevent our construing the act as appellant does, unless its language does not reasonably admit of any other result."

Walling v. Baltimore Steam Packet Co., 4 Cir., 1944, 144 F.2d 130, was an action to recover taxes which had been assessed against a steamship company under the Carriers Taxing Act, and for other relief. The steamship line was owned by railroad carriers and it operated in connection with rail transportation to the extent of establishing and maintaining through routes and joint rates with connecting carriers. It was held that the company was not subject to wage orders of the Fair Labor Standards Act relative to railroad carriers and was not a railroad carrier or employer within the meaning of the Carriers Taxing Act. The court said (144 F.2d at page 134): "Certainly the Congressional intent to include water carriers cannot be drawn from the fact, if it be a fact, which appellant makes so much of, that water carriers, in addition to performing purely steamship services, perform for a charge and for themselves, transportation service which the railroad carriers could have undertaken but left to the water carriers to perform. For, if this were the simple criterion, Congress could easily and would have said so, instead, as it did, of confining the application of the act to rail carriers and companies owned by them which performed a part of their transportation service for them." Reference was made in the opinion to proceedings before a Senate committee when the Carriers Taxing Act was under consideration, and the reports quoted by the court lend support to the view that carrier-owned steamship companies and bus companies were intended to be excluded from the operation of the Act.

Interstate Transit Lines v. United States, D.C.1943, 56 F.Supp. 332, was an action to recover taxes paid under the Carriers Taxing Act by a bus corporation, the stock of which was owned by a railroad corporation. In holding that the taxes should be re-

funded the court said (56 F.Supp. at pages 333, 334): "We hold therefore that the bus service, in which plaintiff is engaged, is service in connection with the transportation of passengers or property by bus, rather than by railroad, and that any contact, connection or interchange of service between the railroads and the plaintiff are mere incidents to their business, and such as are practiced and engaged in by other lines of transportation. Having arrived at this conclusion, it is a simple matter to apply the law. The Act of Congress is simple in language and should be easily and readily understood. The meaning of the word 'employer', as the word is used in the act, is defined, and this word pertains only in connection with the transportation of passengers or property by railroad, within the meaning of Section 1(a) of the Carriers' Taxing Act of 1937."

[3] The trial court in the instant case correctly held that the Pacific Electric Railway Company is not an "employer" of the individuals who work for Los Angeles Motor Coach Lines, within the definition of the term in the Railroad Unemployment Insurance Act.

Under the State Act, as amended by Stats.1937, chap. 739, p. 2053, sec. 8.5, an "employing unit" means "any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company or corporation," etc. Defendants insist that the motor coach company is a partnership. Plaintiffs insist that it is a mere agency, but their argument upon that point is identified with their contention that the motor coach lines are operated as a part of their railroad operation. The language of the California Act was intended to be broad enough, we think, to include all groups of individuals who operate as a unit, whether as a partnership, association, or any other type of organization. The motor coach operation is under the general control of the presidents of the plaintiff corporations and the direct management of a manager, assistant manager, and subordinate officers and employees, but except for the fact that the management is headed by officers of the two plaintiffs and the further fact that it makes use of some of the facilities of the plaintiffs, such as their auditing and purchasing departments, its business operations do not differ from what they would be if the lines were owned by others than plaintiffs. The joint operation

possesses the characteristics of a partnership, in that it is one in which the profits and losses are to be equally shared, but it is not necessary to determine whether it is a partnership, in view of the broad language of the statute, which includes associations and other types of organizations. It is clearly an employer under the State Act.

[4, 5] Plaintiffs advance the further contention that defendants are estopped to exact payment of sums which accrued between July 1, 1939, and the date when defendants first demanded additional payments, namely, in June, 1942. The conduct upon which the claim of estoppel is rested consists not of any affirmative rulings or action taken by defendants, but of their mere inactivity to assert the rights of the State in opposition to those of the Federal Government. We note from the exhibits that the Federal agencies were concerned with the status of the employees of the motor coach company from a time shortly after the Railroad Unemployment Insurance Act took effect. It is said that Pacific Electric at all times complied with the rulings of the Federal agencies, and it is to be presumed that in doing so it accepted the construction of the Acts held by the Federal administrators. As early as October, 1940, the general counsel of the Railroad Retirement Board ruled that the employees of the motor coach company came within the Railroad Retirement and the Railroad Unemployment Insurance Acts, and within the following month the president of the Pacific Electric Railway was advised of this fact. Plaintiffs appear to have relied upon their own judgments and the affirmative actions of the Federal agencies rather than the inaction of the State Commission. The most that can be said in favor of the claim of estoppel is that for a period of three years a mistaken view of the law was entertained by the plaintiffs and both the Federal and the State administrative agencies. It does not appear that responsibility for the mistake rests solely upon the administrators of the State law, or that they led the others, any more than they were led, into the error. It would be difficult to believe that a construction of the Federal Act which operated to the disadvantage of the State originated with State officers or agents.

The doctrine of equitable estoppel may not be invoked to defeat a just claim where each of the parties has acted in good faith

and in the exercise of his own independent judgment. This is a sufficient reason for denying the claim of estoppel without pursuing the subject further.

The judgment is affirmed.

DESMOND, P. J., and WOOD, J., concur.



73 Cal.App.2d 439

PEOPLE v. NOTZ et al.
Cr. 3928.

District Court of Appeal, Second District,
Division 1, California.

March 7, 1946.

Criminal law ☞823(4)

An instruction that "it is wholly immaterial on what day or night the offense charged in the information was committed, provided you believe from the evidence it was committed, and that the same was committed within three years prior to filing of the information in this case," did not constitute reversible error, notwithstanding defendants' defense of alibi, where other instructions fully covered subject of alibi.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

John Notz and Pleny A. Notz were convicted of grand theft after a prior conviction of a felony, and they appeal.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty. of Los Angeles County, and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from judgment of conviction and order denying a motion for new trial.

Defendants were accused by information of two offenses of grand theft after a

prior conviction of a felony. Both defendants admitted the prior conviction. The two grand theft offenses of which defendants were adjudged guilty by a jury, consisted of the robbery of the operator of a liquor store and the theft of an automobile. A revolver was used by one of the defendants in the robbery referred to. There were several witnesses to the robbery, who later identified the defendants. The defense was an alibi.

It is contended by appellants that the trial court erred by instructing the jury that, "it is wholly immaterial on what day or night the offense charged in the information was committed, provided you believe from the evidence it was committed, and that the same was committed within three years prior to the filing of the information in this case".

In support of this contention, appellant relies on *People v. Waits*, 18 Cal.App.2d 20, 62 P.2d 1054. The *Waits* case relies in turn on *People v. Morris*, 3 Cal.App. 1, 84 P. 463. The latter case decided (3 Cal. App. at pages 6 and 7, 84 P. at page 465) that, "while the misconduct of special counsel was such as to require the case to be remanded for a new trial, there is one other matter calling for attention"; then follows a reference to and consideration of the instruction on the subject of alibi. It should be noted in this regard that there is no resemblance between the situation presented in the *Morris* case and the case at bar. Moreover, the extreme presented by the *Morris* case on the subject of alibi instructions is not supported by the weight of authority. And, in any event, inasmuch as the decision was based on other grounds as above noted, reference to the subject of alibi instructions appears to be obiter dictum.

In the *Waits* case such an instruction was held to be prejudicial "in light of appellant's alibi defense." It does not follow that such an instruction constitutes prejudicial error in all cases involving a defense of alibi. Standing alone, manifestly, it would be misleading. But, considered in connection with other instructions, there can be no confusion. Hence the court elsewhere instructed the jury that, "The burden of proving the presence of the Defendants at the time and place of the alleged offense devolves on the prosecution, and the prosecution must prove, beyond a reasonable doubt, that they were present at the time and place of the alleged commission of said

offense. It does not devolve on the Defendants to prove that they were not present, so that after a full and fair consideration of all of the facts and circumstances in evidence, if you have a reasonable doubt as to whether or not the Defendants were at the place of the alleged crime at the time of its commission you are in duty bound to give the Defendants the benefit of that doubt and acquit them." Also, that, "An alibi simply means that the defendant was at another place at the time the crime charged is alleged to have been committed. All the evidence should be carefully considered by you, and, if the evidence on the subject, considered with all the other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendant, you should acquit him. It is sufficient to justify an acquittal if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, if you find that a crime was committed." The jury was fully instructed in other respects as required by law.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., concurs.

WHITE, Justice.

I concur in the judgment, but do so only because of the positive identification of the defendants as perpetrators of the crime charged, coupled with the fact that the testimony placed the time of the commission of the offense at approximately 5:45 p.m." on the date charged in the information, as well as the fact that notwithstanding the challenged instruction the court gave the correct and proper instruction set forth in the main opinion. In my judgment the jury in the instant case were not misled.

However, I am firmly convinced that in cases where the defendant relies upon an alibi for his defense the instruction here under attack should not be given. And that is particularly true when the prosecution, as here, relies for conviction upon a specific date and hour. When a defense of alibi is interposed and an alleged offense is so narrowed as in this case, the date and even the hour may become important. The challenged instruction in such circumstances can have no applicability to the evidence in the case, may prove confusing to the jury, and in some

cases, constitute prejudicial error. *People v. Waits*, 18 Cal.App.2d 20, 21, 62 P.2d 1054. As was so aptly and pertinently stated by Mr. Justice McComb in the case just cited, "In light of appellant's alibi defense, the time the alleged offenses were committed became material, and it was the duty of the trial court to limit the jury in its consideration of the evidence to the period which the prosecution selected at the time of the commission of the offenses."



73 Cal.App.2d 472

BUEHLER v. BUEHLER.

Civ. 15027.

District Court of Appeal, Second District,
Division 2, California.

March 8, 1946.

Hearing Denied May 6, 1946.

1. Divorce ⇐130

Evidence authorized award of divorce to wife against husband on the grounds of extreme cruelty.

2. Husband and wife ⇐249

Where separate property is commingled with community property to such an extent that the separate property cannot be properly segregated from the community property, the commingled property is regarded as community property.

3. Husband and wife ⇐264

When separate and community property has been commingled, the burden is upon the party claiming part of the property as separate property to establish clearly its character as such.

4. Husband and wife ⇐264

Where house, lot, and household furniture and furnishings had been purchased with funds which defendant husband had borrowed from Ministers' Fund on credit of an insurance policy held by him with such fund, and from community funds, and money borrowed was repaid by proceeds of two paid-up life policies, but there was no showing whether policies were held by defendant prior to his marriage or were subsequently acquired, trial court was justi-

fied in inferring that described property was purchased with community funds and was therefore community property.

5. Husband and wife ⇨256

The fact alone that title to real property purchased with community funds was taken in joint tenancy by husband and wife is not determinative of question of whether such property is community property.

6. Husband and wife ⇨256

The rule that use of community funds to purchase property and the taking of title thereto in name of spouses as joint tenants is tantamount to a binding agreement between them that property shall not thereafter be held as community property is subject to qualification that, if evidence shows that parties intended property to be community property, it will be treated as such in spite of fact that title is held in joint tenancy.

7. Husband and wife ⇨264

Testimony that husband had referred to realty as community property or "our property", and on one occasion asked wife to sign a deed changing property from a community interest to an interest whereby wife, husband, and son would each have a one-third interest, justified inference that property was community property even though husband and wife held title in joint tenancy.

8. Divorce ⇨239, 307

Evidence that, although plaintiff wife was a registered nurse and physically able to work and owned a considerable amount of property, such property was nonincome producing, authorized finding that wife was without funds or property to maintain or support herself and a minor child and wife was entitled to an order against husband for support.

9. Divorce ⇨238

When a wife is owner of nonincome producing property, she is not required to have recourse to such property for her support before seeking support from her husband.

10. Divorce ⇨249(3)

Where a divorce decree is granted on grounds of extreme cruelty, trial court may award any or all of the community property to innocent party. Civ.Code, § 146, subd. 1.

11. Divorce ⇨249(3)

Where trial court found, supported by substantial evidence, that wife was entitled to a divorce from husband on grounds of cruelty, that property of parties was community property, and that wife and her minor child were without means of support, award of community property to wife was proper. Civ.Code, § 146, subd. 1.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by E. Rebecca Wagner Buehler against Harold M. Buehler for divorce. From an interlocutory judgment for plaintiff, defendant appeals.

Affirmed.

Frederick L. Botsford and Samuel M. Garroway, all of Los Angeles, for appellant.

Loucks, Phister, Baker & Stephenson, of San Pedro, for respondent.

McCOMB, Justice.

From an interlocutory judgment of divorce in favor of plaintiff granted on the grounds of extreme cruelty, defendant appeals.

[1] It is conceded by defendant (appellant) that the evidence supporting the charges of cruelty was sufficient to warrant the granting of a divorce to plaintiff. Defendant urges however that there is no evidence to sustain the trial court's finding:

First: "*That the property described in Paragraph IV of the First Amended Complaint is the community property of the parties hereto.*"

The foregoing finding is supported in accordance with the following rules of law and the evidence hereinafter set forth.

[2] 1) Where separate property is intermixed and commingled with community property to such an extent that the separate property cannot be properly segregated from the community property, the commingled property is regarded as community property. (Truelsen v. Nelson, 42 Cal.App.2d 750, 754, 109 P.2d 996; In re Estate of Woods, 23 Cal.App.2d 187, 191, 72 P.2d 258; Cline v. Cline, 4 Cal.App.2d 626, 629, 41 P.2d 588.)

[3] 3) When separate and community property have been commingled the bur-

den is on the party claiming part of the property as separate property to establish clearly its character as such. (Truelsen v. Nelson, supra, 42 Cal.App.2d 754, 109 P.2d 996; Dimmick v. Dimmick, 95 Cal. 323, 328, 30 P. 547; In re Freitas, D.C.S.D. Cal., 16 F.Supp. 557, 562.)

[4] In the present case the testimony discloses that the property described in paragraph IV of the First Amended Complaint consisting of household furniture and furnishings and a house and lot located at 610 West 38th Street, San Pedro, California, had been purchased with funds which defendant had borrowed from the Presbyterian Ministers' Fund on the credit of an insurance policy held by him with such fund and from general funds which he had earned subsequent to his marriage to plaintiff on January 31, 1925. The money which he had borrowed from the ministers' fund had been repaid by defendant's cashing in two paid up policies of life insurance which he held with the Northwestern Mutual Mortgage Company.

The record fails to disclose whether the insurance policies which defendant cashed in order to pay his loans from the ministers' fund were life insurance policies held by him prior to his marriage or policies acquired subsequent to it. Under rules (1) and (2) supra, defendant has thus failed to sustain the burden of proving that the money which he borrowed and commingled with his general funds (which it is conceded were community property) was his separate property. Therefore under the rules stated the trial court was justified in drawing the inference that the property described in paragraph IV of the amended complaint was purchased with community funds and was therefore community property.

[5, 6] The fact that the title to the real property was taken in joint tenancy by plaintiff and defendant is not determinative of the question here presented in view of the fact that the rule that the use of community funds to purchase property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property (Siberell v. Siberell, 214 Cal. 767, 773, 7 P.2d 1003), is subject to the qualification that if the evidence shows that the parties intended the property to be community property it will be treated as such in spite of the fact the title was

taken as joint tenants. (Tomaier v. Tomaier, 23 Cal.2d 754, 755 et seq., 146 P.2d 905.)

[7] In the present case plaintiff testified that defendant had referred to the property in question as "community property" or "our property" and that on one occasion defendant had asked plaintiff to sign a deed changing the property from a community interest between them to an interest whereby plaintiff, defendant and their son would each have a one-third interest in the property. From this evidence the trial court was justified in inferring that the property was community property even though they had taken the title in joint tenancy.

Second: "*That plaintiff is without funds or property to maintain or support herself and said minor child either permanently or during the pendency of this action.*"

[8] The foregoing finding is supported by the uncontradicted evidence. The testimony discloses that defendant and plaintiff had two minor children, the younger one being entirely unable to support herself; that plaintiff was a registered nurse and physically able to work; that she owned 107 shares of Crown Knitting Mills stock from which she had not received any dividends in the past five or six years; that she also owned Standard Oil Company stock of the value of \$800, bank stock of the value of \$400, and had an interest in her father's estate valued at \$7000; further that she had received \$1543 from insurance upon the life of her father and \$300 because of her father's death. \$1500 of the insurance on her father's life she loaned to defendant.

[9] The law is settled in California that when a wife is the owner of nonincome producing property she is not required to have recourse to such property for her support before seeking support from her husband. (Farrar v. Farrar, 45 Cal.App. 584, 586, 188 P. 289; Busch v. Busch, 99 Cal.App. 198, 200, 278 P. 456.)

[10] It is likewise established that where, as in the instant case, a divorce decree is granted on the grounds of extreme cruelty the trial court may award any or all of the community property to the innocent party. (Section 146, subd. 1, Civil Code.)

[11] In view of the fact that the trial court found, supported by substantial evi-

dence, that the plaintiff was entitled to a divorce from defendant on the grounds of cruelty, that the property of the parties was community property and that plaintiff and her minor child were without means of support, the award of the community property to plaintiff was proper.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.



73 Cal.App.2d 382

HAHN v. CURTIS.

Civ. 7189.

Sac. 5739.

District Court of Appeal, Third District,
California.

March 4, 1946.

1. Waters and water courses ⚡116, 119(2)

A landowner has right to have waters flow from his land in their natural course onto lands below, but has no right to turn waters naturally accumulating on his land onto lower land by construction of ditches or other artificial means, in absence of prescriptive right to do so.

2. Waters and water courses ⚡119(1), 124

Where waters which would not naturally flow onto land from higher land are caused to do so by upper landowner's construction of ditches or use of other artificial means, there is invasion of and injury to lower landowner's property right and a nuisance per se, continuance or maintenance of which he has right to have enjoined.

3. Waters and water courses ⚡119(2)

An owner of land, on which surface waters accumulate, has right to redeem it by discharging or removing such waters therefrom by artificial ditches or other means to extent that he does not thereby injure owner of adjoining lower land.

4. Waters and water courses ⚡124

A landowner, who is so situated that he may be injured because of disregard of

his rights by adjoining upper landowner's exercise of right to remove and dispose of surface waters entirely on his own land, is not bound to commence action to prevent such possible damage at peril of being denied any relief when injury is actually done him.

5. Injunction ⚡14

An injunction against legitimate use of one's own property will not be granted at another's suit, unless it clearly appears that such use thereof in given way will necessarily entail irreparable injury to complainant.

6. Injunction ⚡12

A mere possibility or anything short of reasonable probability of injury is insufficient to warrant injunction against proposed use of property by owner thereof.

7. Evidence ⚡60

A court must assume that party attempting to exercise legal rights which may never injure another, if properly exercised, will so exercise them that no injury will occur and will cease to exercise them if they ultimately become injurious in their exercise.

8. Waters and water courses ⚡124

A landowner was not called on to commence action to restrain owners of adjoining upper land from draining surface water therefrom through ditch thereon until such lower landowner's property rights were actually invaded by overflow of such waters onto his land.

9. Waters and water courses ⚡150

For a landowner to acquire prescriptive right to overflow another's adjoining lower land with surface waters from upper land, there must be uninterrupted enjoyment of such use under claim of right for five years, actual occupation by flow of water, with lower landowner's knowledge and such as to occasion him damage and give him right of action, and such use of his land and damage thereto as will raise presumption that he would not have submitted to it unless owner of upper land had acquired right so to use it.

10. Easements ⚡36(1, 3)

The burden is on one claiming acquisition of right by prescription to prove it by clearest and most satisfactory evidence and to establish all elements essential to title by prescription.

11. Easements Ⓒ5

The elements essential to "title by prescription" are actual, open and notorious use, hostile and adverse to title of party against whom adverse claim is made, and continuous and uninterrupted for statutory period, under claim of right.

See Words and Phrases, Permanent Edition, for all other definitions of "Title by Prescription".

12. Waters and water courses Ⓒ150

To establish prescriptive right to flood lands by drainage of surface waters from upper lands, owner of upper lands must show that she actually discharged such waters on lower lands openly, continuously and uninterruptedly for over five years under claim of right and with knowledge of owner thereof, unless such invasion was so open and notorious as to impute such knowledge.

13. Waters and water courses Ⓒ123

A landowner, claiming prescriptive right to drain surface waters from her land through ditch thereon to adjoining lower land, was not absolved from liability to owner of such lower land for damages on ground that she had no knowledge of alleged nuisance, in absence of evidence that she ever communicated claim of such right to such owner.

14. Easements Ⓒ40

The extent of a servitude is determined by terms of grant or nature of enjoyment by which it was acquired. Civ. Code, § 806.

15. Easements Ⓒ41

Rights acquired by prescription are stricti juris and cannot extend beyond the use.

16. Waters and water courses Ⓒ126(2)

In action for damage from destruction of crop by overflow onto plaintiff's land of surface waters drained from defendant's adjoining upper land through ditch thereon, defendant's evidence was insufficient to show that she openly, continuously and uninterruptedly discharged drainage waters on plaintiff's land under claim of right, with plaintiff's actual or imputed knowledge, for statutory period, or that plaintiff suffered any damage to his land or crops from such drainage prior to year before that in which he brought suit. Code Civ. Proc. §§ 338, 339.

Appeal from Superior Court, Colusa County; Arthur Coats, Judge Pro Tem.

Action by Henry Hahn against Elizabeth Curtis for damage from destruction of plaintiff's barley crop by water flowing on to plaintiff's land from defendant's adjoining land through a ditch thereon and an order requiring defendant to fill such ditch and confine surface waters on her land to their natural channel. Judgment for defendant, and plaintiff appeals.

Reversed.

C. D. McComish, of Colusa, for appellant.

Hudson Ford, of Colusa, for respondent.

ADAMS, Presiding Justice.

On November 16, 1943, appellant filed his first complaint in this action, and on July 18, 1944, filed his first amended complaint. He alleged therein that he was the owner of certain described lands which were contiguous for a distance of one-fourth mile to lands owned by defendant; that near the dividing line, but upon defendant's land, there was a natural ridge of land that directed the flow of surface waters northeast, away from plaintiff's land, but that defendant, prior to 1942, had caused or permitted a ditch to be dug through said ridge, which said ditch she had, in 1941 or 1942, caused to be deepened, and that she had thereby caused the surface waters on her land and lands west and southwest thereof to flow from their natural channel onto plaintiff's land so that in 1942 plaintiff's crop of barley had been destroyed to his damage in the sum of \$1,365. Plaintiff prayed judgment for the said amount, and for an order requiring defendant to fill said ditch and confine said surface waters to their natural channel.

Defendant answered said complaint, alleging that the ditch had been dug through the ridge many years before, and denying that she had caused same to be deepened. She denied damage to plaintiff's crops, and further alleged that plaintiff's action was barred by sections 338 and 339 of the Code of Civil Procedure. As a separate defense she alleged that she and/or her predecessor in interest had "maintained, used, held and possessed adversely to the legal title of Plaintiff herein, said ditch or drain for more than five (5) years before the commencement of the action; that said use, maintenance, holding and possession was

hostile to the record title and that such use was open, continuous and notorious, and that it was made under claim of right, and there was conveyed to Plaintiff herein a knowledge of the asserted claim"; that "there had been uninterrupted enjoyment of said use under claim of right for more than five (5) years which has ripened into an easement and/or servitude to overflow the lands of Plaintiff; there has been an actual occupation of Plaintiff's land by the flow of water through Defendant's ditch to the knowledge of Plaintiff, and such as to occasion damage more than five (5) years ago and to give him a right of action more than five (5) years ago." And as an additional defense defendant alleged "That Defendant, prior to the commencement of this action, had no knowledge of the existence of the alleged nuisance, and cannot be held liable for damages, if any."

Trial was had by the court which made findings as follows:

"4. That it is true, prior to the year 1942, namely, in the year 1917, and more than five (5) years prior to the filing of this action, Defendant or her predecessor in interest, cut or dug said ditch or drain through said ridge of land, and from said year 1917, Defendant has used same to drain water from Defendant's land on to Plaintiff's land; that said use was, and has been, hostile to the record title of Plaintiff, and was open, continuous and notorious, and that it was made under claim of right and was used adversely to Plaintiff continuously since the year 1917, and that such claim for more than five (5) years was so asserted as to convey to Plaintiff a knowledge of the asserted claim; that it is true that said ditch or drain has retained the same approximate depth and width since the year 1934.

"5. That it is not true that in the year 1941 or in the year 1942, Defendant caused or permitted said ditch to be deepened.

"6. That it is not true that Plaintiff sustained any damages for which Defendant is liable."

It was then concluded that defendant "has acquired a prescriptive right and/or easement to run surface waters through said ditch or drain from Defendant's land on to Plaintiff's land." The judgment which followed was merely that plaintiff take nothing and that defendant recover her costs.

A motion for a new trial was denied and plaintiff appealed from both the judgment and the order denying a new trial.

The first questions presented for determination are whether the findings of the trial court sustain its conclusion of law that defendant has acquired a prescriptive right or easement to run surface waters through her ditch onto plaintiff's land and whether the evidence sustains the findings, particularly the finding that defendant, or her predecessor in interest, has ever since 1917 continuously used the ditch on her land to drain water onto plaintiff's land, and that said use was hostile to plaintiff, open, continuous and notorious and under claim of right. It should be noted first, that defendant did not in her answer allege that she and/or her predecessor in interest had continuously or at all used the ditch through the ridge on her land to drain water onto plaintiff's land. Her allegation is that she had maintained, used, held and possessed the ditch adversely to plaintiff's title for more than five years, and that said use was open, continuous and notorious, and under claim of right, and that said "use" had ripened into an easement to overflow plaintiff's lands. Obviously defendant's use, maintenance and possession of a ditch on her own land could never be adverse to plaintiff or any one else or result in an easement or servitude unless and until such use resulted in an invasion of plaintiff's lands.

[1,2] *Galbreath v. Hopkins*, 159 Cal. 297, 113 P. 174, is a comparable case on its facts, and as the decision therein is applicable to the one before us we are constrained to quote liberally therefrom. There plaintiff sued to enjoin defendants from maintaining a ditch through which surface waters, accumulated in a natural pond or lake on the lands of defendants, were drained upon plaintiff's land. Defendants claimed a prescriptive right to discharge the waters of this pond through a ditch into a slough and thence upon the lands of plaintiff, alleging an adverse user of upwards of sixteen years. The evidence showed that about 1893 the then owner of defendants' land had dug the ditch in controversy, same being entirely on his own land. From that time until 1907 some water passed through the ditch but did no harm to plaintiff's lands. That year a tenant of defendants undertook to excavate the ditch to allow water to pass

into the slough, but was enjoined by plaintiff. In 1908 no water passed through the ditch; but in 1909, by reason of a heavy rainfall, waters from defendants' lands flowed down and overspread plaintiff's lands, damaging a crop of grain, whereupon plaintiff brought his action. The trial court found that defendants had acquired a prescriptive right, and also that plaintiff had suffered no damage. On appeal the judgment was reversed on the ground of the insufficiency of the evidence. Regarding the prescriptive right, the court said, at page 301 of 159 Cal., at page 176 of 113 P., that the theory of the trial court was that the act of constructing the ditch and draining the water from the pond into the slough in 1893 was then an invasion of the property rights of plaintiff and that her right of action against defendants' predecessor accrued then, and that permitting the existence of the ditch and the drainage of water through it into the slough for more than the statutory period barred any right of action plaintiff originally had to prevent defendants from continuing to do so. But the court said, at pages 301, 302, of 159 Cal., at page 176 of 113 P:

"It is, of course, clear under the law that, unless the defendants have acquired a right by prescription to discharge the water from the pond by artificial means upon the land of plaintiff, they have no right to do so at all. While the owner of upper land has the right to have the waters from his land flow in their natural course down upon the lands below, he has no right, by the construction of ditches or other artificial means, to turn waters which have naturally accumulated in ponds or depressions on his land upon the land of his neighbor lower down (*Ogburn v. Connor*, 46 Cal. [346], 347, 13 Am.Rep. 213; *Gray v. McWilliams*, 98 Cal. 157, 32 P. 976, 21 L.R.A. 593, 35 Am.St.Rep. 163), and, where water is thereby caused to flow upon the land of another which would not naturally flow thereon, this is an invasion and injury to his right of property and a nuisance per se, the continuance or maintenance of which he has the right to have enjoined. *Learned v. Castle*, 78 Cal. 454, 18 P. 872, 21 P. 11; *Wood v. Moulton*, 146 Cal. 317, 80 P. 92.

"So, if the defendants have any right to turn the waters from the pond on their land upon the land of plaintiff by means of a ditch constructed in 1893, it must proceed from a prescriptive right to do so, or it does not exist at all."

[3-9] Also it said, at pages 303, 304, of 159 Cal., at page 176 of 113 P.:

"The theory of the defendants upon which their prescriptive right is claimed is, as we have said, that the plaintiff should have brought her action as soon as the ditch was constructed and the drainage into the slough above her lands was commenced. But this ditch was constructed through the defendants' own land by their predecessor in title and the waters from the pond were drained through it upon their own land. No right of the plaintiff was invaded or necessarily threatened by this action. The owner of land upon which surface waters accumulate has a right, by means of artificial ditches or other measures, to redeem his land by discharging or removing these waters therefrom, legally constrained only to the extent that he shall not thereby injure his neighbor. Where a landowner is exercising a right of removing and disposing of surface waters, and is doing so entirely upon his own land, an adjoining proprietor, who may be so situated that a disregard of his rights may cause him injury, is not bound, at the peril of being denied any relief when injury is actually done him, to commence an action to prevent this possible damage. An injunction against the legitimate use of one's own property will not be granted at the suit of another unless it clearly appears that its use in a given way will necessarily entail an irreparable injury to the complainant. As said in *Lorenz v. Waldron*, 96 Cal. 243, 31 P. 54: 'A mere possibility, or anything short of a reasonable probability, of injury, is insufficient to warrant an injunction against any proposed use of property by its owner.' It is always to be assumed, where a party is attempting to exercise legal rights which may never necessarily injure another if properly exercised, that the party will so exercise them that no injury will occur, and, if in their exercise they shall ultimately become injurious, that he will cease to further exercise them. This principle applies here. The defendants were exercising their legal rights in draining their property, and had a right to continue doing so until their conduct showed that they would or were actually injuring plaintiff thereby. Up to the time they actually did so in 1909, if plaintiff had brought an action to enjoin a maintenance of the ditch, the ready and reasonable answer to her suit would have been: This ditch is constructed on our land, and its outfall is on

our land, and we have a legal right to so use our property. There is an easy grade from the outlet point to our land on the slough; we can and will control the water flowing from the pond, so that but such a quantity shall pass to the slough depression as shall be absorbed therein. It will, instead of flowing over your land, naturally percolate beneath it, and, instead of being a damage, actually benefit it. This being true, it is obvious that the plaintiff was not called upon to commence any action to restrain defendants until there was an actual invasion of her property rights, and, as this did not occur until the overflow of 1909, her action was properly commenced at that time. In *Grigsby v. Clear Lake Water Works Co.*, 40 Cal. 396, speaking of the evidence which was essential to establish a prescriptive right to overflow land, this court said: 'To acquire this right there must have been an uninterrupted enjoyment under claim of right for the period of five years. There must have been an actual occupation by the flow of water to the knowledge of the plaintiff and such as to occasion damage and give him a right of action. There must have been such a use of the premises and such damage as will raise a presumption that plaintiff would not have submitted to it unless the defendant had acquired a right so to use it.' See, also, *Carson v. Hayes*, 39 Or. 97, 65 P. 814; *Woodruff v. North Bloomfield G. M. Co.*, 9 Cir., 18 F. 753; *Miller v. Keokuk etc. Ry. Co.*, 63 Iowa, 680, 16 N.W. 567; *Austin & N. Ry. Co. v. Anderson*, 79 Tex. 427, 15 S.W. 484, 23 Am.St.Rep. 350.

The *Galbreath* case was cited in *Collins v. Sargent*, 89 Cal.App. 107, at page 116, 264 P. 776, 780, where the court said: "The statute of limitations in favor of the use does not commence to run until actual injury has been occasioned to the adjoining proprietor."

Carlisle v. Cooper, 19 N.J.Eq. 256, is also pertinent, though there the maintenance of a dam instead of a ditch upon defendant's lands was involved. The court there said, at page 260 of 19 N.J.Eq.: "In case of a dam, the easement acquired is not the right of maintaining a dam or structure upon the land of the party himself, but the right to flow back the water on the land of his neighbor. He may build on his own land a dam of any height, provided it flows back no water. His neighbor has no right of action; his suffering it is no acquiescence in any thing from which

a grant or permission can be presumed. And the prescription, to be valid, must be to flow back the water, by having done so for twenty years. No one is bound to measure the dam of the adjoining proprietor, and employ an engineer to calculate whether, if kept tight and full, it will throw water upon him. But when it does throw water upon him, if he permits it for twenty years, a grant will be presumed; but this only to the extent to which his land was habitually or usually flowed." Also see *Meigs v. Pinkham*, 159 Cal. 104, 112 P. 883, *Murphy v. Calispel Duck Club*, 163 Wash. 366, 300 P. 1060, and *Town of Bennington v. Fillmore & Slade*, 98 Vt. 405, 130 A. 137, 143.

[10-13] It is elementary that the burden is upon one claiming the acquisition of a right by prescription to prove same (*Ward Redwood Co., Inc., v. Fortain*, 16 Cal.2d 34, 43, 104 P.2d 813; 25 Cal.Jur. 1154; *Haight v. Costanich*, 184 Cal. 426, 435, 194 P. 26; *Barlow v. Frink*, 171 Cal. 165, 170, 152 P. 290) by the clearest and most satisfactory proof (*Pyramid Land etc. Co. v. Scott*, 51 Cal.App. 634, 646, 197 P. 398, 1 Cal.Jur. 636, sec. 95); and to establish all of the elements essential to such title. *Clarke v. Clarke*, 133 Cal. 667, 669, 66 P. 10; *Pyramid Land etc. Co. v. Scott*, supra. These elements are actual, open and notorious use, hostile and adverse to the title of the party against whom the adverse claim is made, continuous and uninterrupted for the statutory period, under claim of right. 25 Cal. Jur. 1157, 1158. Therefore, in this case, in order to establish a prescriptive right to flood plaintiff's lands by drainage from her own lands, it was necessary for the defendant to allege and prove that she had, for the statutory period, actually discharged drainage waters upon plaintiff's lands, openly, continuously and uninterruptedly for more than five years, and that she had done so under claim of right and to the knowledge of plaintiff unless such invasion was so open and notorious as to impute knowledge. We think that defendant has neither alleged nor proved these elements, and that, therefore, the evidence does not sustain the findings of the trial court in this respect. As above stated, defendant alleged in her answer that she could not be held liable for damages because she "had no knowledge of the existence of the alleged nuisance." Plainly, if she had no knowledge that the waters draining through her ditch were invading plaintiff's land such invasion cannot have been made under a claim of

right on her part, and there is no evidence that she ever communicated to plaintiff any claim of right to drain the waters from her land upon his land.

As regards plaintiff's knowledge, he testified that no water came upon his land from defendant's ditch prior to 1942; and defendant produced no witness who testified to any actual knowledge on plaintiff's part. Defendant produced witnesses who testified to the existence of the ditch on defendant's land, and there was some evidence that same was visible from the road between plaintiff's land and that of defendant; but no witness testified that the flow of water through it was thus visible. The only testimony produced by defendant that water had been discharged through said ditch onto plaintiff's lands prior to 1941 or 1942, was that of George Reister and his wife whose property adjoined defendant's on the south. Mr Reister testified that he had been on his land since 1933, and that water had flowed through the cut into the Hahn land every winter, with the possible exception of two or three dry winters. When those two or three dry winters occurred he did not state, nor did he testify as to the amount of water which flowed onto Hahn's land, or that he had ever seen it standing on the land, or that it had damaged same or the crops thereon. For all that appears, the amount that flowed may have been a very small quantity. Mrs. Reister's testimony was substantially the same as that of her husband, saying that water runs through the ditch onto Hahn's land in wet winters.

[14, 15] The extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired. Civ.Code, sec. 806. Rights acquired by prescription are stricti juris and cannot extend beyond the use. *Anderson v. Southern California Edison Co.*, 77 Cal. App. 328, 335, 246 P. 559; *Pacific Gas & Elec. Co. v. Crockett Land and Cattle Co.*, 70 Cal.App. 283, 233 P. 370.

[16] The testimony of defendant's witnesses was insufficient to show that defendant had for the statutory period openly, continuously and uninterruptedly actually discharged drainage waters upon plaintiff's land under claim of right and to the knowledge of plaintiff, or to impute knowledge to plaintiff that defendant was claiming an adverse right so to do; and it signally fails

to show that plaintiff suffered any damage either to his lands or his crops from drainage prior to 1942.

As to the damage sustained by him in 1942, the testimony of plaintiff is uncontradicted. In view of this fact the judgment of the trial court that plaintiff take nothing must be assumed to have been based upon its conclusion that defendant had acquired a prescriptive right to overflow plaintiff's lands; and since the evidence is insufficient to support such a conclusion, the judgment appealed from is reversed.

PEEK and THOMPSON, JJ., concur.



73 Cal.App.2d 507

DYKES v. DYKES.

Civ. 3189.

District Court of Appeal, Fourth District,
California.

March 12, 1946.

1. Vendor and purchaser ⇐86

In action to quiet title, evidence supported finding that defendant was induced by a fraudulent representation to sign claimed relinquishment of his interest in realty under purchase contract. Civ.Code, § 1572.

2. Appeal and error ⇐1011(1)

Where evidence is conflicting but there is substantial evidence to support finding, decision of trial court is final.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action to quiet title by Etta Dykes against Leroy Dykes. From the judgment, plaintiff appeals.

Affirmed.

Ralph Robinson, of Fresno, for appellant.

Laurence B. Myers, of Fresno, for respondent.

GRIFFIN, Justice.

Plaintiff brought this action to quiet title to certain described real property. Plaintiff and defendant, as husband and wife, purchased, in the name of defendant, on written contract dated February 10, 1940, from one Papagni and wife, property in Fresno, for the total sum of \$1,500. The down payment of \$150, cost of improvements, and payments on the contract were made with community funds, mainly from rentals derived from two apartments later built on the two lots in the rear of the main building.

On January 29, 1942, while there was matrimonial discord between them, a written agreement was entered into. It provided generally that Mr. Dykes would collect all rents from the buildings and use all money so collected in the payment of incumbrances against the property; that all payments would be made in the names of and for the benefit and credit of both parties. It provided for an accounting upon demand, and that the agreement was "not intended to be a release of the property rights or equity from either party unto the other, but solely an agreement for the preservation of the community property rights of both". The parties accepted it. Leroy Dykes subsequently secured a divorce from plaintiff. Neither the interlocutory nor the final decree made mention of the property herein described.

On May 16, 1942, Leroy Dykes signed his name to a document reading as follows:

"May 16, 1942.

"This is to certify that I Leroy Dykes have agreed with Pete Papagni, that I have purchased a home from Pete Papagni and hereby realise all of my interest in it because I am unable to continue the payments. I do not want anything for my equity.

"Leroy Dykes

"Witness:

"Morris Cocola

"Josephine Cocola."

The trial court found that Leroy Dykes was an illiterate person and that when he signed the document above quoted he could not read, write or understand intelligently; that he was unable to read it and did not understand the meaning or import of the words; that it was not explained to him; that he was told by Pete Papagni, and so believed, that the only purpose of said document was to place upon

Etta Dykes the responsibility and obligation to collect the rents from the property and to pay them to Papagni as payments on the contract, and to pay the necessary expenses of maintenance; that Leroy Dykes was not told that he was conveying his interest in the premises; that he believed said statements and relied upon them, not knowing the contents thereof; that after the separation, Mrs. Dykes did collect the rents and paid them to Papagni; that the revenue was sufficient to pay all installments, interest, taxes and insurance when due; and that the property had a rental value of \$84 per month; that there was never any accounting had between the parties; that the improvements to the property and rents were applied for the benefit of both parties; that each still retained his and her respective one-half undivided interest therein; that the property could not be partitioned; that a sale should be ordered by three named appraisers and referees and that each party have a one-half interest in the proceeds after the payment of the balance due on the purchase price and payment of required fees and expenses of sale. Judgment was rendered accordingly. Plaintiff appealed, not upon the reporter's transcript, but upon a record prepared in accordance with Rule 7 of the Rules on Appeal.

It is the contention of plaintiff that the evidence does not sustain the findings and judgment in respect to the claimed relinquishment of right in the contract of purchase allegedly signed by Leroy Dykes. He admits his signature to the document but claims he signed it through false representations. It is true that there is evidence that at the time Leroy Dykes signed the instrument he was in arrears on payments on the contract and at that time Mrs. Dykes took possession of the property. The amended settled statement on appeal, signed by the trial judge, recites that the testimony at the trial was not all reported; that Dykes, during the trial, testified that he could neither read nor write and was unable to read the document and did not understand the meaning of the words; that he did not intend to assign his interest in the property back to Papagni; that Papagni, although ill at the time of trial, testified that Dykes told him he wanted to give up the place; that it was stipulated that Morris Cocola, if called as a witness, would testify that he prepared the docu-

ment at Leroy Dykes's request; that Leroy did not live on the place nor visit it after May 16, 1942; that the testimony "of Etta Dykes was highly contradictory, and at great variance during the time she testified to the facts"; that Leroy Dykes testified that Etta Dykes had not been making the payments to Papagni although the premises had been rented, and that the rents had been collected by her during that time; that the rentals received were more than ample to meet all payments; that Leroy Dykes discussed the matter of delinquent payments with Papagni and that Papagni told him, when he signed the document presented by Papagni (the so-called relinquishment), that the document was to place upon Etta Dykes the responsibility and obligation to collect the rents and make the payments to Papagni under the contract, together with other operating expenses; that he believed those statements and that otherwise he would not have signed it.

The amended statement of facts further recites that the trial judge stated, from the bench, after the evidence was all in, that in arriving at his decision, it was his position that the "waiver agreement was a void agreement for the reason that he was satisfied from the evidence that Leroy Dykes did not know what he had signed." A motion for new trial was made and several affidavits of individuals were presented endeavoring to show that Leroy Dykes had made statements which would indicate that he believed he had waived his interest therein. The statements were denied by Dykes in his affidavit. The motion was denied.

Several days of trial were consumed in determining the issues presented. Those same issues, here in dispute, were again considered by the trial court on the motion for new trial. The entire evidence on the subject is not available to us on appeal. Since the appeal was perfected, on motion, this court allowed an augmentation of the record. It consisted of a copy of the translation of the reporter's notes of the testimony of Doris Convillion. A reporter was not used after the first day's trial. According to this evidence, the witness testified that she knew both Mr. and Mrs. Dykes for several years; that she discussed the question of the property herein involved with both parties; that Mrs. Dykes asked her about finding her a good lawyer because she wanted to get

the property for herself; that Mrs. Dykes stated, after their separation, that she was to collect rentals and apply them on the contract price; that for some reason the rentals had not been collected and that Mr. Papagni and Leroy Dykes came to her place to see Mrs. Dykes about it; that all parties discussed the matter in each other's presence and in the presence of Mrs. Dykes; that it was suggested and "they wrote a piece of" paper "that Leroy Dykes would turn all the books and papers over to and let Etta collect all the rents and make the payments on the property"; that Mr. Papagni wrote something out "in pencil" and that she read it and it said: "I, Leroy Dykes, decide and turn the property books over to Etta Dykes" and "to collect the payments and make the payments"; that Etta did not sign it but agreed to comply; that Leroy did sign some paper at that time "in pencil"; that Mr. Dykes stated that at all times he wanted to divide the property equally when it was sold, or suggested, as an alternative, that one might "buy the other out". A photostatic copy of the claimed relinquishment makes it appear that it was written and signed in ink. It is true that the evidence was, to say the least, confusing, but it likewise appears to be conflicting. The trial court had the opportunity of observing the witnesses and to better evaluate the weight to be given their testimony.

[1,2] From the settled statement on appeal and from an examination of the entire record, it appears to us that the question presented was one of fact for the determination of the trial court. It cannot be said that there was no substantial evidence supporting the finding that the defendant was deceived and was fraudulently induced into signing the claimed relinquishment by a fraudulent representation, even though the evidence might well have supported a contrary finding. Sec. 1572, Civil Code; *Cox v. Schnerr*, 172 Cal. 371; *Hinshaw v. Hopkins*, 37 Cal.App.2d 230, 99 P.2d 283. Under these circumstances, where there is substantial evidence to support the finding, the decision of the trial court is final. *Chichester v. Seymour*, 28 Cal.App.2d 696, 83 P.2d 301.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

73 Cal.App.2d 476

PEOPLE v. KEOSABABIAN et al.

Cr. 3949.

District Court of Appeal, Second District,
Division 2, California.

March 8, 1946.

1. Criminal law ⇨1144(13)

On appeal from judgment of conviction, evidence would be viewed in light most favorable to the people.

2. Robbery ⇨24(3)

In prosecution for first-degree robbery, evidence sustained finding of jury that defendant was a participant in the crime.

3. Criminal law ⇨1159(2)

Determination of trier of fact based on substantial evidence is binding on appellate court.

4. Criminal law ⇨703

Where defendant testified in his own defense in robbery prosecution and, during cross-examination, deputy district attorney asked defendant if he had not been previously convicted of burglary and attempted robbery, defendant answered first question in affirmative and second question in negative, whereupon deputy district attorney asked defendant's counsel if he would stipulate that defendant had previously pleaded guilty to two counts of burglary and one count of attempted robbery to which defendant's counsel agreed, the testimony was admissible and did not constitute misconduct on part of deputy district attorney.

5. Witnesses ⇨337(5)

Where a defendant, who is being prosecuted for a felony, voluntarily takes witness stand, prosecution may on cross-examination by way of impeachment elicit from him fact that he has been previously convicted of a felony and the nature of crime of which he was convicted is proper subject of inquiry.

6. Criminal law ⇨859

It is proper for trial judge to have testimony of a witness read to jury before they retire for their deliberation.

7. Criminal law ⇨656(1)

In robbery prosecution, where trial judge, after having court reporter read testimony of complaining witness to jury before they retired to deliberate, commented

that he wanted jury to understand what complaining witness said about the mouth of the man resembling mouth of defendant, that complaining witness testified that only portion of face that was hidden was from eyebrows to middle of nose and suggested that jury look at defendant and satisfy themselves if a person could be recognized from that or not, the trial court's comments were proper. Const. art. 6, § 19.

8. Criminal law ⇨898

Where defendant through his counsel acquiesced in remarks of trial judge by offering to produce defendant for a view before jury, by such acquiescence defendant waived any possible objection to procedure which had been followed. Const. art. 6, § 19.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Arthur Zorab Keosababian was convicted of robbery in the first degree, and he appeals.

Affirmed.

A. M. Astor, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of robbery in the first degree after trial by jury, defendant appeals.

[1] The evidence being viewed in the light most favorable to the People (respondent), and pursuant to the rules set forth in *People v. Pianezzi*, 42 Cal.App.2d 265, 269 et seq., 108 P.2d 732, the essential facts are:

On March 29, 1945, at about 5:00 p.m., the complaining witness, Mr. John L. Bath, was employed as a service station operator at a station located on East Firestone Boulevard in the county of Los Angeles. Mr. Bath heard a noise and as he turned around Howard Bernard pointed a .45 calibre automatic gun at him and demanded the keys to the safe. He replied that he did not have them; whereupon Mr. Bernard directed defendant who accompanied him to get the keys, and open the cash register. As soon as this had been done, defendant removed money from the cash register and asked his companion if they

were going to tie Mr. Bath up. After Mr. Bernard had replied in the negative defendant struck Mr. Bath under the heart with his fist. They thereupon locked Mr. Bath in a restroom. In addition to the money taken from the cash register defendant and his companion took \$47 from Mr. Bath, \$30 of which belonged to the latter's employer.

Defendant relies for reversal of the judgment on three propositions which will be stated and answered hereunder seriatim:

[2] First: *There is not any substantial evidence to sustain the finding of the jury that defendant was (1) a participant in the crime and (2) present when the felony was perpetrated.*

This proposition is untenable. An examination of the record discloses substantial evidence together with inferences which the jury may have reasonably drawn therefrom to sustain each and every material finding of fact upon which the judgment was necessarily predicated, including the identity of the defendant as being a participant in the crime of which he was convicted. For example:

[3] 1 & 2) Mr. Bath testified that defendant was the man who participated in the robbery. The fact that his testimony was contradicted by other witnesses who attempted to establish an alibi for defendant, and that on cross-examination, Mr. Bath stated that he was basing his identification of defendant solely upon the portion of defendant's face which was exposed to his view, merely created a conflict in the testimony. The resolution of this conflict was for the trier of fact whose determination based on substantial evidence, as in the instant case, is binding upon this court. (See *People v. Pianezzi*, supra, 42 Cal.App. 2d at page 269, 108 P.2d at page 734.)

[4] Second: *The district attorney committed prejudicial error in asking the defendant, on cross-examination, whether he had been previously convicted of felonies.*

This proposition is also untenable. On cross-examination of defendant, who took the witness stand in his own defense, the deputy district attorney asked him if he had not been previously convicted of burglary and attempted robbery. To the first question defendant answered, "Yes," and to the second question, "No." Thereupon the deputy district attorney asked defendant's counsel if he would stipulate that defendant had previously pleaded guilty to two

counts of burglary, and one count of attempted robbery, to which defendant's counsel replied, "Yes." Clearly such testimony was admissible and did not constitute misconduct upon the part of the deputy district attorney.

[5] The law is established in this state that when a defendant who is being prosecuted for having committed a felony, voluntarily takes the witness stand, the prosecution may on cross-examination by way of impeachment elicit from him the fact that he has been previously convicted of a felony; and the nature of the crime of which he was convicted is a proper subject of inquiry. (*People v. Romer*, 218 Cal. 449, 452, 23 P.2d 749; *People v. Craig*, 196 Cal. 19, 28, 235 P. 721.)

Third: *The trial judge committed prejudicial error in (1) having the court reporter read the testimony of the complaining witness to the jury before they retired to deliberate, and (2) making the following comments after Mr. Bath's testimony had been read to the jury:*

"The Court: *I have had that done because I want the jury to understand what he said about the mouth of the man resembling the mouth of the defendant. You will also remember the testimony that the only portion of the face that was hidden, was from the eyebrows to the middle of the nose. That was brought out by a question of my own. You have the defendant here before you. Take a look at him and satisfy yourselves if a person could be recognized from that or not.*"

This proposition is likewise untenable.

[6] 1) It is proper for the trial judge to have the testimony of a witness read to the jury before they retire for their deliberation. (*People v. Doyell*, 48 Cal. 85, 91; *People v. Perry*, 65 Cal. 568, 569, 4 P. 572.)

[7,8] 2) After the trial judge had made the comments set forth above defendant's counsel said: "In that connection we offer to demonstrate that with the defendant himself." Whereupon the defendant exhibited himself before the jury, with dark glasses and his hat on. The trial court's comments after the complaining witness's testimony had been read to the jury was proper and authorized by the provisions of Article VI, section 19 of the Constitution of the State of California as amended November 6, 1934. Such provision, among other things, authorizes the trial judge to make such comments on the

evidence, the testimony and credibility of any witness as in his opinion is necessary for the proper determination of the case. It is to be noted that defendant through his counsel acquiesced in the remarks of the trial judge by offering to produce the defendant for a view before the jury. By such acquiescence in the trial judge's comments defendant waived any possible objection to the procedure which had been followed.

Such cases as *People v. Talkington*, 8 Cal.App.2d 75, 47 P.2d 368; *People v. DeMoss*, 4 Cal.2d 469, 50 P.2d 1031; *People v. Dail*, 22 Cal.2d 642, 140 P.2d 828; *People v. Ottey*, 5 Cal.2d 714, 56 P.2d 193; *People v. Lynch*, 60 Cal.App.2d 133, 144, 140 P.2d 418, and *People v. Mason*, Cal. App., 165 P.2d 481, are each factually distinguishable from the instant case. In each of the cases just cited the trial judge by his comments abused the discretion vested in him by Article VI, section 19 of the Constitution by either withdrawing from the consideration of the jury material evidence or failing to fairly state the evidence to the jury. In the instant case the trial judge merely submitted the evidence to the jury and pointed out to it the questions presented for their determination leaving expressly to the jury the decision to be reached from the evidence which had been introduced at the trial.

For the foregoing reasons and since no errors appear in the record the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.



73 Cal.App.2d 545

ARBALLO v. NIELSON et al.
Civ. 3509.

District Court of Appeal, Fourth District,
California.
March 15, 1946.

Appeal and error ☞ 1010(1)

In action for technical assault allegedly committed on deceased by physicians in performing operation on deceased without

his consent, trial court's finding on substantial evidence that deceased was conscious and in full possession of his mental faculties throughout examination by physicians, and that at that time he gave his consent to the operation was conclusive on appeal although there was evidence, produced by plaintiff, that prior to examination deceased appeared to be in a dazed and semiconscious condition.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Exiquia Arballo, as mother and sole heir at law of Ignacio Arballo, deceased, against L. R. Nielson and Edwin A. Patterson to recover damages for a technical assault allegedly committed upon deceased by the defendants in performing a surgical operation. Judgment for defendants, and plaintiff appeals.

Affirmed.

Ralph Robinson, of Fresno, for appellant.

Chester O. Hansen, of Fresno, for respondents.

GRIFFIN, Justice.

This action was brought by plaintiff and appellant Exiquia Arballo, mother of Ignacio Arballo, deceased, who at the time of his death was single and 46 years of age. Plaintiff was his sole heir at law. Defendants and respondents are two practicing physicians and surgeons who, it is alleged, operated upon deceased, without the consent of plaintiff, thereby committing a technical assault upon the son, who died shortly after the operation. The trial was had without a jury. Judgment went for defendants and plaintiff appealed.

The record comes before us upon a settled statement in lieu of a reporter's and clerk's transcript, under Rule 7 of the Rules on Appeal.

The narrative statement, signed and certified by the trial judge, recites that defendants, on October 13, 1944, examined Ignacio and that the examination revealed a "mass in the lower right abdomen"; that the patient was suffering from nausea; that he entered the sanitarium for further treatment and that a cystoscopic examination revealed that the patient's bladder was occupied by a stone approximately the size of a baseball; that throughout the

examination he was conscious and in full possession of his mental faculties; that defendants advised the patient of the true condition and informed him that he could not survive if the stone was not immediately removed; that Ignacio consented to the operation; that an aggravated vesical abscess was found; that the patient died on October 22, 1944; that had said operation not been performed the patient would not have survived for more than a few days; and that at all times Ignacio was in the sanitarium his mother, plaintiff herein, or an adult sister, was present.

It further recites that plaintiff testified that she told Dr. Nielson that her son told her that he did not want to be operated upon; that she told the doctor the same thing; that plaintiff spoke imperfect English; that Dr. Nielson did not understand anything said to him by plaintiff, if such conversation did take place; that she was absent from the sanitarium when the examination took place. It then recites that during the cystoscopic examination a nurse, employed by the sanitarium, and in charge of the case, advised Ignacio's sister, who was present, that her brother was seriously ill and that the doctors believed that the only possibility of saving his life was an immediate operation; that there was evidence produced by plaintiff that the sister then signed a written consent to operation procedure; that the sister testified that she told the nurse that the signed consent should be executed by the plaintiff (mother), but that the nurse insisted that she sign it.

From this evidence the trial court found that Ignacio was conscious and in full possession of his mental faculties throughout the examination and at the time he gave his consent to the operative procedure, even though there was evidence, produced by plaintiff, that prior thereto he appeared to be in a dazed and semi-conscious condition.

It is plaintiff's argument, on appeal, that the operation was performed upon her son without her consent; that she was the proper person to give such consent and therefore an assault was committed upon her son, for which she was entitled to compensation, citing *Valdez v. Percy*, 35 Cal. App.2d 485, 96 P.2d 142; *Bonner v. Moran*, 75 U.S.App.D.C. 156, 126 F.2d 121, 139 A.L.R. 1366; *Barfield v. South Highlands Infirmary*, 191 Ala. 553, 68 So. 30,

*Ann.Cas.*1916C, 1097; and *Moss v. Rishworth*, Tex.Com.App., 222 S.W. 225.

The argument of plaintiff's counsel, in his brief, seems to ignore the settled statement of facts and the findings based thereon. It is true, as indicated, that the trial court allowed him to set forth in the settled statement of facts and findings that there was evidence produced on behalf of the plaintiff indicating that Ignacio was in a dazed or semi-conscious condition when he was taken to the examination room. From this evidence he argues that it was therefore established that the patient was incapable of acting for himself in giving consent to the operation. At most, such evidence only created a conflict to be determined by the trial judge. The finding that he did give his consent and was conscious and in full possession of his mental faculties at that time has substantial evidentiary support and cannot be disturbed on appeal. *Grimes v. Williams*, 61 Cal.App.2d 304, 142 P.2d 749.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.



73 Cal.App.2d 330

COHEN v. COHEN.

Civ. 14894.

District Court of Appeal, Second District,
Division 1, California.

Feb. 28, 1946.

1. Divorce ⇐71

Generally, a suit for divorce must be regarded as one which is so strictly personal that it cannot be maintained at pleasure of guardian or committee of insane spouse.

2. Divorce ⇐165(2)

A wife who in husband's suit for divorce had filed a cross-complaint for separate maintenance was not estopped from challenging validity of decree granting her a divorce on amended cross-complaint filed by her guardian ad litem on ground that husband was innocent victim of situation, in view of record.

3. Divorce ⇐11, 12

The state has an interest in marital status, its continuance, and its dissolution, and hence contract of marriage cannot be dissolved upon whim or caprice or by consent or collusion of contracting parties but may be dissolved only for causes recognized by law.

4. Divorce ⇐104

In husband's suit for divorce, wherein wife had filed a cross-complaint for separate maintenance, permitting filing of amended cross-complaint by wife's guardian ad litem seeking a divorce was error where, if wife was incompetent, she was incapable of consenting to divorce, and, if wife was sane, wife's personal oath to divorce pleading should have been obtained. Civ. Code, § 128.

5. Divorce ⇐253

Trial court may in its discretion determine property rights of parties in interlocutory divorce decree, provided such course does not unduly prejudice either party.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action for divorce by Joseph Cohen against Kathryn B. Cohen, wherein defendant filed a cross-complaint seeking separate maintenance and division of community property. Thereafter plaintiff filed a second action to set aside transfers of property. Thereafter plaintiff filed a supplemental complaint for divorce, and default was entered. After John E. Glover was appointed guardian ad litem for defendant, he filed in defendant's behalf an amended cross-complaint for divorce. From a judgment, defendant appeals.

Reversed and remanded for new trial.

Lasher B. Gallagher, of Los Angeles, for appellant.

Howlett & Williams, of Los Angeles, for respondent.

WHITE, Justice.

Respondent, Joseph Cohen, commenced this litigation by filing in the Superior Court of Los Angeles County a complaint for divorce. Appellant wife, in addition to her answer denying the charges of cruelty set forth by respondent, filed a cross-complaint seeking separate maintenance and a division of the community property. Respond-

ent also filed a second action by which he sought to set aside certain transfers of real and personal property theretofore made by him to appellant. The two cases were consolidated for trial. On April 29, 1943, respondent, by leave of court, filed a "supplemental" complaint for divorce which set forth 58 alleged acts of cruelty on the part of appellant. Appellant failed to answer the supplemental complaint, and on September 21, 1943, her default was duly entered. On September 28, 1943, Attorney John E. Glover, who had previously represented appellant (but who was not her counsel at the time her default was entered), filed a petition for the appointment of himself as a guardian ad litem of appellant, alleging that she "is totally incapable of conducting the defense or prosecution of the within action"; and upon presentation of this petition to the court (not the department of the judge who tried the case), an order was made appointing Mr. Glover guardian ad litem of appellant and substituting him as defendant in the cause. So far as appears from the record, this petition was filed and the order was made without notice to or appearance by appellant personally.

At the opening of the trial, appellant being now represented by Mr. Glover, it was stipulated that her default be set aside, and Mr. Glover thereupon filed in her behalf an amended cross-complaint for divorce and a "supplement to amended cross-complaint." The allegations of these pleadings were by stipulation deemed denied by respondent.

Following submission of the case, but before entry of judgment, the record discloses that appellant, through her attorney and guardian ad litem, Mr. Glover, moved to vacate the order of submission, withdraw her amended cross-complaint (for divorce) and reinstate her original cross-complaint (for separate maintenance). This motion, submitted upon the affidavit of Attorney Glover, was denied. Thereafter, on March 13, 1944, the court made findings of fact and conclusions of law, and adjudged that appellant was entitled to a divorce upon the ground of desertion (the ground stated in her "supplement to amended cross-complaint"). The court further ordered that respondent pay to appellant the sum of \$7,732.50 plus \$200 per month for 24 months, and pay to appellant's attorney a fee of \$2,500. Certain real property of respondent was impressed with a lien to secure the payments required by this interlocutory judgment.

Mrs. Cohen, having obtained new counsel (her fourth or fifth change of attorneys), filed notice of appeal from (1) the interlocutory judgment; (2) an order of April 20, 1944, "which order struck from the files all the affidavits and attached exhibits filed by defendant and cross-complainant in support of her motion for a new trial"; and (3) an order of April 24, 1944, "which denied the motion of the defendant and cross-complainant to be relieved of her default for failure to file her supporting affidavits on motion for a new trial within the time allowed by law."

After the filing of the notice of appeal Mrs. Cohen discharged her counsel and appeared in propria persona. Upon the lodging of the record on appeal in this court, she appeared by her present counsel and filed an application for leave to produce additional evidence, consisting of (1) the judgment, now final, in favor of appellant in the consolidated action whereby respondent sought to set aside certain transfers of property to her, and (2) evidence as to additional assets of respondent not disclosed at the trial. Since the case must be reversed and retried, the additional evidence would serve no useful purpose in this court.

Appellant's contentions on appeal may be divided into two categories: (1) An attack upon the validity of the appointment of the guardian ad litem, the granting of a divorce upon the cross-complaint signed by the guardian, and the refusal of the court to permit the withdrawal of the cross-complaint for divorce and the reinstatement of the cross-complaint for separate maintenance only; and (2) an attack upon the findings and judgment of the court with respect to the property rights of the parties. The second group of contentions need not be considered, as the conclusions reached by this court on the first group require that the judgment be reversed and all issues set at large for retrial.

As heretofore indicated, defendant wife by her pleadings originally sought separate maintenance and a division of the community property. About the time that plaintiff husband filed his supplemental complaint for divorce the wife had discharged her attorneys and was appearing in propria persona; she failed to answer the supplemental complaint and her default was entered. Shortly before the trial she re-engaged her former counsel, who presented to the court his verified petition, al-

leging "that said Kathryn B. Cohen, since the inception of said proceedings, has had five separate and distinct law firms or attorneys representing her in connection with said proceedings, and she now appears in propria persona. * * * That your petitioner is informed and believes * * * that said Kathryn B. Cohen, from the causes set forth in the affidavit of Dr. David Harold Fink hereto attached and made a part hereof, is unable unassisted to properly manage and take care of her property, and is totally incapable of conducting the defense or prosecution of the within action, which action involves substantial property interests. * * *." The affidavit of Dr. Fink stated that the wife was "suffering from severe situational neurosis, caused in part, according to her statements, by her husband's desertion for another woman. * * * that the said Kathryn B. Cohen, by reason of the aforementioned situational neurosis, coupled with an emotional upset, is unable unassisted to properly manage and take care of her property, and totally incapable of conducting the defense or prosecution of the aforementioned litigation." During the course of the trial Dr. Fink was called to the stand by Mrs. Cohen's counsel, and he then testified in part as follows:

"The Court: Would you say she was sane or insane? A. Well, I would say she was on the border line. She is sane enough so that no court in this country would ever declare her insane, and yet she is not sane enough to take any kind of professional advice. * * * She requires psychiatric care under sanitarium conditions."

The trial of the cause occupied from October 7 to October 13, 1943. On December 30, 1943, Mrs. Cohen's guardian ad litem moved the court to vacate the order of submission and allow the withdrawal of the cross-complaint for divorce and the reinstatement of the cross-complaint for separate maintenance. This motion was submitted upon an affidavit of the guardian ad litem as follows:

"That your affiant has been requested by said Kathryn B. Cohen to take the necessary legal steps to effect a withdrawal of her cross-complaint, wherein she seeks, among other things, a dissolution of the marriage of the above named parties, and a reinstatement of her original cross-complaint for separate maintenance, stating in substance that your affiant is insisting and compelling her to sue for divorce

against her will and wishes; that it is her, the said Kathryn B. Cohen's life, and that she loves her husband."

This motion was denied by the trial court. Thereafter, on January 27, 1944, the trial court rendered its decision granting a divorce to appellant, but formal findings and judgment were not entered until March 17, 1944. On May 18, 1944, appellant's motion, in the law and motion department of the superior court, to discharge her guardian ad litem was denied without prejudice. Again, on June 2, 1944, appellant and her guardian ad litem presented a motion to discharge Mr. Glover as guardian ad litem. This motion was granted. In support of the motion Dr. Fink made an affidavit to the effect "that it is the opinion of your affiant, based upon his knowledge and experience, personal contact with said Kathryn B. Cohen; that Mrs. Kathryn B. Cohen is sane and mentally competent and therefore requires no guardianship in the above entitled matter, or for any other reason, or at all."

Under the point that "the trial court erred in appointing a guardian ad litem for the defendant," appellant contends that the record contains nothing to show that she ever at any time personally agreed to seek or actually sought or authorized her attorney to obtain a divorce; that the prosecution of a suit for divorce through a guardian ad litem is contrary to public policy, the wife being entitled to decide that question for herself; and that the appointment of a guardian ad litem without notice to her, followed by the filing of amended pleadings seeking a divorce rather than separation, constituted a denial of her right of decision in contravention of the due process clauses of the state and Federal constitutions.

[1] The weight of authority would seem to be that a suit for divorce must be regarded as one which is so strictly personal that it cannot be maintained at the pleasure of a guardian or committee of an insane spouse. *Mohrmann v. Kob*, 291 N.Y. 181, 51 N.E.2d 921, 149 A.L.R. 1274; *Hinkle v. Lovelace*, 204 Mo. 208, 102 S.W. 1015, 11 L.R.A., N.S., 730, 120 Am.St.Rep. 698, 11 Ann.Cas. 794. For both majority and minority expressions see cases in 70 A.L.R. 964 and 149 A.L.R. 1284. Assuming that situations could or should arise in which consent to a divorce might be given by a guardian in behalf of an incompetent, the

present case is not one of them, and the facts disclosed herein plainly call for a reversal of the judgment. It was the privilege of appellant as the allegedly aggrieved party to decline to seek a divorce, and regardless of the motives behind her attitude it was not within the province of her counsel, her guardian or the court to force one upon her. As heretofore indicated, her desires in this regard were communicated to the court prior to the rendition of its decision.

[2] It is urged that appellant is estopped by her conduct in permitting the divorce pleadings to be filed and not objecting to being represented by a guardian ad litem, and that respondent is an innocent victim of a situation over which he had no control. The record, however, discloses that the circuitous procedure adopted in this case whereby a divorce was sought without the express consent of the wife was agreed to by respondent's counsel (not his counsel upon this appeal). Section 128 of the Civil Code provides that in an action for divorce a cross-complainant must personally verify the cross-complaint. The pleadings here involved were not verified, but it was stipulated that they be admitted "with the same force and effect as if they had been verified."

[3] The state has an interest in the marital status, its continuance, and its dissolution. 27 C.J.S., *Divorce*, § 8, pp. 528, 529; *Elms v. Elms*, 4 Cal.2d 681, 52 P.2d 223, 102 A.L.R. 811. In *re Lazar*, 37 Cal.App. 2d 327, 330, 99 P.2d 342. The state recognizes the family as the foundation-stone of the social order. Because under the American philosophy of government the state itself springs from the family, it can only exist so long as the solemnity of marriage and the stability of the family and home ideal endure. Therefore the contract of marriage cannot be dissolved upon the whim or caprice, or by the consent or collusion, of the contracting parties. Only for the grave causes recognized and sanctioned by law can the marriage bond be dissolved. In the case of *In re Lazar*, supra, at page 330, of 37 Cal.App.2d, at page 343 of 99 P.2d, it was said:

"The state, while not a party in a divorce action, has an interest in the contract and relationship of marriage, which is not subject to dissolution upon the whim or caprice of one of the contracting parties or even upon their mutual consent. It may

be dissolved only for causes sanctioned by law. In *Grannis v. Superior Court*, 146 Cal. 245, 252, 253, 79 P. 891, 894, 106 Am. St. Rep. 23, the court said: "The parties to such an action have not the right to control procedure as in other actions. The court is not bound by admissions in the pleadings, nor by the stipulations of the parties, nor is its inquiry as to the facts limited by the pleadings. * * * The rule in actions affecting property, that the parties interested may control the disposition of the interests involved, and that the judgment of the court will be made to conform to such disposition, when ascertained, has no application to divorce cases." *Greenhood on Public Policy*, 490; *Roberts v. Roberts*, 83 Cal. App. 345, 256 P. 826; *Deyoe v. Superior Court*, 140 Cal. 476, 74 P. 28, 98 Am. St. Rep. 73; *Maynard v. Hill*, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654."

And in *Rehfuss v. Rehfuss*, 169 Cal. 86, 92, 145 P. 1020, 1022, the court declared:

"An action for divorce concerns not only the parties immediately interested, but also the state. The attorneys in the case represent the respective parties—the court in a sense represents the state. It is the duty of the court, representing the state, in accordance with the letter and policy of the law, to guard strictly against fraud, collusion, or imposition when the husband or wife seeks to dissolve the bonds that bind them together. * * * "The state has an interest in the maintenance of the marriage tie, which neither the collusion nor the negligence of the parties can impair." Where it becomes manifest to the court, before it loses jurisdiction of the case, that a judgment decreeing a divorce has been obtained by collusive agreement between the parties, or through fraud practiced upon the court, the court has the inherent power to set aside the judgment."

[4] So in the case at bar, it was error for the court to permit the filing of the amended cross-complaints by the guardian ad litem. If appellant was incompetent, she was incapable of consenting to a divorce; if, as testified by Dr. Fink at the trial, she was "sane enough so that no court in this country would ever declare her insane," her personal oath to the divorce pleadings should have been obtained. At no time during the trial, so far as the record discloses, was the wife asked by her guardian, opposing counsel or the court, whether she desired a divorce or whether she had read her amended pleadings.

[5] The conclusions at which we have arrived on this phase of the case render it unnecessary to give extended consideration to other contentions of appellant, as upon the record here presented the cause should be remanded for a new trial upon all of the issues. It is only necessary to note, in this connection, appellant's contention that the trial court erred in finally determining the property rights of the parties by the interlocutory decree. The case of *Leupe v. Leupe*, 21 Cal.2d 145, 130 P.2d 697, 699, holds: "An immediate disposal of property upon an interlocutory decree of divorce is thus within the *jurisdiction* of the trial court." (Emphasis added.) "It has been held in certain cases that the trial court *should not* assign and dispose of the community or homestead property immediately by an interlocutory decree of divorce, but should wait until such time as the marriage is absolutely dissolved. (Citing cases.) These cases, however, dealt with direct appeals from interlocutory decrees in which error only was claimed and do not involve questions of jurisdiction or the effect of such decrees after the time for appeal has passed. Furthermore, it has been said that the court generally should determine the property issues at the same time it determines the issues with respect to the divorce, although" (following emphasis added) "*The court may specify that its determination should not become effective or final until the entry of the final decree.* (Citing cases.) This practical solution of the problem was recognized and approved in the *Remley [Remley v. Remley]*, 49 Cal. App. 489, 193 P. 604] and *Strupelle [Strupelle v. Strupelle]*, 59 Cal. App. 526, 211 P. 248] cases, *supra*. We need not decide in this case whether it was error to make an immediate assignment of property in the interlocutory decree or whether the right to so dispose of the property of the parties was within the discretion of the court." The trial court may, therefore, in its discretion, determine the property rights of the parties in the interlocutory decree, provided such a course does not operate to the undue prejudice of either party.

While it may be that pursuant to the interlocutory judgment of divorce entered herein plaintiff has paid to defendant wife certain sums of money, nevertheless no prejudice will ensue to plaintiff in that regard by reason of a reversal of the judgment which sets at large all of the issues raised by the pleadings, and upon a retrial the

court may take into consideration in the rendition of its judgment such benefits, if any, as have enured to defendant wife by reason of the interlocutory judgment of divorce which is the subject of this appeal.

The interlocutory judgment of divorce granted herein and entered March 15, 1944, docketed March 16, 1944, in Book 1412, Page 116, of Judgments, is reversed, and the cause remanded for a new trial in accordance with the views herein expressed. The attempted appeals from the order of April 20, 1944, striking from the files all affidavits, pleadings and exhibits filed by the defendant in support of her motion for a new trial, and from the order of April 24, 1944, denying the motion of defendant to be relieved of her default for failure to file within the time prescribed by law her supporting affidavits on motion for a new trial, are, and each is, dismissed. The application for leave to produce additional evidence is denied.

YORK, P. J., concurs.

DORAN, J., concurs in the judgment.



73 Cal.App.2d 415

**MORRIS PLAN CO. OF CALIFORNIA
v. STATE.**
Civ. 12913.

District Court of Appeal, First District,
Division 1, California.
March 5, 1946.

1. Constitutional law ⇨284(2)

Pawnbrokers and money lenders ⇨4

Where refusal to pay tax might result in penalties in excess of 60 per cent. yearly, alleged right of taxpayer to await collection suit by state did not provide a "hearing" within constitutional guaranty of due process so as to preclude taxpayer from adopting alternative method of paying under protest and then suing state to recover back amount paid. Gen.Laws Act 3603, § 15a; Const.Cal. art. 1, §§ 13, 14; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearing".

2. Constitutional law ⇨305

The "due process" clause in its procedural sense is a guaranty that, before one may be deprived of property, a hearing must be had before a judicial or quasi-judicial body according to established rules of law. Const.Cal. art. 1, §§ 13, 14; U.S. C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

3. Constitutional law ⇨284(2)

The exigencies of the governmental process in tax matters are paramount, and procedural "due process" of law is satisfied if at some time, whether in a suit for collection, or subsequent to collection in a suit for a refund of taxes paid under protest, the taxpayer is permitted a hearing. Const.Cal. art. 1, §§ 13, 14; U.S.C.A.Const. Amend. 14.

4. Constitutional law ⇨48

The Legislature is deemed to have intended a constitutional operation of its acts rather than an unconstitutional one.

5. Statutes ⇨181(1)

Provision of statute was to be construed in accordance with the words used.

6. Pawnbrokers and money lenders ⇨4

The provision in the Industrial Loan Act that every order, decision, license, or other official act of the commissioner shall be subject to review in accordance with law, constitutes an express consent on part of the state to a review of every official act of the commissioner including consent to be sued for amounts paid under protest under the act as pro rata cost of administration. Gen.Laws, Act 3603, §§ 15a, 23.

7. Appeal and error ⇨854(3)

The District Court of Appeal should sustain judgment rendered after entry of order sustaining demurrer to complaint if either ground of demurrer urged in superior court is good.

8. Pleading ⇨214(1)

All factual allegations alleged in the complaint, which are legally provable and not inconsistent with other allegations and not conclusive, must be assumed to be true on demurrer.

3. Pawnbrokers and money lenders 4

In action against state to recover amount paid under protest under the Industrial Loan Act as pro rata cost of administration, complaint, though it might be subject to special demurrer, pleaded a good cause of action in plaintiff with all conditions precedent performed and all essential elements present at time suit was filed, or showed that there was a possibility of pleading such material and relevant matters. Gen.Laws, Act 3603, § 15a.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by the Morris Plan Company of California against the State of California, to recover amount of payment made under protest under the Industrial Loan Act as plaintiff's pro rata cost of administration. From a judgment rendered after entry of an order sustaining defendant's demurrer to the complaint without leave to amend, plaintiff appeals.

Reversed.

Samuel S. Stevens and Heller, Ehrman, White & McAuliffe, all of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and T. A. Westphal, Jr., Deputy Atty. Gen., for respondent.

WARD, Justice.

Plaintiff appeals from a judgment rendered after entry of an order sustaining defendant's demurrer to the complaint without leave to amend. The complaint alleged the payment of taxes, under protest, under sec. 15a of the Industrial Loan Act, which may be referred to herein as the act. Deering's California General Laws, Vol. 2, Act 3603, pp. 1325, 1334. The purpose of the act is to regulate corporations, incorporated under the provisions of the act, in the regular course of business of loaning money and issuing their own installment investment certificates with loans. Secs. 1 and 2, p. 1326. Section 15a provides: "To defray the costs of administration of this act, including examinations and supervision, the commissioner shall require each company incorporated under and by virtue of the Industrial Loan Act to pay in advance to him its pro rata amount of all such costs as estimated by the commissioner for the ensuing year and it is here-

by made the duty of every such company to pay the same. Such pro rata shall be the proportion which its assets bear to the aggregate assets of all companies incorporated under and by virtue of the Industrial Loan Act as shown by the latest annual reports of such companies to the commissioner." Twenty days is allowed within which to pay the assessment, a penalty being fixed of "5 per cent for each month or part of a month that such payment may be delayed or withheld." (*Italics added.*)

The complaint alleges that:

"On or about the 30th day of November, 1943, the Commissioner of Corporations of the State of California, purporting to act pursuant to the provisions of section 15a of the Industrial Loan Act of the State of California (added by Chapter 298 [page 1288], Statutes of 1943), made demand upon plaintiff for the payment to said Commissioner of Corporations of the sum of \$5,396.40 claimed to be due from plaintiff pursuant to the provisions of section 15a of the Industrial Loan Act as plaintiff's pro rata cost of the administration of said Act, including examination and supervision, for the year 1944. * * *

"On or about the 17th day of December, 1943, plaintiff paid to said Commissioner of Corporations of the State of California the said sum of \$5,396.40, which said payment was made under protest on the grounds set forth in plaintiff's protest * * *

"Said sum * * * is greatly in excess of the actual amount of plaintiff's pro rata cost of the administration of said Act for the year 1944; and in this connection plaintiff alleges that its pro rata amount of the cost of the administration of said Act for the year 1942 amounted to the sum of \$547.58, and for the year of 1943 amounted to the sum of \$424.83 and plaintiff is informed and believes and, therefore, alleges that its pro rata amount of the cost of administration of said Act for the year 1944 will be approximately the same as its pro rata amount of the cost of administration of said Act for the years 1942 and 1943."

The demurrer sets forth that "said complaint does not state facts sufficient to constitute a cause of action [and] That this court does not have jurisdiction to entertain the above purported cause of action." The court sustained the demurrer without leave to amend "on the ground that the State having failed to give its consent to

be sued in an action of this character, the same will not lie."

Appellant presents the question involved as follows: "May the State of California nullify the provisions of the Fourteenth Amendment to the Constitution of the United States guaranteeing the fundamental rights of life, liberty and the protection of property by failure to enact legislation permitting suits to be brought against the State to protect and enforce such rights?" Respondent urges that there are two issues on appeal:

"1. May the Superior Court's judgment be sustained on the ground that appellant's complaint does not indicate that the Court had jurisdiction to entertain the proposed cause of action in that the State of California, having failed to give its consent to be sued in an action of this character, the same will not lie?

"2. May the Superior Court's judgment be sustained on any other ground raised by the demurrer, and particularly the ground that the complaint does not state a cause of action in that the action of the Commissioner of Corporations was in accord with a valid and constitutional law, to-wit, section 15a of the Industrial Loan Act?"

From this statement of the contentions of the parties it is apparent that it must first be determined whether the state has consented to be sued. This question involves (1) whether the taxpayer has any adequate remedy by which to test the validity of the assessment other than this suit against the state; (2) whether the assessment, in the event no other adequate remedy is provided, would be unconstitutional as in contravention of art. 1, sec. 13, of the state Constitution; and (3) whether the act, in the event the answer to (2) is in the affirmative can be construed to provide for "due process of law."

[1] In the present matter respondent suggests that appellant could have refused to pay the tax and that a collection suit by the state would have determined the constitutionality of the assessment and provided the hearing required by the fourteenth amendment to the Constitution of the United States and art. 1, secs. 13 and 14 of the Constitution of the State of California. From this it is argued that appellant did not pursue its remedy and therefore may not avail itself of the constitutional privilege in this suit. Payment of

the tax is voluntary unless there be a fear on the part of the taxpayer that property will be greatly lessened in value, injured, lost or destroyed, in which event it is ordinarily paid under protest. To obtain the benefit of a constitutional right a taxpayer should not be required to perform a futile or unreasonable act. The payment of the assessment, under protest, was made to protect and secure the enjoyment of a right to which appellant was then immediately entitled. The refusal to pay would have resulted in the infliction of penalties in excess of 60% yearly in the event his refusal was wrongful. The tax was fixed in the sum of \$5,396.40. The present contest has covered up to date of submission a period of over two years, which would require a penalty of approximately \$12,877.53 or a total of \$18,273.93. The infliction of such a penalty, without right of contest prior to payment, is coercive. It means that if the taxpayer is wrong, though he honestly believes he was right, his refusal to pay would cost him in excess of \$12,000 plus the assessment of over \$5,000. Such a penalty is excessive. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R.A., N.S., 932, 14 Ann.Cas. 764. Payment of the tax assessed under threat of such a penalty would make it appear to have been made under compulsion. And if "due process of law" requires a hearing at some late stage in tax proceedings, the dubious privilege of a hearing under these circumstances can not be held to satisfy the constitutional right.

[2,3] This conclusion raises the second problem above noted. Here the Legislature adopted a scheme to regulate corporations in the business of loaning money under certain circumstances. The tax has been imposed with notice but without hearing prior or subsequent to the imposition of the assessment by the commission to determine whether appellant has been justly deprived of property. This appears to be a violation of the due process clause of the United States and the state Constitutions unless at some time in the proceedings under the act it can be said that the taxpayer had a right to a hearing. The due process clause in its procedural sense is a guarantee that before one may be deprived of property, a hearing must be had before a judicial or quasi-judicial body according to established rules of law. *City of Los Angeles v. Oliver*, 102 Cal.App. 299, 283

P. 298; *Roberts v. Wehmeyer*, 191 Cal. 601, 218 P. 22; *Beck v. Ransome-Crummey Co.*, 42 Cal.App. 674, 184 P. 431; *Overell v. Overell*, 18 Cal.App.2d 499, 64 P.2d 483. The care with which the courts have protected the due process clause is illustrated by the extent to which statutory provisions have been held unconstitutional if "due process" was not kept in mind in framing a legislative enactment. "Thus courts have held that the sale of land to satisfy a void street assessment which the legislature has unconstitutionally attempted to validate; a legislative act divesting the title of the purchaser of property previously mortgaged by his grantor, by a foreclosure suit in which the mortgagor was alone defendant; a denial of recovery for property conveyed under a contract legal when made and legal when the property was conveyed, but which by reason of a change in public policy has become unlawful; and the trying of title to property upon a writ of prohibition, are invalid as depriving parties of their property without due process of law. Again it has been held that laws in respect to liens on wages of attachment or execution debtors cannot constitutionally deprive a debtor of his right to a notice of the claim and an opportunity to dispute it. Nor can the legislature pass a valid law providing for the assessment and summary sale of land without notice to the owner or an opportunity to be heard." 5 Cal.Jur., p. 881, sec. 230. The exigencies of the governmental process in tax matters are paramount, and procedural "due process of law" is satisfied if at some time, whether in a suit for collection, or subsequent to collection in a suit for a refund of taxes paid under protest, the taxpayer is permitted a hearing. *Central of Georgia R. Co. v. Wright*, 207 U.S. 127, 28 S.Ct. 47, 52 L.Ed. 134, 12 Ann.Cas. 463; *Reclamation Dist. No. 108 v. Evans*, 61 Cal. 104, 107; Annotation—What is necessary to due process of law in tax proceedings? L.R.A.1916E, 5. As above demonstrated the right of the taxpayer to wait for the state to institute a suit to collect this tax conferred a nebulous privilege which entailed dangers not commensurate with the guarantee of the constitutional right sought to be protected.

[4] It remains to be determined whether the act can be construed so as adequately to protect the taxpayer's constitutional rights in view of the general rule that the legislature is deemed to have intended a

constitutional operation of its acts rather than an unconstitutional one.

[5] Section 23 of the act provides: "Every order, decision, license or other official act of the commissioner shall be subject to review in accordance with law. Upon such review, the burden of proof shall lie upon the appellant, and the court shall receive and consider any pertinent evidence which was introduced in the formal hearing before the commissioner, whether oral or documentary, concerning the action of the commissioner under review, but shall be limited to a consideration and determination of the question whether there has been an abuse of discretion on the part of the commissioner in making such order, decision, finding, requirement, or rule." It may be conceded that primarily the section was enacted to supplement procedure in reference to other sections, for instance, sec. 11, providing for an "Order to discontinue unsafe practices" and the "Right to take possession of property" and "to liquidate the same in the manner provided by the Bank Act." See, also, sec. 11a. However, the section must be construed in accordance with the words used. The section provides: "Every order * * * or other official act * * * shall be subject to review." "Exhibit A" attached to the complaint is in effect a demand and order "To pay in advance" \$5,396.40. Attention is called to section 15a of the act which as heretofore noted, provides for increasing penalties for continued non payment. The demand is an official act in the form of an order and subject "to review in accordance with law." Sec. 23.

[6] Respondent contends that the official acts of the commissioner are those, for instance, referred to in sections 11 and 11a and not to the commissioner's act in "assessing" with consequent penalties. Respondent also contends that the review must be from a "formal hearing" and limited to a determination of whether there was an abuse of discretion in making an order. This view might be technically correct if the section did not provide that "Every order * * * shall be subject to review." To adopt respondent's theory only the formal orders would be subject to review and the various assessments and penalties could never be reviewed in a court of justice. If this is true appellant is precluded from maintaining an action to test the legality and propriety of the section of the statute

(15a) requiring industrial loan companies to pay in advance a share of the estimated costs of examination and supervision by the commissioner. This condition might result in a declaration that sec. 15a is unconstitutional as violative of the fourteenth amendment of the Constitution of the United States and section 13 of art. I of the Constitution of California. Referring to art. XIII, sec. 1 $\frac{1}{4}$ of the Constitution of California covering exemptions of veterans it was said in *Chesney v. Byram*, 15 Cal.2d 460, 463, 101 P.2d 1106, 1107: "How such exemption could be obtained, would be a matter first for the determination of the assessors of the respective political subdivisions, and in case of their failure to recognize the right granted to the veteran, their action would be *subject to review by the courts*." (Italics added.) "A legal right without a remedy would be an anomaly in the law." 1 Am.Jur., p. 409, sec. 9. "Suffice it to say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property." *Monongahela Bridge Co. v. United States*, 216 U.S. 177, 195, 30 S.Ct. 356, 361, 54 L.Ed. 435. In California the Supreme Court has recorded its views as follows: "In any event this court is not powerless to formulate rules of procedure where justice demands it. Indeed, it has shown itself ready to adapt rules of procedure to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits. *Wennerholm v. Stanford University School of Medicine*, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; *Christin v. Superior Court*, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; *Tuller v. Superior Court*, 215 Cal. 352, 10 P.2d 43; see 31 Cal.L.Rev. 225, 227; see, also, *Rogers v. Duhart*, 97 Cal. 500, 504, 32 P. 570; California Constitution, art. VI, § 4 $\frac{1}{2}$; Code Civ.Proc., §§ 355, 356, 473, 475; Civ.Code, §§ 3523, 3528." *Bollinger v. National Fire Ins. Co.*, 25 Cal.2d 399, 410, 154 P.2d 399, 405.

Having in mind that otherwise the taxpayer would have no opportunity for a hearing to remedy errors in assessments, and that if the act is so construed the assessment is probably unconstitutional, it is concluded that sec. 23 of the act is an express consent on the part of the state "to

review in accordance with law" "every * * * official act of the commissioner." The act, here sought to be reviewed, is the payment under protest of \$5,396.40. This sum under the terms of the act "shall be deposited in the State treasury to the credit of the General Fund." Sec. 3a. The state therefore is a proper party defendant in view of sec. 23. Whatever the rule previously may have been in relation to the strict construction to be applied to statutes authorizing persons to sue the state as being in derogation of sovereignty, the Supreme Court of this state in 1944 broadened such right. The strict rule heretofore followed appears to have been abrogated as demonstrated in *People v. Moroney*, 24 Cal. 2d 638, 150 P.2d 888. In that case the court was called upon to construe sec. 4300a of the Political Code. At pages 641, 642 of 24 Cal.2d, at page 890 of 150 P.2d, the court said: "'No fee shall be charged by the clerk for service rendered in any criminal action or adoption proceeding, *nor for any service to the State of California*. No fee shall be charged by the clerk for service rendered to any municipality or county in said State, or to the National Government, nor for any service relating thereto, except for making or certifying to a copy of a filed paper, record or proceeding, when not otherwise provided by law.' (Italics added.) It cannot be doubted that that language is broad enough to include an officer of the State as well as the State itself acting in his official capacity on behalf of the State. It has been held that an action against an officer in his official capacity is equivalent to and may be treated as an action against the State or a political subdivision thereof. See *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818; *California Securities Co. v. State*, 111 Cal. App. 258, 295 P. 583. And the Bank & Corporation Franchise Tax Act specifically provides for such a suit against the commissioner. (§ 30.) Likewise, a suit to recover taxes paid under protest although against a state officer rather than the State is treated as an action against the latter in regard to the immunity of the State from costs. See *Innes v. McColgan*, 52 Cal.App.2d 698, 126 P.2d 930."

In *California Securities Co. v. State*, 111 Cal.App. 258, at pages 260, 261, 295 P. 583, at page 585, the opinion sets forth the facts as follows: "Briefly, the allegations are that the secretary of state as such demanded of respondents the payment of moneys under and pursuant to the so-called Cali-

fornia Corporation License Tax Act on penalty of having their right to transact business within the state forfeited if they failed so to do; that, in order to avoid such forfeitures, the moneys were paid under protest to the secretary of state, who in turn paid them forthwith to the state treasurer; that the act under which the moneys were collected is void; that demand for a refund was made and refused, and that the moneys were due and owing to respondents." The opinion states (111 Cal.App. at page 260, 295 P. at page 584): "The state of California now appeals, alleging as grounds of appeal: (1) That the original actions brought against the secretary of state were not in fact actions against the state of California; (2) that the order substituting the state of California in the place of said secretary of state was void * * ." The court on appeal decided that the order substituting the state in the place of the secretary of state was of legal force and effect a valid order.

For the foregoing reasons it is concluded that the trial court incorrectly sustained the demurrer on the grounds "that the State having failed to give its consent to be sued in an action of this character, the same will not lie." And by reason of this conclusion it becomes unnecessary to determine whether art. I, sec. 13 of the Constitution of the State of California in its substantive sense is a self-executing provision which comes within the rule enunciated by our Supreme Court in *Rose v. State of California*, 19 Cal.2d 713, 123 P.2d 505, so as to make it possible to sue the state without its consent.

[7,8] However, respondent correctly contends that this court should sustain the judgment below if either ground of demurrer urged in the superior court is good. *Frasch v. London & Lancashire F. Ins. Co.*, 213 Cal. 219, 2 P.2d 147; *Stratford Irr. Dist. v. Empire Water Co.*, 44 Cal.App. 2d 61, 111 P.2d 957; *Johnson v. Fletcher*, 97 Cal.App. 153, 274 P. 1001; *Burke v. Maguire*, 154 Cal. 456, 98 P. 21. In considering the demurrer all factual allegations alleged in the complaint which are legally provable and not inconsistent with other allegations and not conclusive must be assumed to be true. *Blake v. Blake*, 86 Cal.App. 377, 260 P. 937; *Hevren v. Reed*, 126 Cal. 219, 58 P. 536; *Smith v. Lewis*, 211 Cal. 294, 295 P. 37; *Katenkamp v. Union Realty Co.*, 6 Cal.2d 765, 59 P.2d 473; *Abroms v. New York Life Ins. Co.*,

53 Cal.App.2d 764, 128 P.2d 391; *Penziner v. West American Finance Co.*, 133 Cal. App. 578, 54 P.2d 501.

[9] The complaint, though it may be subject to special demurrer, pleads a good cause of action in the plaintiff with all conditions precedent performed and all essential elements present at the time the suit was filed or shows that there is a possibility of pleading such material and relevant matters. 1 Am.Jur., p. 408, sec. 8. In the complaint appellant questions the constitutionality of sec. 15a in the following form: "Plaintiff alleges that section 15a of the Industrial Loan Act of the State of California and the assessment levied against plaintiff pursuant to the terms thereof are, and each of them is, invalid, unjust, discriminatory, unequal in their protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States." There are two questions that might be considered in this respect: (1) Do the provisions of the section in and of themselves violate federal or state constitutional provisions and (2) are the facts as alleged sufficient to show that the amount assessed is such a disproportionate, unreasonable and arbitrary assessment that it is in violation of the federal and state constitutional provisions or of either? In the closing brief appellant states its position as follows: "Although appellant's complaint alleges that section 15a of the Industrial Loan Act and the assessment levied against appellant pursuant to the terms thereof are, and each of them is, invalid, unjust, discriminatory, and unequal in their operation, appellant does not contend that section 15a is in itself invalid and unconstitutional. It is recognized, of course, that industrial loan companies are properly subject to supervision and regulation by State authorities and that said companies may properly be assessed an amount reasonably related to the actual cost of such supervision. However, appellant insists that an assessment for the purpose of regulation having no reasonable relation to the actual cost of such regulation is arbitrary, invalid, unjust and discriminatory."

Appellant correctly admits that constitutionally industrial loan companies are subject to proper state regulation. Whether the particular assessment is improper, unjust and discriminatory, and therefore invalid, primarily presents a question of fact. In a supplemental brief appellant asserts: "* * * the Commissioner is attempting

to levy a tax against appellant for the purpose of revenue," which presents a question of law. Assuming that only a question of law is presented, the allegations of the complaint plus the statements of appellant are not sufficiently specific to pass upon the constitutionality of sec. 15a.

The judgment in this case is reversed on the ground that when section 23 is read in conjunction with other sections a fair and just interpretation of the section is that it gives an express consent to sue the state, so far as the facts of this case are concerned. The complaint may be subject to a special demurrer, a point not necessary or advisable to decide at this time. The trial court is directed to set aside that portion of the order sustaining the demurrer *without leave to amend* and in the trial court's discretion permit either plaintiff to amend or defendant to file an amended demurrer. If neither side cares to act, the trial court should proceed to trial.

The judgment is reversed.

PETERS, P. J., and ATTERIDGE, Justice pro tem., concur.



73 Cal.App.2d 488

PEOPLE v. JOHNSTON et al.
Cr. 3945.

District Court of Appeal, Second District,
Division 1, California.

March 11, 1946.

1. Poisons ⇨4

"Possession" of narcotics as respects criminal responsibility therefor, is established when it is shown that a person has physical control thereof with the intent to exercise such control, or having had such physical control, has not abandoned it and no other person has that possession. Health and Safety Code, § 11160.

See Words and Phrases, Permanent Edition, for all other definitions of "Possession".

2. Poisons ⇨4

Proof of possession of narcotics at the very time of arrest or that accused had the
166 P.2d—40½

unlawful article on his person are not necessary to sustain conviction for unlawful possession. Health and Safety Code, § 11160.

3. Poisons ⇨4

In prosecution for unlawful possession of narcotics the evidence must show that possession was immediate and exclusive and under the dominion and control of defendant. Health and Safety Code, § 11160.

4. Poisons ⇨9

In prosecution for unlawful possession of narcotics the testimony substantially supported an inference that defendant had the narcotics in her possession and also that she knew that they were there. Health and Safety Code, § 11160.

5. Criminal law ⇨1159(1)

To warrant the rejection of statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

6. Criminal law ⇨1159(3)

Conflicts in testimony and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.

7. Criminal law ⇨941(1)

In prosecution for unlawful possession of narcotics trial court did not abuse its discretion in denying a new trial based on affidavits setting out testimony which was merely cumulative of that given on trial. Health and Safety Code, § 11160.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Jean Johnston and another were charged with an offense and named defendant was convicted of possessing marijuana and opium in violation of section 11160, of Health and Safety Code. From the conviction and from an order denying motion for a new trial and from the sentence imposed, she appeals.

Appeal from sentence dismissed. Judgment and order appealed from affirmed.

David Silverton, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

This is an appeal by defendant Jean Johnston from "the order denying her motion for a new trial and from the judgment of conviction and sentence rendered against her."

By an information appellant and her co-defendant DuBrowa were jointly charged with a violation of section 11160 of the Health and Safety Code, i. e., the unlawful possession of marijuana and opium. A jury trial was waived and by stipulation the case for the prosecution was submitted upon the transcript of the preliminary examination which was read into the record. At the conclusion of the trial, the court found appellant guilty, as charged in the information, and found defendant DuBrowa not guilty. Appellant's application for probation and her motion for a new trial having been denied, she was sentenced to the Los Angeles County Jail for a term of six months.

It appears from the record herein that appellant and defendant DuBrowa resided together and were employed in the late evening hours until around midnight; that on March 7, 1945, accompanied by Seymour Handel, they returned to their home around three o'clock in the morning, at which time Officers Mott, Pena, Stark and Russell, of the Los Angeles City Police Department attached to the Narcotic Detail, were "staked out" close to one house where the two women resided. Officer Mott testified that he saw appellant, defendant DuBrowa and Handel as they approached the house at the time in question, and observed appellant "leave the sidewalk and go across the weeds which are adjoining the driveway to an area alongside of the garage. Against the garage there is a hedge or group of shrubs, and I observed the defendant Johnston stop near the shrubs, lean over and with her right hand reach down into the shrubbery. She stood erect and she had what appeared to be a small object in her right hand. She then returned to the sidewalk to where the defendant DuBrowa and this Seymour Handel were waiting. She rejoined them and went into the house at 6511 Romaine. * * * I stood at the kitchen window just immediately after they went onto the porch and I observed them come into the living room of this house. * * * I went over to that spot where she went to and

reached down and made a thorough search of that portion of the hedge to see if I could find any objects at all that she might have deposited or left there. * * *

"Q. Did you discover anything? A. I made a thorough search with my flashlight and, as I recall, there was a child's woolen mitten and two or three pieces of wood other than the leaves that were around from the hedge.

"Q. That is, you saw them there? A. Yes, sir.

"Q. Did you take any out? A. No, I left things just as they were. I made a close inspection of what was there. * * *

"Q. By Mr. Safier: What did you do then after you completed your search? A. I went back to my post there at the kitchen window. * * * I stood at that window for approximately, oh, I would say 15 or 20 minutes, and at the end of that time the defendant Johnston came out of the front door and went out onto the walk across the driveway to this same location where she had gone to before in the shrubbery. I observed her reach down with her right hand again and go through the motions of depositing something in the shrubbery. * * * She then rose and went back into the house. I immediately went over to this location beside the garage and made an examination of the shrubbery and observed this bottle wedged against the side of the garage about a foot and a half off the ground.

"Q. By Mr. Danoff: Was there anything in the bottle? A. There were four cigarettes which appeared to be marijuana."

After marking the cigarettes, said witness left the bottle in the shrubbery and together with Officer Pena, Sergeants Stark and Russell, entered the front door of the house. Continuing, said witness testified: "As we entered * * * I observed * * * Seymour Handel make a motion toward a small coffee table near the center of the room, either through the motion of placing something in a little flower pot or throwing something to the floor. * * * Before we opened the door, through the Venetian blinds, a small crack in the blind, I observed him by looking through that. * * * When we entered, the defendant Du Browa was seated near a stove in the front room * * * and the defendant Johnston, I believe, was in the bedroom or coming from the doorway of this bedroom; we also found a party by the name of Charles Krakowe in the front room and he was

seated on the davenport. * * * We then made a search of the house and I observed Sergeant Stark come out from the direction of the bathroom and display this silver spoon which contains a brown substance. * * * In making a thorough search of the front room I observed a quantity of material on the floor in the vicinity of the area that I observed Mr. Handel make the motion, and I observed a quantity of flakes that appeared to be marijuana on the floor. * * * I picked up some of the larger flakes. There were quite a few smaller flakes that had sifted or settled into the nap of the rug. I got a few of the larger ones and placed it in a piece of paper and folded it up into a package." Thereafter, in the presence of defendant DuBrowa and the others in the room, said witness questioned appellant with respect to the bottle containing the cigarettes, to-wit: "I told defendant Johnston that I observed her place an object near the garage, and after she had returned into the house I told her, I went to that location and observed a small green bottle containing four cigarettes and I asked her if she wanted to go out with me to remove the bottle. She stated she didn't know anything about it, and did not want to have anything to do with it. I then went outside and recovered the bottle, People's Exhibit A, and brought it inside and displayed it to her and she said she didn't know anything about it. I displayed it to the defendant DuBrowa and she also denied any knowledge of it. I then displayed the debris that we took from the rug and I told her it appeared to be seed and flakes of marijuana, and she said, 'I don't know anything about it.'"

Officer Pena testified that on March 7, 1945, at approximately 3 a. m., he was standing in the rear of the house at 6511 Romaine "looking in the bathroom window" and observed the defendant DuBrowa in the process of washing her hair; that "as she was drying it, I observed the defendant Johnston come to the door and ask Miss DuBrowa some question and I heard Miss DuBrowa ask her in turn, 'How many sticks are there left?' to which defendant Johnston answered, 'There are four.' The defendant DuBrowa said, 'Put them in the bottle and take it outside.' And at that time the defendant Johnston walked down the hall and disappeared and the defendant DuBrowa continued drying her hair."

Mr. J. A. Allen, a member of the Los Angeles Police Department and attached to

the Scientific Investigation Bureau as a chemist, testified that he had made a microscopic examination of the four cigarettes contained in the green jar (People's Exhibit A) and was of the opinion that the "contents of the four cigarettes were the leaves and flower tops of cannabis sativa, which is more commonly known as marijuana or Indian hemp." This witness' attention was then directed to People's Exhibit B, "which is an envelope and a spoon, the spoon having some black substance adhering to it and a piece of cotton." With respect to this, the witness testified that he had made a chemical examination of the black material in the spoon and "it is my opinion that the residue material in this spoon is opium."

Appellant denied that she left DuBrowa and Handel on the sidewalk and went to the hedge when they were on their way home on the night in question, and denied that she and DuBrowa had any conversation in the bathroom concerning "sticks". She also denied that she had left the house that night after the three of them had gone in. She testified that she did not use narcotics in any form and had never had in her possession a cigarette or paper similar to those in the green bottle. Defendant DuBrowa testified that up until about ten days prior to the date of appellant's arrest, Bob and Ruth Greenberg had boarded and lived in the house at 6511 Romaine Street with her and appellant, and that one evening they discovered opium in the room occupied by the Greenbergs.

It is here urged by appellant that the evidence is insufficient to sustain the judgment for the reason that it is not shown that she had possession of the narcotics, nor that she had knowledge that the substance found in her house was marijuana and opium.

[1-3] As was stated by this court in *People v. Bassett*, 68 Cal.App.2d 241, 247, 156 P.2d 457, 460: "'Possession' of a chattel is established when it is shown that a person has physical control thereof with the intent to exercise such control, or having had such physical control, has not abandoned it and no other person has that possession. Rest., Torts, Sec. 216. The statute does not require 'proof of possession' at the very time of arrest (*People v. Belli*, 127 Cal. App. 269, 271, 15 P.2d 809), nor is it necessary to prove that the accused had the unlawful article on his person. *People v. Sinclair*, 129 Cal.App. 320, 322, 19 P.2d 23. The question therefore arises, does the evidence in the case before us establish the

fact that 'possession' of the narcotics was immediate and exclusive and under the dominion and control of appellant."

[4] In the instant cause, appellant denied participating in the events narrated by the police officers, hereinbefore recited; consequently the verity of the testimony thus adduced became a question for the determination of the trial court, and by finding appellant guilty, it impliedly accepted as true the testimony given by the police officers. Their testimony substantially supports an inference that appellant had the narcotics in her possession and also that she knew what they were.

Appellant urges that the People's evidence should be wholly disregarded as being inherently improbable. In support of this contention she sets forth in her opening brief alleged inconsistencies in the testimony of Officers Mott and Pena.

[5, 6] "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. (Citing authorities.) Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758, 759.

[7] Appellant finally urges that the court erred in denying her motion for a new trial and should have considered upon their merits the affidavits presented in support of the motion. Both the affidavit of appellant and that of DuBrowa are to the effect that the person who went toward the hedge, as testified to by officer Mott, was their companion Handel; and that the reason they did not so testify at the trial was because they were not asked. Appellant's affidavit also avers that she was greatly in fear of Handel and was therefore afraid to tell the officers that Handel went to the shrubbery; that Handel had threatened her and beaten her and that she was in great fear of him; further, that he had left Los Angeles before she could subpoena him.

Even though it be conceded that the evidence that it was Handel who went to the hedge was material, such evidence, so far as the instant cause is concerned, was only

cumulative of appellant's testimony that she did not go to the hedge. Under the facts presented, the trial court did not abuse its discretion in impliedly determining that it was not Handel, who deposited the marijuana cigarettes in the hedge, and that it was not the duress of Handel which prevented appellant from so testifying at the trial, particularly in view of the statement of appellant's counsel made during the trial that Handel was then in New York.

The appeal from the sentence is dismissed. The judgment and order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concur.



73 Cal.App.2d 391

PEOPLE v. PILGRIM.

Cr. 1946.

District Court of Appeal, Third District,
California.

March 4, 1946.

1. Homicide ⚡244(1)

Evidence supported conviction of manslaughter, as against defendant's claim that he struck decedent in necessary defense of himself and his 12-year-old nephew.

2. Criminal law ⚡829(5, 9)

Refusal of requested instructions on burden of proof and on defendant's right to act in defense of himself and nephew was not error, where requested instructions were fully covered by other instructions given.

3. Criminal law ⚡729

Statement in prosecuting attorney's argument to jury that, "if the old gentleman struck the little boy in the stomach, why didn't they have the young man here?" did not constitute reversible misconduct, where record clearly indicated that statement was retracted and the court was not asked to instruct the jury.

4. Criminal law ⚡730(14)

Statement by prosecuting attorney in his argument to jury referring to possibili-

ty that trial judge would grant a parole if defendant was found guilty did not constitute reversible error, where effect of the improper statement was counteracted by trial court's prompt admonition to disregard it.

5. Criminal law ⚖️982

Under statute the granting probation to defendant following his conviction of voluntary manslaughter was discretionary with trial court. Pen.Code, § 1203.

6. Criminal law ⚖️982

"Involuntary manslaughter," which is the taking of life in certain unlawful ways, without any intention of doing so, must be distinguished from "voluntary manslaughter" in considering application for probation following conviction. Pen.Code, §§ 192, 1203.

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary Manslaughter" and "Voluntary Manslaughter".

7. Assault and battery ⚖️82

If one willfully and violently assaults another without cause, with evident purpose of inflicting bodily injury, he must be presumed to intend natural consequences of his unlawful act. Code Civ.Proc. § 1962.

8. Assault and battery ⚖️55

An assault by means of force likely to produce great bodily injury may be accomplished by use of fists only, without employing a deadly weapon.

9. Criminal law ⚖️982

Trial court did not abuse its discretion in summarily denying without a hearing defendant's petition for probation, following his conviction of manslaughter based upon attacks made by him with his fists upon a 70-year-old Indian. Pen.Code, § 1203.

Appeal from Superior Court, Del Norte County; Samuel F. Finley, Judge.

Grant Pilgrim was convicted of manslaughter, and he appeals.

Affirmed.

Blaine McGowan, of Eureka, for appellant.

Robt. W. Kenny, Atty. Gen., James O. Reavis, Deputy Atty. Gen., and John Childs, Dist. Atty., and Geo. W. Howe,

Asst. Dist. Atty., both of Crescent City, for respondent.

THOMPSON, Justice.

The defendant was charged with murder and convicted of manslaughter. He made two attacks upon Don Harrison, an old Indian, striking him in the face with his fist, and knocking him down each time. As a result of the blow in the second attack, the deceased struck his head upon a rock, fracturing his skull which resulted in cerebral hemorrhage from which he died. The defendant claimed that he struck the deceased in necessary defense of himself and of his young nephew, Carol Gensaw. A motion for new trial was denied. Defendant's motion for probation was also summarily denied. From the judgment of conviction of manslaughter and from the order denying a new trial the defendant has appealed.

For grounds of reversal it is contended the court erred in refusing to give certain instructions, and that the prosecuting officer was guilty of prejudicial misconduct in statements which he made in his argument to the jury. It is also asserted the court erred in denying defendant's motion for probation without a hearing.

The assault which resulted in the death of Don Harrison, an old, intoxicated Indian seventy years of age, occurred in the town of Klamath about eight o'clock on the evening of June 4, 1945. The defendant is a muscular young Indian nineteen years of age. He had been employed as a woodsman. The defendant and the deceased had been acquaintances for several years. No previous trouble existed between them. There is no evidence that the deceased was quarrelsome.

Carol Gensaw is a nephew of the defendant. He was twelve years of age. About eight o'clock on the evening of the homicide Gensaw and his companion, Dale Sanderson, were sitting in an automobile. It belonged to Matthew Fisher. The machine was parked in front of a restaurant in Klamath. They sat in the car quarreling and striking each other. Fisher, the owner of the car, who was in the restaurant, heard the disturbance and came out and told them to stop quarreling. Carol Gensaw either got out of the machine, or he was pulled out by Fisher. Gensaw stood on the sidewalk crying when Don Harrison, the deceased, came walking along the sidewalk toward them. Seeing Gensaw crying, the

old man evidently laughed at him and the boy then began "poking at him," or "socking him." The deceased pushed him aside and started walking." The defendant then arrived. He said his nephew told him Harrison had struck him in the stomach. The defendant testified: I got there and I asked Don what the heck you hit him for, and Don stepped back, his fists come up, and that is when I hit him the first time." The deceased told the defendant he did not strike his nephew. He was not then threatening to do so. He was merely laughing when he was first struck and knocked down. Another Indian helped him to arise. His mouth was bleeding. Without attempting to retaliate and without threatening the defendant, the deceased immediately "walked off the sidewalk and started back for the alley right next to the meat market." The defendant left the scene of the first assault and going over to the automobile parked near by, he removed his coat and, placing it on the seat of the car, he immediately returned and, following the deceased, stepped in front of him and again struck him in the face with his fist and knocked him down. It was not claimed that the deceased then threatened the defendant, and Carol Gensaw was not then present. As a result of that second attack the old man's head struck a rock and his skull was fractured, causing cerebral hemorrhage from which he died.

George Macil, a friend of Gensaw and Sanderson, the boys who had been quarreling, stood near by and saw the entire affair. He testified that the deceased told the defendant that "he didn't touch" Gensaw. He said that the defendant struck the deceased on his chin or mouth, with his fist, and knocked him down; that Harrison was bleeding; that he got up and "started walking away;" that "Grant [the defendant] went over to the car and took off his coat, * * * then went back to Don Harrison. * * * He socked him again. * * * He fell down on the ground and hit his head on a rock." He testified that at no time did he see the deceased attempt to strike the defendant; that when the defendant hit him the last time "he was going away from the defendant." Matthew Fisher corroborated the testimony of Macil in regard to the last fatal blow which resulted in the death of the deceased, and upon some other details of the affair.

[1] There is substantial evidence that the defendant made an unprovoked assault

upon an apparently harmless, good-natured, fat, old, drunken Indian. He was seventy years of age and weighed two hundred pounds. He had been drinking for a couple of days. There is no evidence that he was quarrelsome. Evidently the defendant struck him in the heat of passion merely because he had been told that he had previously hit his nephew in the stomach. He was not then threatening to attack the boy. Moreover, the evidence indicates that the deceased did not strike the boy. The implied finding of the jury that the defendant did not strike and kill the deceased in necessary self defense or in defense of his nephew is supported by the evidence.

[2] We find no error in the refusal of instructions. The jury was fairly and fully charged upon every essential element of the offense, including the degrees of murder, the crime of manslaughter, the rule of self-defense and the right to use necessary force to protect a relative against imminent danger of great bodily harm.

The appellant contends that the court erred in rejecting three instructions which he offered. We think not. They were adequately covered by other instructions which were given to the jury. The first omitted instruction reads in part:

"The burden is upon the prosecution from the beginning to the end of the trial. It is never upon the accused to establish his innocence of the crime of which he is informed against. If there is a single material allegation of the Information that the prosecution has failed to prove to your minds to a moral certainty and beyond a reasonable doubt, you must find the defendant not guilty."

The second one covered substantially the same principle regarding the burden of proof. The third instruction which was refused reads:

"The court instructs the jury that the law is that a man or a relative assaulted or about to be assaulted is not required by law to wait until his adversary is on equal terms with him, but may rightfully anticipate his action and kill his assailant, when to strike in anticipation reasonably appeared to be necessary to self-defense as I have herein defined."

The jury was repeatedly and properly instructed that the burden of proof was on the "state" to prove the guilt of the defendant "beyond a reasonable doubt and to a moral certainty." That rule was applied to

every essential element of the crime. The jury was told that "If you entertain any reasonable doubt upon any single material fact, you are to return a verdict of not guilty." It was also charged that the defendant was presumed to be innocent until his guilt was proved beyond a reasonable doubt, and that the facts should be reconciled, if possible, upon the theory of his innocence.

The first and second refused instructions were adequately covered by others which were given to the jury. We are unable to perceive how the jury could have been misled regarding the presumption of innocence or the burden of proof. Moreover, while those proffered instructions are technically correct, they may be misleading. In both of them the jury was told, in effect, that the burden of proof was never cast upon the defendant. That assertion, in a trial for murder, is not strictly correct. Section 1105 of the Penal Code provides that:

"Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

See *People v. Wells*, 10 Cal.2d 610, 617, 76 P.2d 493.

However, since the court fully instructed the jury upon the principle of the burden of proof, it is not necessary for us to determine whether the refused instructions were misleading under the circumstances of this case, and therefore properly rejected on that account.

The third omitted instruction was also amply covered by others which were given to the jury. At the request of the defendant the jury was instructed that:

"The right of self-defense of a party violently assaulted by another, to repel such attack and fully protect himself *or a relative*, is a law of nature. * * * The right is expressly recognized by our own statutes, and the conditions under which it may be asserted are clearly defined. These are, that the party was not himself the first aggressor, or if the aggressor, that he had in good faith withdrawn from the contest before the fatal blow. Second, that the slaying was necessary to prevent the in-

fliction upon himself *or a relative* of a great bodily injury by the party slain."

At the request of the defendant the jury was further charged that to justify the killing on the ground of self-defense or for the protection of a relative, it is not necessary "that the danger be actual," but, on the contrary, "it is enough that it be an apparent danger, such an appearance as would induce a reasonable person in defendant's position to believe that he *or a relative* was in immediate danger of great bodily harm." The court concluded that feature of the charge by saying, "If this was defendant's position, it was his right to repel aggression and fully protect himself *or a relative* from such apparent danger." Those instructions certainly covered the charge contained in the rejected one.

The instructions which were given fully protected the rights of the defendant. The jury evidently concluded that the defendant was the aggressor, which is amply supported by the evidence, and that the deceased had not assaulted defendant's nephew, Carol Gensaw, or if he did strike him that he did not threaten to repeat the assault at the time the deceased was knocked down and killed.

[3] We are of the opinion the defendant was not prejudiced by the challenged statements of the prosecuting officer made to the jury in the course of his argument. The first assignment of misconduct consisted of a statement to the jury by the prosecuting attorney that, "If the old gentleman struck the little boy in the stomach, why didn't they have the young man here?" To that statement the attorney for the defendant objected and asked the court to instruct the district attorney "to discontinue that line of argument." Clearly there was no wilful attempt to prejudice the jury. The prosecuting attorney promptly withdrew the statement and asked both the court and the defendant's attorney to excuse him. The court was not asked to instruct the jury to disregard it. That was not necessary under the circumstances. The record clearly indicates that all parties assumed that the statement was retracted and that the jury was therefore expected to disregard it. Certainly that incident could not prejudice the jury. It was not reversible misconduct.

[4] The only other assignment of misconduct occurred when the prosecuting at-

torney, in his argument to the jury, was commenting on the reliance upon the fairness of the judge in pronouncing judgment in the event of a conviction. After stating that "the court, * * * [when the circumstances justified it], has paroled quite a number," he said "And if this young man were found guilty he [the judge] might parole him." The defendant's attorney assigned that statement as an infringement of the court's province, and as prejudicial misconduct. The prosecuting attorney promptly replied that he did not pretend to say "what the Court might do;" that he was merely "talking about this parole proposition" generally. The court instructed the jury to disregard the statement. He said "The jury will disregard any comments on punishment." The jury could not have misunderstood that all parties concerned recognized the fact that the granting of parole and the punishment for a crime were solely within the province of the court. The prosecuting attorney specifically admitted that fact. Of course that reference to the possibility of parole was not warranted. It might be taken as an inducement to find the defendant guilty. But the error and misconduct were counteracted by the court's prompt admonition to disregard it. It was not reversible error under the circumstances of this case.

There was no miscarriage of justice in this case.

For the reason previously stated, the motion for a new trial was properly denied.

[5] The court did not err in summarily denying defendant's motion for probation under Section 1203 of the Penal Code. The statute specifically gives the trial court that discretion, under the circumstances of this case. *People v. Darrow*, 212 Cal. 167, 298 P. 1, 9; Penal Code, Sec. 1203. The section last cited provides in part that:

"After the conviction by plea or verdict of guilty of a public offense, * * * upon application of the defendant or of the people or upon its own motion, *may summarily deny probation*, * * * further provided, however, that *probation shall not be granted* to any defendant who shall have been convicted of robbery, burglary, * * * nor to one who in the perpetration of the crime of which he was convicted *inflicted great bodily injury* or torture, * * *."

In the *Darrow* case, *supra*, the Supreme Court held that the trial court properly denied defendant's petition for probation

without a hearing because the crime of murder, of which the defendant was convicted, as well as all crimes in which great bodily injury is inflicted, is specifically excluded from the benefits of Section 1203 of the Penal Code. In that case the defendant was charged with murder in the perpetration of abortion. He was convicted of murder of the second degree. A petition for probation was summarily denied. The Supreme Court said that since the *intent* to commit the crime of abortion "was present," and the judge had heard the evidence at the trial, a separate hearing on the petition for probation was not necessary. The court said:

"In the commission of that crime the intent was present. The criminal act resulted in the infliction of great bodily injury, death, * * * The statute [Sec. 1203 of the Penal Code], before amended to its present form to include those who in the perpetration of the crime have inflicted great bodily injury or torture, specifically excluded those who had committed murder from its provisions. Each case is to be adjudged by its own facts, and, in the instant case, the trial judge who heard the case had determined that it is not a case in which probation should be granted."

[6] The cases of *People v. Jones*, 87 Cal. App. 482, 262 P. 361, and *People v. Lovelace*, 97 Cal.App. 228, 275 P. 489, relied upon by the appellant, are not in conflict with what we have previously said regarding the summary denial of a petition for probation. In the *Jones* case the defendant was convicted of embezzlement. Embezzlement is not one of the crimes exempted from the benefit of probation under Section 1203 of the Penal Code. That case, therefore, has no bearing on the issue in this case regarding the discretion of the trial court to summarily deny a petition for probation. In the *Lovelace* case the defendant pleaded guilty of *involuntary* manslaughter. In that case it does not appear, as it does in the present case, that great bodily injury was *intentionally* inflicted in the commission of the involuntary manslaughter. Quoting with approval from *People v. Kelley*, 24 Cal.App. 54, 140 P. 302, 305, the court said, "'Involuntary manslaughter, as the phrase necessarily imports and as our Code defines that crime, is the taking of life, in certain unlawful ways, without any intention of doing so.'" Involuntary manslaughter is clearly distinguishable from voluntary manslaughter committed in the

heat of passion or even upon a sudden quarrel. Penal Code, sec. 192. The court recognizes that distinction in the Lovelace opinion when it says [97 Cal.App. 228, 275 P. 492]:

"It follows that within the meaning of the statute in question one who in the perpetration of a crime inflicts great bodily injury must do so willfully and intentionally (expressly or impliedly) before the substantial rights relating to probation, to which, under the terms of the statute, he is entitled, will be denied him."

In the Lovelace case it appears that the act of the defendant which led to his conviction of involuntary manslaughter was not a wilful, intentional assault upon another person, as it was in this case. It was an act performed, as the court states, "without due care and circumspection." At page 234 of 97 Cal.App., at page 492 of 275 P. the court said:

"It may, therefore, be considered as established by judicial decision, as well as by statute, that in cases of involuntary manslaughter (especially where, as here, the crime was committed 'without due care and circumspection') no intention to commit the act may be even imputed to the guilty person."

[7, 8] That language does not apply to voluntary manslaughter. It is true that in the commission of involuntary manslaughter accomplished while performing "a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection," as it did in the Lovelace case, the *intention* to inflict "great bodily injury" may not be presumed. But that situation does not apply to the present case in which the defendant was convicted of a wilful and unprovoked assault upon the deceased. If one wilfully and violently assaults another without cause, with the evident purpose of inflicting bodily injury, he must be presumed to intend the natural consequences of his unlawful act. 7 Cal. Jur. 853, sec. 13; 8 Cal. Jur. 25, sec. 144; Sec. 1962, Code Civ. Proc. It has been fre-

quently held that an assault by means of force likely to produce great bodily injury may be accomplished by use of the fists only, without employing a deadly weapon. People v. Bumbaugh, 48 Cal.App.2d 791, 797, 120 P.2d 703; People v. Kimmerle, 90 Cal.App. 186, 189, 265 P. 525; People v. Nudo, 38 Cal.App.2d 381, 101 P.2d 162; People v. Blake, 129 Cal.App. 196, 205, 18 P. 2d 399; People v. Hinshaw, 194 Cal. 1, 17, 227 P. 156; 3 Cal. Jur. 202, sec. 19; 6 C.J.S. Assault and Battery, § 79 b, p. 937.

The Supreme Court in the Darrow case distinguished it from the Jones and Lovelace cases, upon which the defendant in this case relies, by saying:

"People v. Jones, 87 Cal.App. 482, 262 P. 361; People v. Lovelace, 97 Cal.App. 228, 275 P. 489, are not in point in fact and cannot rule the decision in the instant case."

[9] On principle, we think the Darrow case is controlling of the issue in this case with regard to the right of the trial court to summarily deny the petition for probation, wherein the defendant was convicted of manslaughter as a result of a deliberate, wilful and intentional assault upon another person, necessarily constituting voluntary manslaughter. Indeed, the statute appears to specifically exclude such a case from the benefit of probation. The trial judge had heard all the evidence and he was perfectly familiar with the facts. He knew that the offense of which the defendant was convicted was not involuntary manslaughter. We must assume that the court so determined in summarily denying the petition for probation. A rehearing of the evidence adduced at the trial would furnish the judge with no further facts distinguishing the offense from involuntary manslaughter. A hearing upon the petition would be idle and useless. The statute authorizes the summary denial of a petition for probation under the circumstances of this case.

The judgment and the order are affirmed.

ADAMS, P. J., and PEEK, J., concur.

73 Cal.App.2d 692

FELL et al. v. M. & T., Inc., et al.

Civ. 7213.

Sac. 5747.

District Court of Appeal, Third District,
California.

March 28, 1946.

Rehearing Denied April 26, 1946.

Hearing Denied May 23, 1946.

1. Waters and water courses ⇨127

The constitutional mandates that water resources of state be put to beneficial use apply to the use of all water under whatever right the use may be enjoyed. Const. art. 14, § 3.

2. Waters and water courses ⇨130

Since foreign waters may be produced for beneficial use and a natural channel may be used as a drain for the flow of such waters, the use of foreign waters, so long as it does not interfere with the rights of another, is of no concern to such other. Water Code, §§ 100-107; Const. art. 14, § 3.

3. Waters and water courses ⇨130, 152(3)

Non-injurious and reasonable use of foreign waters imported upon land for irrigation and allowed to drain into a natural water course is within protection of constitutional mandates that water resources of state be put to beneficial use and may not be enjoined. Water Code, §§ 100-107; Const. art. 14, § 3.

4. Waters and water courses ⇨150

Turning imported water into the channel of a stream may ripen into an easement only if it results in interference with the rights of another.

5. Property ⇨7

One may make any beneficial use of his own property so long as he does not injure others.

6. Waters and water courses ⇨150

Upper riparian owners could predicate no claim of easement upon privilege of draining into natural water course foreign waters imported onto lands for irrigation, provided such drainage did not damage lower riparian lands.

7. Waters and water courses ⇨152(3)

Lower riparian owners were entitled to injunction restraining only such use of upper riparian lands and foreign waters

thereon as caused large quantity of such waters to flow into a natural water course causing growth of tules and other vegetation and resultant overflow of lower riparian lands to their substantial damage and were not entitled to an injunction against permitting any foreign waters to flow over lower riparian lands. Water Code, §§ 100-107; Const. art. 14, § 3.

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Action by Edward R. Fell and others against M. & T., Incorporated, and others to enjoin defendants from permitting irrigation, drainage, overflow and seepage waters from flowing over plaintiffs' lands. From a judgment granting an injunction against Maude Maddrill and another defendant Maude Maddrill appeals.

Judgment reversed, with directions to modify it in accordance with opinion.

Peters & Peters, of Chico, for appellant.

Ware & Ware, of Chico, for respondents.

PEEK, Justice.

This is an appeal by defendant Maude Maddrill alone from the judgment of the trial court restraining her and a co-defendant Ben Crouch from "permitting irrigation, drainage, overflow and seepage waters produced from wells on the lands of said Maude Maddrill * * * and any and all other waters used on said lands for irrigation that would not otherwise and naturally run in the channel of Little Chico Creek, to run or drain from the lands of the said Maude Maddrill, * * * down through and over said lands of plaintiffs."

The court found that plaintiffs were the owners of certain lands situated in Butte County; that Little Chico Creek, a natural watercourse, flows westerly through the lands of defendants and thence westerly and southerly through and over the lands of plaintiffs; that during 1944 defendants in the course of the farming to rice of approximately 200 acres upstream from plaintiffs' land permitted, and if not enjoined will continue to permit, large quantities of water to escape from said rice farming and to overflow, drain and seep therefrom into the channel of Little Chico Creek and through said channel over and

upon the lands of plaintiffs; that all of the water so discharged by defendants into said creek was pumped from deep wells on her premises, located a long distance from the channel, and waters foreign to the watershed of said creek furnished by the Phelan-Parrott Irrigation System; that none of the waters so drained by defendants naturally would or could run in said channel; that said drainage has caused the growth of tules and other vegetation in and adjacent to the channel and upon plaintiffs' land; that such growth has retarded the flow in said channel, causing the further spread of such vegetation to higher levels on plaintiffs' land; that plaintiffs' land has been substantially damaged; that due to such damming up and flowing of waters in said channel during the summer and growing season it has become impossible for plaintiffs to conduct farming operations on approximately 110 acres of land situated easterly of said creek; that for the same reason it was impossible for trucks and other agricultural machinery to cross said channel and likewise it was impossible for sheep to cross the same for grazing on the easterly side of said channel; that the encroachment of said tules and other vegetation made it impossible for plaintiffs to farm other portions of their lands which otherwise could have produced valuable agricultural crops; that the growth of said vegetation has and will continue to retard the natural winter run-off, thereby causing the creek to overflow and further damage plaintiffs' crops; that defendants plan to continue such practices, and such acts unless enjoined will ripen into an easement and burden upon plaintiffs' land thereby causing damage to plaintiffs and to their title and ownership thereof; that prior to the filing of their action plaintiffs demanded of defendants that they cease such acts, but that defendants have denied any obligation so to do and claim a right or easement to run such drainage, seepage and overflow over the lands of plaintiffs.

From the foregoing findings the court concluded that plaintiffs were entitled to a judgment perpetually enjoining defendants from doing any of the acts set forth and entered judgment accordingly.

Appellant admits that the drainage from her lands during the year 1944 damaged plaintiffs' lands, as found by the court, and that the judgment of the court restraining such acts in the future was proper. Her

sole contention is that as her lands are riparian to Little Chico Creek, which the court found to be a natural watercourse, she has the right to drain waters therein irrespective of the source of the same when to do so will not damage plaintiffs or their lands; but that under the terms of the judgment she is precluded from so doing even to the extent of raising any crop on her land which may require irrigation if in so doing there is any seepage, drainage or overflow, and in conclusion she contends that said judgment should be modified "to the extent that it enjoin only the seepage, drainage and/or flow of water into Little Chico Creek, when to do so would damage plaintiffs and/or their lands."

To this respondents reply that the judgment as given is based upon real damage pleaded, proved and found, and further that any invasion of property always constitutes damage per se and as a matter of law when it threatens to establish an easement and to burden and diminish the owner's title.

[1-3] The California Constitution, Article XIV, Section 3, declares that the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent possible. Compare, Water Code sections 100-107. The mandates of this section "apply to the use of all water, under whatever right the use may be enjoyed." *Peabody v. City of Vallejo*, 2 Cal.2d 351, 367, 40 P.2d 486, 491. Since foreign waters may be produced for beneficial use (*Stevens v. Oakdale Irr. Dist.*, 13 Cal.2d 343, 352, 90 P.2d 58), and a natural channel may be used as a conduit or drain for the flow of such waters (*City of Los Angeles v. City of Glendale*, 23 Cal. 2d 68, 76, 77, 142 P.2d 289; *Stevens v. Oakdale Irr. Dist.*, supra), and since the use of such foreign waters, as long as it does not interfere with the rights of another, is of no concern to such other (*Bloss v. Rahilly*, 16 Cal.2d 70, at pages 78, 79, 104 P.2d 1049), it follows that a noninjurious and reasonable use by defendants of the waters imported upon their lands and allowed to drain into Little Chico Creek is within the protection of the Constitution and may not be enjoined.

[4-6] Although it is true that the privilege of turning imported water into the channel of a stream might ripen into an easement (*Crane v. Stevinson*, 5 Cal.2d

387, 395, 54 P.2d 1100), still under general principles this could happen only if there should be an interference with the rights of another. See, *City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 105, 132-135, 287 P. 475. Since the judgment herein, if modified in accordance with appellant's request, would not authorize interference, but would merely reiterate the rule that one may make any beneficial use of his own property so long as he does not injure others (*Reclamation Dist. v. American Farms Co.*, 209 Cal. 74, at page 80, 285 P. 688), no claim of easement could be predicated thereon.

In this connection the case of *Galbreath v. Hopkins*, 159 Cal. 297, 113 P. 174, relied upon by respondents, is not in point, for there the court held that the defendants therein, by constructing artificial ditches which turned the waters that had accumulated in ponds and depressions on their lands upon the lands of their neighbors, were maintaining a nuisance per se, the continuance of which the plaintiff was entitled to have enjoined. In the present case there is no finding that the utilization of foreign waters on appellant's lands will necessarily constitute a nuisance.

[7] The essence of the findings is that defendants have so used their lands and the foreign waters thereon as to cause or permit to flow in the channel of Little Chico Creek a "large" quantity of such waters which causes and fosters the growth of tules and other vegetation with the result that the waters of said creek overflow plaintiffs' lands to their substantial damage. Therefore, from said findings it is only such use of defendants' lands and the foreign waters thereon that the decree should enjoin. *Thompson v. Kraft Cheese Co.*, 210 Cal. 171, 176, 291 P. 204; *Byers v. Colonial Irr. Co.*, 134 Cal. 553, 555, 556, 66 P. 732; *Switzer v. Yunt*, 5 Cal.App.2d 71, 79, 41 P.2d 974; *Baldocchi v. Four Fifty Sutter Corp.*, 129 Cal.App. 383, 393-395, 18 P.2d 682.

While the court did find that "all of said irrigation, drainage, overflow and seepage caused and permitted * * * has caused an increasing and great growth of tules * * * and * * * the flowing of all water * * * has been greatly retarded * * * and that plaintiffs' said lands * * * have been materially and substantially damaged and injured thereby * * *," yet if the interpretation we have

placed on the findings as a whole be correct, then the language of this finding should not be construed to be the equivalent of a finding that a lesser volume of such irrigation, drainage, overflow and seepage would necessarily have the same effect.

However, as now phrased, the decree proscribes causing or permitting any foreign water to "run down through and over" plaintiffs' land, and as so phrased said decree might well be susceptible of a construction that, although none of the foreign waters used by defendants may overflow or flood plaintiffs' land, or interfere with plaintiffs' rights, still such waters must not be mingled with the natural flow of water in the creek in any quantity whatever. Any apparent justification for such a conclusion is to be avoided. See, *Thompson v. Kraft Cheese Co.*, supra; *Byers v. Colonial Irr. Co.*, supra.

For the foregoing reasons, the judgment is reversed, with directions to modify the same in accordance with the views herein expressed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



73 Cal.App.2d 728

BIERLEIN v. JOHNSON.

Civ. 15082.

District Court of Appeal, Second District,
Division 3, California.

March 29, 1946.

Hearing Denied May 27, 1946.

1. Arbitration and award ⇨29

Arbitrators' authority to act is derived from, and limited by, arbitration agreement or submission. Code Civ.Proc. § 1288.

2. Arbitration and award ⇨48

An "award" by arbitrators is the determination of the issue presented for arbitration. Code Civ.Proc. § 1288.

See Words and Phrases, Permanent Edition, for all other definitions of "Award".

3. Arbitration and award ⇨57

Where agreement provided that stock in new corporation was to be divided eq-

ually between plaintiff and defendant, taking into consideration any amounts withdrawn by either party, and plaintiff's petition for arbitration and specific questions presented to arbitrators showed that plaintiff was desirous of knowing what his proportionate stock interest was in new corporation, and did not show that he was desirous of disposing of his interest in new corporation for cash award, arbitrators exceeded authority in making cash award to plaintiff, and finding that plaintiff had no interest in new corporation. Code Civ.Proc. § 1288.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Proceeding for arbitration by F. G. Bierlein against Albert H. Johnson, wherein a formal judgment for arbitration was filed. From an order confirming an award of arbitrators, plaintiff appeals.

Order reversed.

George C. Lyon, of Los Angeles, for appellant.

George Appell, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff appeals from an order confirming an award of arbitrators, and asserts that they exceeded their powers in making the award.

Plaintiff was the inventor of machines used in the manufacture of pliofilm products, had contracts for the manufacture of the products, had certain claims for damages for breach of contract, was the owner of machines used in manufacturing curlers, and was the owner of one-half interest in the Endura Corporation. Defendant owned the other one-half interest in that corporation, and had lent money to plaintiff. On April 1, 1940, they entered into a written agreement which recited that each party owned the above-mentioned interests, and stated that plaintiff assigned his said invention and interests to a company thereafter to be incorporated under the name of Endura, Inc., that defendant would make loans to Endura, Inc., to finance the manufacture and sale of pliofilm products and curlers, and that he had advanced \$2622.50 for Endura, Inc. It was further agreed therein that said loan and any future loans, if not paid within

one year, should then bear 6% interest; that plaintiff should draw \$30 per week against his future profits; that defendant should not draw against his profits until the loans were paid; that until the formation of the new corporation, plaintiff should have full charge of manufacturing, office management and bookkeeping, and that defendant should have full charge of sales. It was further agreed that all profits should be divided equally between them until such time as said new corporation was formed, and at that time the stock thereof "shall be divided equally, taking into consideration any amounts drawn by either party prior thereto." It was also provided therein that: "In case of dispute between the parties hereto, each shall appoint one arbitrator and the two arbitrators so appointed shall appoint a third arbitrator, and said three arbitrators shall decide the matter in dispute * * *. This contract shall continue indefinitely, but in the event it shall prove inadequate or unjust, or unfair on one of the parties hereto, such matter may be referred to arbitrators, chosen as above, and said arbitrators shall work out an equitable adjustment which shall be binding on both parties hereto."

On April 22, 1941, plaintiff filed his petition for arbitration and alleged therein that about March 28, 1941, defendant excluded plaintiff from and kept him out of the premises occupied by the business, refused to allow plaintiff to have possession of any of plaintiff's property at said place of business; that a corporation by the name of Endura Company, Inc., was incorporated at the request of defendant, without the knowledge or consent of plaintiff, and defendant claimed said corporation was the one to be incorporated under said agreement; that a controversy had arisen between them as to whether the assignment made by plaintiff in the agreement was effective until after stock in the new corporation had been issued to him in payment for his property, and as to what division should be made of stock in the new corporation; and that the controversy should be settled by arbitration.

Defendant answered said petition, alleging in part that the Endura Company, Inc. was formed under the terms of said agreement, that plaintiff had transferred all the property acquired under said agreement to said corporation, and that the new corporation was formed with the acquiescence of plaintiff.

Upon the hearing of the petition on November 6, 1941, the court made a minute order that, "The Court gives judgment for plaintiff that the controversy be submitted to arbitration upon issues to be agreed upon by both counsel."

On December 4, 1941, a formal judgment for arbitration was filed which provided that:

"The plaintiff and defendant shall submit to arbitration the following disputes arising from said contract:

"(a) What machinery * * * or other things of value, did F. G. Bierlein put into the business * * *?"

"(b) What sums of money * * * has F. G. Bierlein withdrawn from said business which are properly chargeable to his account?

"(c) Did F. G. Bierlein drive his own auto in business of said Company?

"(d) If * * * [he] did drive his own auto * * * is he entitled to make a charge therefor, and if so, what is the proper charge * * *?"

"(e) What sums of money * * * or other things of value did Albert H. Johnson put into the business * * *?"

"(f) What sums of money, or other things of value, has Albert H. Johnson withdrawn from said business which are properly chargeable to his account?

"(g) Did Albert H. Johnson do the work required of him under the contract of April 1, 1940?

"(h) If * * * [he] did not do the work required of him * * * are the salary or wages of any of the employees who did the selling of the products properly chargeable to the separate account of Albert H. Johnson rather than cost of doing business generally?

"(i) Was the provision in said contract * * * for the formation of a corporation abandoned * * * by the mutual consent of * * * [them] prior to the formation of Endura Company, Inc?

"(j) Was Endura Company, Inc., organized in accordance with the agreement * * * which provides for the incorporation of Endura, Inc.?

"(k) Has there been a delivery of the assets of said business, as operated under said contract of April 1, 1940, to the * * * Endura Company, Inc.?

"(1) If Endura Company, Inc., is organized in accordance with the agreement

* * * and there has been a delivery of assets thereto, what is the proper stock interest of plaintiff and defendant in such corporation?

"(m) If Endura Company, Inc., is not organized in accordance with the agreement * * * what are the proportionate interests of plaintiff and defendant in said business?"

Thereafter arbitration was delayed for various reasons more than two years. On March 20, 1944, the arbitrator appointed by the court having died, and defendant having failed to appoint an arbitrator, the plaintiff made application for the appointment of arbitrators by the court so that the arbitration could proceed. Pursuant to stipulation of the parties, the court thereafter ordered arbitration to proceed before arbitrators selected by the American Arbitration Association.

On April 21, 1944, plaintiff and defendant also signed a "Submission" in which they agreed to submit to arbitration "Controversies ordered to be arbitrated in the judgment of the Superior Court * * * dated December 4, 1941." Attached to said written submission, and made a part thereof, were the same 13 specific issues which, upon agreement of counsel, had been incorporated in said judgment of the court. They further stated therein that they would "abide by and perform any Award rendered pursuant to this Agreement, and that a judgment of the Court, State or Federal, having jurisdiction may be entered upon the Award."

On February 3, 1945, the arbitrators made findings as to each of the 13 issues or questions submitted to them. They found that plaintiff put machinery and material of a value of \$1000 in the business; that he was chargeable with \$1562.30 withdrawn from the business; that he drove his automobile in the business and was entitled to charge \$540 for the use thereof. They found that defendant put \$1666.93 net cash into the business; that he did the work required of him under the contract; that the provision in the contract for the formation of a corporation was not abandoned by mutual consent prior to the formation of Endura Company, Inc.; that Endura Company, Inc., was not organized in accordance with the agreement; that there had been a delivery of the assets of the business, as operated under the contract, to Endura Company, Inc. In an-

swer to question (m), above quoted, as to "what are the proportionate interests of plaintiff and defendant in said business?" if the Endura Company, Inc., was not organized in accordance with the contract, the arbitrators found as follows: "Plaintiff has no interest in the business of Endura Company, Inc."

Also on February 13, 1945, in addition to their findings as to the 13 questions, the arbitrators made a written statement as follows: "The undersigned arbitrators award to the plaintiff F. G. Bierlein * * * (\$2,249.94) against the defendant Albert H. Johnson in full settlement of the claims of each party against the other submitted to arbitration. Attached hereto and incorporated herewith as a part of this award, are the findings of the arbitrators in respect to the specific questions submitted to the arbitrators for determination."

Appellant contends that the last above-mentioned statement by the arbitrators was not within the issues submitted to them, that by reason of such award of money in full settlement of the claims of each party the arbitrators exceeded their authority, and therefore the award should not have been confirmed. His argument is that the 13 specific points submitted to the arbitrators marked their authority and power and they could not go beyond them; that the award shows that they considered the 13 questions to be nothing more than the basis for findings of fact, and that, then based upon those findings, they made a cash award; that they determined that defendant had transferred the assets of the business to a corporation not contemplated by the agreement of the parties, and in which plaintiff had no interest; that the damage caused to plaintiff by this stratagem of defendant was not submitted to arbitration; that even if the arbitrators were justified in treating the 13 specific questions as the basis for a cash award in full settlement of the controversy, their conclusion based upon such findings must have support in the findings, and such support is not present for the reason the figure \$2249.94, shown in their conclusion, cannot be obtained from the findings.

[1] Section 1288 of the Code of Civil Procedure provides that the superior court in which arbitration is had, "must make an order vacating the award, upon the application of any party to the arbitration. * * * Where the arbitrators exceeded their powers, or so imperfectly executed

them, that a mutual, final and definite award, upon the subject matter submitted, was not made. * * *" The plaintiff made a motion to vacate the award upon the ground that the arbitrators exceeded their authority, but the motion was denied. The arbitrators' jurisdiction or authority to act is derived from, and limited by, the arbitration agreement or submission. 6 C. J.S., Arbitration and Award § 80, p. 219.

[2, 3] The 13 questions submitted to the arbitrators did not include specifically the matter of determining the amount of cash to be paid by one to the other in full settlement of his interest in the business. It is not implied in those questions that such an award should be made, the effect of which would be to preclude plaintiff from retaining an interest in the company to which his property had been transferred upon the understanding that he should have a stock interest therein. The first 4 questions related to the value of things plaintiff had put into the business, what money he had withdrawn, and what credit should be allowed him for use of his automobile. The next 4 questions related to the value of things defendant had put into the business, what money he had withdrawn, and whether he was entitled to credit for the work required of him under the contract. The next 3 questions related to the formation of the new company and its assets. The next and last 2 questions related to the *stock interests* and the *proportionate interests* of each party in the new company. The agreement of April 1, 1940, between the parties provided that the stock in the new corporation "shall be divided equally, taking into consideration any amounts withdrawn by either party." It appears that the first 8 questions submitted to the arbitrators, which related to credits and charges as to each party, were for two purposes: (1) For the purpose of "taking into consideration any amounts withdrawn by either party," in dividing "equally" under their contract the stock of the new corporation, if it was formed in accordance with the contract; and (2) for the purpose of ascertaining the credits and charges as to each party as a basis for determining the interest of each party in the new company, if it was not formed in accordance with the contract. It also appears that the next 3 questions were for the purpose of ascertaining whether or not the new company was formed in accordance with the contract, and of ascertaining whether the assets of the old com-

pany were transferred to the new company. The last 2 questions were for the purpose of ascertaining the *stock interests* of the parties in the new company. Plaintiff was claiming, according to his petition for arbitration, that he was kept out of the place of business, that the new company was formed without his knowledge, that his property was transferred to it, and that there was a controversy as to the *division of stock* in the new company. The specific questions and the petition for arbitration show that plaintiff was desirous of knowing what his proportionate stock interest was in the new company. It does not appear from the questions or his petition that he was desirous of disposing of his interest in the business in consideration of a cash award. Under the contract, and under the business as conducted before the new company was organized, he had an interest in the assets of the business. Since the assets which he had furnished to the old company had been transferred to the new company, it appears that he had some interest in the new company. It is true that the arbitrators found that he had no interest in the new company. It might be, however, that they so found because they considered that the cash award was in lieu of his stock interest in the new company. It does not appear what disposition was made of his interest in the assets transferred to the new company. Under the questions submitted, if he had any interest in the new company, he had the right to have it determined as a stock interest, rather than to have a cash award for the value thereof. As above indicated, it does not appear that the arbitrators made the cash award upon that basis. If the cash award was for damages resulting to plaintiff by reason of wrongful conversion of his property, the arbitrators were determining a matter which was not submitted to them. Although the parties agreed that they would abide by any award rendered pursuant to the agreement of submission, that stipulation did not signify that the award should be cash. An award is the determination of the issue presented for arbitration. The arbitrators exceeded their authority in making a cash award.

The order confirming the award is reversed.

DESMOND, P. J., and SHINN, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

EASTLICK v. CITY OF LOS ANGELES.*

Civ. 15008.

District Court of Appeal, Second District,
Division 3, California.

March 21, 1946.

Hearing Granted May 16, 1946.

1. Municipal corporations ⇨812(7)

A written demand by pedestrian, who had fallen on sidewalk, stating that fall occurred at a specified place on a designated date, that it resulted in fracturing leg at knee joint with possibility of a stiff knee, and that pedestrian claimed wages lost, doctor's fees, X-ray pictures, rent for splint, and nurse's wages was sufficient to comply with requirements of charter that demand specify each several item of demand with date and amount thereof.

2. Municipal corporations ⇨1021

Provisions of city charter requiring itemization of demands as a prerequisite to suit must be given a reasonable construction and one that will not lead to absurdities.

3. Municipal corporations ⇨1021

The rule of substantial compliance with city charter provisions requiring the itemization of demands as prerequisites to suit prevents the requirement of the impossible or absurd.

4. Municipal corporations ⇨1021

The purpose of having claim against city itemized as a prerequisite to suit is to facilitate checking the amounts claimed with those which the city admits owing and checking the several items going to make up the total to ascertain whether the city is under liability with reference thereto.

5. Municipal corporations ⇨757(1)

That the navy took over Terminal Island, which was part of Los Angeles Harbor, did not relieve the city of the duty of keeping the sidewalks on that island in repair.

6. Municipal corporations ⇨817(1)

In action by pedestrian for injuries sustained on sidewalk on Terminal Island, which is part of Harbor of Los Angeles, burden was on city claiming that title or the right to possession and use of the sidewalk had passed to the United States Government to prove such claim.

* Subsequent opinion 177 P.2d 558.

7. Municipal corporations $\S$ 819(1)

In action against city by pedestrian for injuries sustained on sidewalk on Terminal Island, evidence failed to show that title or right to possession and use of the sidewalk had passed to the United States Government.

8. Municipal corporations $\S$ 757(1)

The taking of possession by the navy of area north of public sidewalk on Terminal Island did not militate against or interfere with the use of the sidewalk by the public or relieve City of Los Angeles of its duty to maintain sidewalk in a reasonably safe condition for public use.

9. Municipal corporations $\S$ 822(5)

Where broken condition of sidewalk at place pedestrian fell made it inherently dangerous, court properly refused an instruction that, if jury believed that the erection of a fence along southerly side of the sidewalk made condition of sidewalk where plaintiff fell dangerous because it rendered the condition difficult to see, plaintiff was required to prove that the city, or the Board of Harbor Commissioners, had knowledge of such fact, and that after acquiring such knowledge the city or board failed within a reasonable time to protect the public against it.

10. Trial $\S$ 248

It is neither necessary nor proper for the court to give instructions founded upon hypothetical factual situations other than those which are reasonably deducible from the evidence.

11. Municipal corporations $\S$ 822(1)

In action by pedestrian for injuries sustained on public sidewalk on Terminal Island which had been taken over by Executive Order of the President of the United States, instruction that the mere fact that guards and patrols may have been maintained by military authorities did not relieve the City of Los Angeles, its boards or officers, from the duty of maintaining the public streets and sidewalks in a reasonably safe condition, was proper. Executive Order Dec. 12, 1941, No. 8972.

12. Damages $\S$ 157(1), 210(2)

Damages may not exceed the amount demanded in complaint, but no purpose is served by stating the rule to the jury, since, if the verdict is excessive, the court will reduce it.

13. Appeal and error $\S$ 1068(4)

Where plaintiff alleged that her general damage was \$5,000 and that her special damage was \$2,385, but complaint contained a prayer for \$8,895 and jury rendered verdict for \$5,000, an instruction that damages alleged in complaint were \$8,895, but that allegation was not evidence and could not be considered by jury but that amount alleged fixed the maximum which jury were not permitted to exceed, was not prejudicial to defendant.

14. Municipal corporations $\S$ 821(20)

Whether pedestrian suing for damages for injuries sustained in fall on sidewalk was contributorily negligent was for jury.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Ethel Eastlick against the City of Los Angeles for personal injuries sustained when plaintiff tripped and fell on sidewalk. From a judgment for plaintiff for \$5,000, the defendant appeals.

Judgment affirmed.

Ray L. Chesebro, City Atty., Arthur W. Nordstrom, Asst. City Atty., and Leonard Husar, Deputy City Atty., all of Los Angeles, for appellant.

Kenneth Sperry and Houser & Houser, all of Long Beach, for respondent.

SHINN, Justice.

Defendant City of Los Angeles appeals from a judgment entered upon a verdict in favor of plaintiff in an action for damages for personal injuries sustained when plaintiff tripped and fell on the sidewalk of Cannery Street on Terminal Island, in the Harbor District.

The condition of the sidewalk, which was alleged to have been a dangerous one, and which caused plaintiff to fall, consisted of a broken section of cement in which a part of the pavement extended several inches above the adjoining surface. Cannery Street extends east and west and is 100 feet wide between property lines. It is intersected by Tuna Street, which extends north and south and is some 40 feet wide.

Plaintiff was employed in the Fishermen's Cafe on the east side of Tuna Street about a half block south of Cannery Street. At about 7:30 p. m., October 27, 1943, she left her place of employment, walked north-

erly on the east side of Tuna Street, crossed the intersection of Cannery Street to the northwest corner and proceeded westerly on the sidewalk, some 3 to 5 feet wide, along the north side of Cannery Street. It was dark at the time, and the spot where plaintiff fell was somewhat shaded by a fence that was in course of construction along the north curb line of Cannery Street. Plaintiff filed her verified claim with the City of Los Angeles. It was rejected and the present suit was instituted.

Appellant advances two principal arguments in contending for a reversal of the judgment. It is argued first that the written demand filed by plaintiff was defective and a nullity because it failed to separately state and itemize the several elements of damage which would be recoverable upon establishment of the city's liability, and in support of this argument it relies upon certain provisions of the city charter. The demand as filed was duly verified; it stated plaintiff's name and address, the date and place of the accident, and it itemized sums paid on account of doctors' and nurses' bills and charges for rent of a splint, in the total amount of \$35. These payments were stated to have been made October 30, 1943; the claim was filed November 16, 1943. In answer to the question, "How did damage or injury occur?" the claim stated, "walking to Ferry Bldg. from work (at Fishermen's Cafe), tripped on broken place in sidewalk and fell, fracturing leg at knee joint." In answer to the question, "What damages or injuries do you claim resulted? Give full extent of injuries or damage claimed," the claim stated, "fractured leg at knee joint with the possibility of a stiff knee." In answer to the question, "What sum do you claim on account of each item of injury or damage?" the claim stated, "wages lost, Dr. fees, X-ray pictures, rent for splint and nurses wages."

The essentials of the several sections of the city charter which are relied upon by defendant are summarized in section 368, which reads: "No demand can be approved by any board, officer or employee, or be audited, unless it specify each several item, with the date and amount thereof." Section 376 provides: "No suit shall be brought on any claim for money or damages against the City of Los Angeles, or any officer or board of the city, until a demand for the same has been presented, as herein provided, and rejected in whole

or in part." It is argued that a demand is not presented, within the meaning of section 376 of the charter, unless it specifies each separate item of damage, with the date and amount thereof.

[1] Act 5149, Deering's General Laws, requires the filing of demands with cities, counties, etc., for claimed damages for injuries to person or property resulting from alleged negligence of such cities, counties, etc., and such demands are required to state "the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." Plaintiff contends that the requirement of the charter that claims be itemized is contrary to the general law and that the latter must prevail. Defendant contends that the sections of the charter do not conflict with the general law, but merely supplement it and tend to further its purposes. It is unnecessary to decide whether the general law or the charter provisions control in the matter of the form of such demands. We are in accord with the contention of plaintiff that her written demand was sufficient to meet the requirement of the charter. Substantial compliance, only, is required. *Knight v. City of Los Angeles*, 1945, Cal.2d, 160 P.2d 779; *Silva v. Fresno County*, 1944, 63 Cal. App.2d 253, 146 P.2d 520; *Sandstoe v. Atchison, T. & S. F. R. Co.*, 1938, 28 Cal. App.2d 215, 82 P.2d 216.

[2-4] Assuming that the provisions of the charter properly require the itemization of such demands as a prerequisite to suit, we must give them a reasonable construction and one that will not lead to absurdities. As stated in *Knight v. City of Los Angeles*, supra [26 Cal.2d 767., 160 P.2d 781], "The rule of substantial compliance prevents the requirement of the impossible or absurd." The purpose of having claims itemized is to facilitate checking the amounts claimed with those which the city admits owing, and checking the several items going to make up the total to ascertain whether the city is under liability with reference thereto. Plaintiff's claim was filed soon after the accident and we think it contained a sufficient statement of the nature of her injuries. It would have been useless for her to make an estimate on November 16 as to the probable duration or severity of those injuries, without which estimate she could not intelligibly state the amount of her anticipated damages. It was enough to specify

fracture of the leg and to state that it might result in a stiff knee. No more could she have estimated intelligently the special damages which she probably would sustain in the future on account of loss of wages, loss of earning capacity, and treatment of her injuries. Any estimate of such anticipated damages would have constituted no more than an offer of settlement and would have served in no way to accomplish the purposes of the several sections of the charter.

The second point urged by the defendant is that there was no evidence that the sidewalk area where plaintiff fell was under the possession, control or management of the city, or that the city was under any duty to keep the same in a reasonably safe condition. This contention is founded upon certain fragmentary evidence with respect to the activities of the Navy in the Terminal Island area commencing with December 7, 1941. Terminal Island is the land which forms the southerly and easterly boundary of Los Angeles Harbor. The particular section of the Island in question was used by commercial fishermen, including the Japanese. There is a minimum of evidence as to the extent of the activities of the Navy. For want of a better term, we may say that on December 7, 1941, the Navy "took over" Terminal Island. It took exclusive possession of some sections and excluded the public therefrom; it also took control of all travel to and from the Island and required civilians passing to and from the Island to obtain and carry passes issued by the Navy; it stationed guards at different points, one of them being the northeast corner of Tuna and Cannery Streets. Plaintiff carried a pass which she regularly exhibited upon entering or leaving the Island. She came across the channel from San Pedro by ferry and was accustomed to use the sidewalk in question in passing to and from her work. Persons lawfully on the Island made free use of this sidewalk, without interference by the Navy. It was not closed to such use and travel at any time. From and after December 7, 1941, the city discontinued inspection and supervision of the sidewalk in question and of streets and sidewalks generally in the areas in which the activities of the Navy were manifested. There was no evidence of any agreement with the Navy upon the subject or that the Navy ever undertook or ever did any repair work on the streets or sidewalks.

Two days before the date of plaintiff's accident, the Navy commenced the construction of a board fence along the northerly curb line of Cannery Street. By the 27th of October construction had progressed easterly to a point beyond the place where plaintiff fell. The fence was constructed of boards about 5 feet high, some 4 to 6 inches wide, spaced 2 or more inches apart. The sidewalk was left open at Tuna Street and the fence was not intended to and did not bar or interfere with travel on the sidewalk. On each side of the fence was fastened a sign, "Property of United States Navy."

[5] There is nothing in this state of facts which would have relieved the city of the duty to keep the sidewalk in repair. The failure to inspect it and repair it was an act of voluntary omission on the part of the city and did not result from any necessity of fact nor find any excuse in law based upon the precautions that were being taken by the Navy to guard the Island and control the activities of the people thereon.

[6, 7] In June, 1943, the United States Government instituted an action to condemn some interest in the lands abutting on Cannery Street to the north of that street and west of Tuna Street, as well as certain parcels in other districts. The nature of the interest sought to be acquired by the Government is not disclosed by the record. It appears that the government, through the Navy, had entered into possession of the land sought to be condemned, but it is immaterial whether the purpose of the government was to condemn the fee, or, as suggested by some passages in the record, only the right of possession and use for a period of 5 years. Evidently there had been a decree of some sort entered, with which counsel in the case were familiar, but no copy of it was received in evidence nor were the terms of it otherwise proved or agreed upon except as hereinafter stated. The matter of the condemnation of the land or an interest in it by the government is of interest for the reason that the city now takes the position that title to the land adjoining Cannery Street on the north, and including the sidewalk in question, which was a part of the street, and the exclusive right to the possession and use thereof, had passed from the city to the United States Government. We find numerous assertions of this contention in the briefs of the city.

Although the answer of the city denied that Cannery Street was a public street in the City of Los Angeles, there was ample evidence at the trial that it was laid out and constructed by the city and had been used as a public street from the time the street was improved and the sidewalk was constructed in 1924 to a date subsequent to October 27, 1943. It was not questioned at the trial, and is not questioned here, that it was so used for many years and that the sidewalk was a part of it. If, therefore, title or the right to possession and use of the sidewalk passed from the public to the United States Government at any time, so as to relieve the city of the duty of inspecting and maintaining the sidewalk, it was incumbent upon the city to prove that fact. This it failed to do.

[8] Plaintiff introduced a map in evidence which was identified as a delineation of the streets in question, and the areas shown, according to the legend, as "Property of United States Navy." The map bears date 6-4-42 and the signature of the Harbor Engineer. It contains a scale in feet, and the testimony was that it was drawn to scale. The areas embraced in the taking were marked in yellow. One of these lies immediately adjacent to the north side of Cannery Street to the west of Tuna Street. Cannery Street, as shown on the map, was scaled by one of the witnesses and he testified that the width was 100 feet. The map did not show the sidewalk separately. There was testimony to the effect that the sidewalk in question was included in the 100-foot width of Cannery Street, and it was shown by the map that the area in possession of the Navy did not include the sidewalk. Another map was received in evidence, which was prepared by the Harbor Department when Cannery Street was improved in 1924. Cannery Street, according to the scale of this map, was shown to be 100 feet wide, inclusive of the sidewalk. There was no evidence whatever that the government's suit affected Cannery Street or the sidewalk in question. That suit, so far as disclosed by the record, and the taking of possession by the Navy thereunder of the area north of the sidewalk, did not militate against or interfere with the use of the sidewalk by the public or relieve the city of its duty to maintain it in a reasonably safe condition for public use.

[9,10] Defendant assigns as error the refusal of the following instruction: "If

you believe that the erection of the fence along the southerly side of the sidewalk made the condition of the sidewalk, where plaintiff fell, dangerous because it rendered the condition difficult to see, before plaintiff can recover in this case she must prove to your satisfaction that the City of Los Angeles or the Board of Harbor Commissioners of the City of Los Angeles had knowledge of such fact, and that after acquiring such knowledge, the City or the Board failed within a reasonable time to protect the public against it." The instruction was properly refused. The broken condition of the sidewalk was inherently dangerous. It is not necessary, nor is it proper, for the court to give instructions founded upon hypothetical factual situations other than those which are reasonably deducible from the evidence. The jury could not reasonably have concluded that the condition of the sidewalk was dangerous only because it was somewhat shaded by the fence. Furthermore, the statement that the proof must show that the city or the board "had knowledge of such fact," etc., was ambiguous and confusing. If it had been understood by the jury as we understand it, it was a statement that the city must have had knowledge not only of the condition, but also knowledge or appreciation of the dangerous character of it, and it was not a correct statement of the law. If the city had knowledge of the condition and the jury believed it to have been an obviously dangerous one, as it unquestionably was, the city could be excused from responsibility upon the theory that although it had knowledge of the condition, it failed to anticipate that it was one that might cause injury.

[11] The court gave the following instruction: "Under date of December 12, 1941, the President of the United States, by Executive Order No. 8972, made provision for the establishment and maintenance of military guards and patrols for the purpose of protecting from injury or destruction any national defense material and utilities. The mere fact that such guards and patrols may have been maintained by the military authorities did not relieve the defendant, City of Los Angeles, a municipal corporation, its officers or boards, from the duty of maintaining the public streets and sidewalks within its territorial boundaries, including its Harbor Department, in a reasonably safe condi-

tion." It is contended that it was error to give this instruction. Defendant says: "The instruction practically told the jury that the Navy was on that property by Presidential Order, and the Presidential Order did not relieve the City of the duty of maintaining the sidewalk." Defendant had made much of the fact that the Navy had entered upon Terminal Island by taking exclusive possession of sections of it and by guarding the remainder. In cross-examining plaintiff, counsel for defendant exhibited to her a photograph and read therefrom the inscription on a sign, "Terminal Island is Under Navy Jurisdiction by Presidential Executive Order. (Signed) Commander ———," and plaintiff was asked whether she saw such a sign at the entrance to the ferry as she traveled to and from the Island; an objection was sustained but the question was immediately repeated and plaintiff answered that she did not remember. The fact that there was such a sign was disclosed to the jury in this indirect manner. Furthermore, the Harbor Engineer, called as a witness for plaintiff, testified that he had placed on a map which was used in evidence such statements as "Sign on fence, 'Property of U. S. Navy,' Sign on Building, 'Warning, Federal Government Property, No Trespassing Under Penalty of Law.'" He testified that he had done this because the signs were on the property. The witness at numerous points in his testimony made the statement that the property was "under the jurisdiction of the United States Navy" and that "the United States Navy assumed jurisdiction of that area," and similar statements. The instruction was a correct statement of the law. Although there was no evidence as to the terms of Executive Order 8972, enough had been said about such an order as to call for an explanatory instruction.

[12, 13] The court instructed as follows: "The amount of damages alleged in the complaint to have been suffered by plaintiff is \$8895.00. This allegation is merely a claim and is not evidence and must not be considered by you as evidence. It does, however, fix a maximum limit and you are not permitted to award plaintiff more than that amount." Defendant points out that the sum of the items of damage alleged in the complaint was \$7,385, whereas the prayer, as amended, was for the sum of \$8,895. It is not contended that it was improper to advise the

jury as to the amount demanded in the complaint, but it is insisted that in stating the amount the prayer should have been disregarded and the amount should have been stated as the sum of the items of damage alleged. We have never been able to see the advisability of stating to the jury the amount demanded in a complaint for damages. It seems somewhat futile, if not ridiculous, to advise a jury as to the amount demanded by the plaintiff and then tell them that it is not evidence and they are not to consider it. It is a rule of law that the damages may not exceed the amount demanded in the complaint, but no purpose is served by stating the rule to the jury. If the verdict is excessive, the court will reduce it. Plaintiff alleged her general damage to be \$5,000, her special damage \$2,385. The verdict was for \$5,000. No harm resulted from the mistake as to the amount demanded, if in fact a mistake was committed.

[14] The final contention to be noticed is that plaintiff was guilty of contributory negligence as a matter of law. Plaintiff testified that at the point where she fell, one piece of the sidewalk overlapped the other by about three inches; that this condition extended clear across the sidewalk; that she had been working on Terminal Island for five months, had stepped over the crack twice a day; that she did not see the break or have it in mind just before she fell, and that the newly erected fence cast shadows, although she was not at the time aware of the change that this made in the lighting conditions. This testimony did not prove as a matter of law that plaintiff was guilty of contributory negligence. The boards of the fence were spaced two inches or more apart. Such shadows as were cast would have alternated with strips of light; plaintiff had not passed along the sidewalk before under these conditions; she evidently came upon the break in the sidewalk before she expected and without realizing that the changed conditions, due to the erection of the fence, made the break more difficult to see. The facts were such as to allow of reasonable differences of opinion as to whether plaintiff's failure to see the break under the new and unfamiliar conditions was a failure to use ordinary care. Defendant would have us hold that plaintiff's conduct was no more excusable than it would have been if she had fallen over the obstruction in broad daylight, under

conditions with which she was thoroughly familiar. The argument was one for the jury upon a question of fact. As a proposition of law it is not sustainable.

The judgment is affirmed.

DESMOND, P. J., and WOOD, J.,
concur.



73 Cal.App.2d 536

BUTTRAM et al. v. FINLEY et al.

Civ. 7185; Sac. 5735.

District Court of Appeal, Third District,
California.

March 14, 1946.

Hearing Denied May 9, 1946.

1. Appeal and error ⇨1198

The failure of trial court to conform to specific directions of District Court of Appeal to render judgment in favor of plaintiffs by quieting title in plaintiffs, and rendering of another judgment against plaintiffs based on new facts and a new issue which were not presented or considered on former trial or appeal, were error.

2. Appeal and error ⇨1199

An amendment of decree of distribution nunc pro tunc after District Court of Appeal reversed judgment and directed trial court to quiet title in plaintiffs on basis of original decree of distribution was not newly discovered evidence and was improperly considered by trial court, where original decree had been on record for more than 60 years, and defendants' title rested on terms of original decree and defendants had not been diligent and the fact upon which the amendment was made was in existence at time of decision of district court of appeal and the issue raised by such facts was not involved or considered on the former trial.

3. Appeal and error ⇨1198

Generally, mandate of reviewing court is binding on the trial court and must be strictly followed.

4. Appeal and error ⇨1198

Where a reviewing court reverses a judgment with directions to render a con-

trary judgment and to determine a specified issue only, the trial court is bound by the directions given and cannot retry any other issue or admit new evidence in conflict with reviewing court's judgment or enter a contrary judgment, and the directed judgment of reviewing court is the law of the case and is absolutely controlling on trial court's jurisdiction.

5. Executors and administrators ⇨315(3)

An amended decree of distribution under will should not be permitted to apply nunc pro tunc as of date of original decree so as to antedate and defeat the title of strangers to the estate who have acquired title in good faith for a valuable consideration and in reliance upon the terms of the original decree.

6. Appeal and error ⇨1195(3)

A judgment of District Court of Appeal reversing judgment and directing trial court to quiet title in plaintiffs was the "law of the case" with respect to the issue of title to the real property.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

7. Partition ⇨85, 86

The question of respective rights of tenants in common in partition suits to benefit of enhanced value of land on account of improvements and of right to offset the same by rents and profits derived, depends upon the facts of the particular case and involves questions of good faith, consent of parties, nature of improvements, source and amount of rents and profits, and other elements.

8. Appeal and error ⇨1212(1)

Where trial court determined that plaintiffs had no title to undivided one-half interest in land, and District Court of Appeal reversed judgment and directed trial court to render judgment quieting title to such undivided one-half interest in the plaintiffs, the cause was remanded for trial of undecided issues of partition or sale of property and to determine as incident thereto all liens and legal allowances to be charged against the various shares of plaintiffs and defendants.

Appeal from Superior Court, Sonoma County; Ben. C. Jones, Judge.

Suit in equity to quiet title to realty by H. S. Buttram and others against Livonia J. Finley and others. From a judgment for the defendants the plaintiffs appeal.

Reversed with direction.

See also 37 Cal.App.2d 459, 99 P.2d 1093.

Murphy & Brownscombe, of Santa Rosa, and James F. Brennan, of San Francisco, for appellants.

Geary & Tauzer and Barrett & McConnell, all of Santa Rosa (A. Dal Thomson, of San Francisco, of counsel), for respondents.

PER CURIAM.

In a former appeal in this case this court reversed a judgment in favor of defendants and directed the trial court to render judgment for plaintiffs quieting title in them to their undivided one-half interest in the real property in Sonoma County which is involved on this appeal. Buttram v. Finley, 37 Cal.App.2d 459, 99 P.2d 1093, 1098. Upon rehearing of a designated issue, instead of complying with the mandate of this court, after a decree of distribution in the estate of Henry Clay Mizer, deceased, originally entered in 1880, had been amended nunc pro tunc, over the objection of plaintiffs, the trial court received in evidence the amended decree which raises an issue which was neither tried nor considered at the former hearing or by this court, and again rendered judgment for the defendants contrary to the explicit direction of this court. From that judgment this appeal was perfected.

The complaint alleges that plaintiffs own an undivided one-half interest in real property in Sonoma County, and ask partition thereof. A decree of distribution, which was rendered in the estate of Henry Clay Mizer, deceased, April 12, 1880, is the source of title of the respective parties. Mr. Mizer died testate in 1877, leaving surviving him, his widow, Sarah P. Lynch, formerly Sarah P. Mizer, and other heirs and devisees. The will was admitted to probate. In due time the decree of distribution was made, from which no appeal was taken. It distributed "To the said Sarah P. Lynch, the one-half of the residue of said Estate and a life estate in the other half, * * * and to the said Nancy Buttram if she survives her [Sarah P. Lynch], the residue of said other one-half * * * but should said Nancy die first, then to her

heirs, but *as a condition precedent* the said share to Nancy Buttram or her heirs is *subject to the sum of \$1500.00 to be invested as a monument* to be erected to the said Sarah P. Lynch according to said Will, and the said amount be and is hereby made a charge upon said residue devised to Nancy Buttram or her heirs." (Italics added.) The will made no reference to a "condition precedent." The terms of the will were not included in the decree. Sarah P. Mizer survived Nancy Buttram. The monument was not erected.

On the former hearing of this case the trial court determined that the erecting of the monument at a cost of \$1500 was a "condition precedent" to the passing of title and that the failure to erect the monument defeated plaintiffs' title. Judgment was thereupon rendered against plaintiffs. From that judgment the first appeal was taken December 29, 1937. This court held that the erecting of the monument was not a condition precedent. Since the decree of distribution was ambiguous on its face, resort was had to the provisions of the will to ascertain the intention of the testator. A hearing, after judgment by this court, was denied by the Supreme Court. This court reversed the judgment of the trial court and specifically directed the court to "ascertain the interests of the several plaintiffs and *render judgment in their favor* quieting title thereto."

On the first trial, the only issue with respect to the title to the real property was the question as to whether the provision of the decree of distribution requiring the erection of a monument on the grave of Sarah P. Mizer, the widow of the deceased, created a "condition precedent" to the passing of title. No other provision of the will or decree was called to the attention of either the trial court or this court. At the former trial it was not contended the devise to Sarah P. Mizer was coupled with a power of sale. Neither the trial court nor this court knew of that alleged provision. It was first called to the attention of the Supreme Court on defendants' petition for a hearing after the decision of this court. The Supreme Court properly disregarded that contention because it was not an issue at the trial.

On the second hearing which occurred March 23, 1942, after the reversal of the former judgment, and after the amendment of the decree of distribution nunc pro tunc over the objection of plaintiffs, the trial

court received in evidence the amended decree over plaintiffs' objection. That amendment provides in part that distribution be made:

"To the said Sarah P. Lynch [formerly Sarah P. Mizer] the one-half of the residue of said estate and a life estate in the other half to have and to hold during her natural life, *and to use and dispose of the same as she may see fit, * * *.*" (Italics added.)

It is now contended the italicized language of the decree, as amended, created a devise coupled with the power of sale, which became an absolute transfer of title and defeated plaintiffs' interest in the property. *Parker v. Bower*, 172 Cal. 436, 156 P. 869.

Based upon that amended decree, the trial court again rendered judgment for the defendants contrary to the decision of this court, to the effect that plaintiffs have no title to the land in question.

The appellants contend that the trial court was not authorized to disregard the mandate of this court by admitting evidence of the decree as amended nunc pro tunc, after the lapse of more than sixty years, and to render judgment for the defendants based thereon, with respect to the title to the real property, contrary to the explicit direction of this court on the former appeal, since the amendment raises a new issue which was not considered by the trial court or by this court at the first hearing or on appeal therefrom; that the decision of this court became the law of the case and is absolutely controlling with respect to the title to the land.

The defendants assert that "The amendment of the decree nunc pro tunc occurred subsequently to the decision of this Court upon the prior appeal and was a fact which was not in existence at the time of the decision on the prior appeal," and that, as an exception to the general rule, the trial court was authorized to receive in evidence the amended decree and to render judgment in accordance therewith, contrary to the mandate of this court.

[1-3] We are of the opinion the trial court erred in failing to conform to the specific directions of the Appellate Court to render judgment in favor of the plaintiffs, quieting title in them, and in again rendering a judgment against plaintiffs based on new facts and a new issue which were neither presented nor considered on the for-

mer trial or appeal. In effect that procedure would amount to the granting of a new trial, contrary to the specific direction of the Appellate Court, and it resulted in nullifying this court's judgment, upon facts which were within defendants' knowledge from the inception of the litigation. The defendants could not consistently plead ignorance of the provisions of the will and of the decree of distribution upon the terms of which their title rested. It is conceded that the decree of distribution is the source of the title of the respective parties. That decree had been on record for more than sixty years. The amendment to the decree does not rise to the dignity of newly discovered evidence. The lack of diligence is apparent. While it is true that the decree, as amended, was not in existence when the judgment of this court was rendered and the specific direction of the trial court was made, the fact upon which that amendment of the decree was made was then in existence and the defendants must be presumed to have had knowledge of that fact. The fact which was the basis of the amendment to the decree did not occur after the judgment of this court was rendered. The issue raised by that fact was not involved or considered on the former trial. It therefore did not come within the asserted exception to the general rule that the mandate of the reviewing court is binding on the trial court and must be strictly followed. 3 Am.Jur. 730, § 1234.

[4] Where a reviewing court reverses a judgment with directions to render a contrary judgment and to determine a specified issue only, such as the amount of damages to be awarded, or to ascertain the several interests of the respective parties, the trial court is bound by the directions given and has no authority to retry any other issue, or to admit new evidence in conflict with the judgment of the reviewing court, or to enter a contrary judgment. The directed judgment of the reviewing court becomes the law of the case, and it is absolutely controlling on the jurisdiction of the trial court. *Rice v. Schmid*, 25 Cal.2d 259, 153 P.2d 313; *Soule v. Dawes*, 14 Cal. 247; *Lial v. Superior Court*, 133 Cal. App. 31, 23 P.2d 795; *Snoffer v. City of Los Angeles*, 14 Cal.App.2d 650, 58 P.2d 961; 2 Cal.Jur. pp. 1051-1054, §§ 625-627; 3 Am.Jur. 730, § 1234.

The case of *Rudiger v. Coleman*, 228 N. Y. 225, 126 N.E. 723, 729, upon which the defendants in this case chiefly rely, is not

in conflict with the previous statement of the law with respect to the duty of a trial court to carry into effect the mandate of a reviewing court. In that suit to cancel a deed and a contract conveying land to the defendants, for breach of contract and failure to organize and to hold and operate the property in the name of a corporation, and for an accounting, the trial court dismissed the action. The appellate court reversed the judgment and directed the trial court to render judgment for plaintiffs requiring the defendants to *reconvey the land to plaintiffs*, and to account for all proceeds from sales of rock quarried from the property. After the judgment of the trial court, pending the appeal, a portion of the real property which the reviewing court directed to be reconveyed to plaintiffs, was condemned and acquired by the City of New York, without fault on defendants' part and without knowledge of the reviewing court. Upon supplemental proceedings the trial court granted emergency relief to meet conditions which changed pending the first appeal over which none of the parties had control. A portion of the real estate having been condemned and taken from the defendants, they were powerless to convey it to plaintiffs. In lieu of the conveyance of the property which the city had condemned and acquired the defendants were ordered to pay plaintiffs their share of the award of damages secured on the condemnation proceedings. The mandate of the reviewing court was not disregarded or otherwise disturbed. The relief merely authorized the payment of plaintiffs' share of the money received from condemnation of a portion of the land. The reversal of the judgment still stood. The spirit and effect of the judgment of the reviewing court was carried out as completely as was possible under the changed conditions. It merely added a further provision in support of the judgment.

In the very able opinion of Mr. Justice Cardozo it is said in that regard:

"Our decision [rendered after the appeal was taken in October 1906] spoke as of that time. We found the land intact in October, 1906, and we held that the trustees were then under a duty to return it to the plaintiffs. That adjudication was a finality. The Supreme Court, in entering judgment on our remittitur, was powerless to change it. Sayre v. State of New York, 128 N.Y. 622, 27 N.E. 1079. But, as a result of new conditions, the relief to which

we held that the plaintiffs were entitled in October, 1906, was no longer complete or effective in October, 1910. We could not know when we ordered the trustees to reconvey, that part of the subject-matter of the conveyance had been sold and that part of it had been wasted. In adapting the relief to the exigencies of new conditions, the Supreme Court was not attempting to overrule our judgment or to review it. Such adaptation is not nullification, but enforcement."

The Rudiger case is not authority in support of the rendering of judgment in this case adverse to the clear mandate of this court.

Likewise, the other cases cited by respondents upon that principle of law are similarly distinguishable. They have no application to the facts of this case.

In *Re Estate of Goldberg*, 10 Cal.2d 709, 76 P.2d 508, cited by the respondents in this case, it was held that, *where it appears from the face of a decree of distribution* that a clerical error exists therein, the decree may be amended to correct that error. That case does not hold that the decree may be amended to set up a fact or a new issue which was neither presented nor considered at the trial or on appeal as a basis for the trial court to disregard the mandate of a reviewing court or to justify the trial court in rendering a judgment in absolute conflict with that of the reviewing court. The question of a trial court disregarding the direction of a reviewing court in its decision on appeal was not involved in that case.

We conclude that the last judgment of the trial court in this case is in conflict with the mandate of this court on the issue of title to the property, and that it is therefore erroneous and ineffectual.

[5,6] Moreover, the decree in the estate of Henry Clay Mizer, deceased, on account of the death of Nancy Buttram prior to the death of Sarah P. Mizer, distributed the property in question "to the heirs" of Nancy Buttram. Pursuant to that decree title was acquired by the plaintiffs in this case. An amended decree of distribution should not be permitted to apply nunc pro tunc as of the date of the original decree so as to antedate and defeat the title of strangers to the estate who have acquired title in good faith for a valuable consideration and in reliance upon the terms of the original decree. However, it

is not necessary for us to determine that equitable principle since the decision of this court became the law of the case with respect to the issue of title to the real property.

[7,8] On this appeal the parties concede that, if it is determined plaintiffs have title to their one-half undivided interest in the property, the right to partition the land is an issue which has not been but should be determined by the trial court. In the event that partition is ordered defendants claim the benefit of the value of improvements which they placed on the property, at least to the extent that their improvements enhanced the value of the land. The plaintiffs assert that if such value of improvements is allowed, they are entitled to offset such enhanced value by the rental value of the land while defendants were in the exclusive possession thereof. These are questions which must be determined by the trial court on rehearing of that phase of the case. We cannot anticipate the nature of the evidence which may be adduced on the issue of partition.

The defendants rely chiefly on their claim that the plaintiffs have no title to the land. That issue has been finally determined in favor of the plaintiffs. The former decision of this court is conclusive of that issue. *Buttram v. Finley*, *supra*. The amended answer does allege that certain named defendants constructed a dwelling house and planted prune, cherry and walnut trees on the land. It is not alleged that defendants then had exclusive possession of the land, or the circumstances under which such improvements were made. Nor is it alleged such improvements enhanced the value of the land, or how much the value was increased thereby. The plaintiffs contend that if the value of improvements is allowed to the defendants on partition, that plaintiffs are entitled to offset the same in the amount of "the reasonable value of the use and occupancy of plaintiffs' interest in the property," amounting to \$965 per year, since January 4, 1928. Plaintiffs suggest that this court should direct the trial court to render judgment in their favor for said amount.

The question of the respective rights of tenants in common in partition suits, to the

benefit of the enhanced value of land on account of improvements, and of the right to offset the same by rents and profits derived, depends upon the facts of a particular case. It involves the questions of good faith, consent of parties, nature of the improvements, the source and amount of rents and profits, and many elements which do not appear to have been considered in either the pleadings or proof in this case. No findings were adopted on any such issues. On the theory and finding that the plaintiffs have no title in the property, the court merely held that they were not entitled to partition. It also appears that the land is subject to certain specified mortgage liens. We assume the question of the right to partition, and the allowances incident thereto, have not been determined by the trial court on their merits.

In partition suits between tenants in common, the subject of allowances of enhanced value of the real property by virtue of alleged improvements thereon, and of the right to offset such allowances, if any, by the rents and profits derived, has been frequently considered by the courts and text writers. *Ventre v. Tiscornia*, 23 Cal.App. 598, 138 P. 954; *Gerontopoulos v. Gerontopoulos*, 20 Cal.App.2d 261, 66 P.2d 724; *McWhorter v. McWhorter*, 99 Cal. App. 293, 278 P. 454; *Goodenow v. Ewer*, 16 Cal. 461, 76 Am.Dec. 540; *Pico v. Columbet*, 12 Cal. 414, 73 Am.Dec. 550; 40 Am.Jur. pp. 32-44, §§ 39-51; 47 C.J. pp. 469-476, §§ 497-515; 1 A.L.R. 1189, Note; 122 A.L.R. 234, Note.

With respect to the undecided issue of partition or sale of the property, and of the terms, conditions and allowances to be imposed or awarded, if any, it becomes necessary to remand the case for hearing and determination thereof.

The judgment is reversed and the trial court is directed to render judgment in favor of the plaintiffs, quieting title in them to their undivided one-half interest in the real property as previously determined by this court, and the cause is remanded for trial of the issues of partition or sale of the property and to determine, as incident thereto, all liens and legal allowances to be charged against the various shares of the respective parties.

27 Cal.2d 716

HEATON v. KERLAN et al.
L. A. 19477.

Supreme Court of California, in Banc.
March 14, 1946.

1. Workmen's compensation ⇨2254

The payment of an award including compensation for negligent treatment of employee's injury and payment of a judgment for damages caused by same treatment is a double recovery precluded by the statutory provision that employer or his insurance carrier paying compensation may obtain a lien against the entire amount of any judgment for any damages recovered by the employee against a negligent third party for the amount of expenditures for compensation. Labor Code, § 3856.

2. Workmen's compensation ⇨2252

Expenditures for compensation for which a lien is allowed the employer or his insurance carrier on amount recovered by employee against negligent third party include expenditures for all benefits conferred upon the employee by the labor code, and so include expenditures for medical and hospital treatment as well as for disability benefits awarded. Labor Code, §§ 3201-6002, 3207, 3856, 4600, 4650-4663.

3. Workmen's compensation ⇨2254

Evidence established that an award for compensation which was made over 17 months after the last of a physician's treatment included compensation for disability caused by physician's malpractice as respects the right of insurance carrier which paid the compensation award to assert a lien against the employee's recovery from the physician. Labor Code, § 3856.

4. Workmen's compensation ⇨766

Recovery of compensation is not conditional upon the employee's rendering service to the employer at the time of the injury. Labor Code, § 3600(b).

5. Workmen's compensation ⇨957

The rule that aggravation of injuries by the negligence of a doctor is within the scope of the original tortious acts is applicable in workman's compensation cases. Labor Code, § 3600(b).

6. Workmen's compensation ⇨2254

That an injury resulting from an alleged malpractice of physician who treated

employee's injuries was not incurred in the course of her employment would not preclude the employer's compensation insurance carrier from filing a lien for any part of the compensation payments paid to the employee against any judgment that might be recovered by the employee against the physician, since the aggravation of injuries by the physician's negligence is within the scope of the risk created by the original tortious act. Labor Code, §§ 3600(b), 3856.

7. Workmen's compensation ⇨2254

That employee's judgment for malpractice against physicians had been fully satisfied did not require dismissal of the appeal of insurance carrier seeking a lien against the judgment for compensation paid the employee on ground that the controversy had become moot, where the carrier filed its notice of appeal before the satisfaction of the judgment. Labor Code, §§ 3856, 3858.

8. Workmen's compensation ⇨2254

Under the compensation statutes the court and not the Industrial Accident Commission has jurisdiction to fix the amount of the lien of the insurance carrier paying compensation to the injured employee who recovered a judgment against the physician for malpractice in the treatment of his injuries. Labor Code, §§ 3852, 3853, 3856, 3857, 5300.

9. Workmen's compensation ⇨1791

When the Industrial Accident Commission has made an award fixing the compensation to which an employee is entitled, the award will govern any later determination as to what was payable as compensation under the award.

10. Workmen's compensation ⇨2252

Where compensation is paid injured employee by employer without proceedings in the Industrial Accident Commission, the court, in ascertaining the amount of the lien employer is entitled to, against any recovery by the employee against a third party for the injury, must determine what amount will properly be expended in fulfillment of employer's duty to compensate the employee. Labor Code, § 3856.

11. Workmen's compensation ⇨957

Awards for disability under the compensation act are based upon the ultimate result of the accident, and the employee

is entitled to recover under the schedule of compensation for the extent of his disability, based on the ultimate result of the accident regardless of the fact that the disability has been aggravated and increased by the intervening negligence of the employer's selected physician. Labor Code, § 3856.

12. Workmen's compensation ☞2254

Where employee recovered judgment for malpractice in treatment of compensable injuries and insurer paid subsequent award for permanent disability, insurer was entitled to a lien upon the judgment limited to the amount required under the award attributable to the malpractice. Labor Code, § 3856.

13. Workmen's compensation ☞2254

Under the compensation statute as amended, the lien of the employer who has paid compensation to an injured employee attaches to the entire judgment that the employee recovers against a physician for malpractice for the injuries, and it is no longer necessary to segregate the part thereof that represents damages for pain and suffering. Labor Code, § 3856.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Esther Heaton against Milton Kerlan, M. D., and others to recover damages for alleged malpractice in treatment of injuries compensable under workmen's compensation, wherein Associated Indemnity Corporation, insurer, filed application for lien against judgment that might be recovered in the action. From a judgment dismissing the application for a lien after sustaining defendant's demurrer thereto, the insurer appeals.

Judgment of dismissal reversed.

Prior opinion 160 P.2d 181.

Syril S. Tipton, of Los Angeles, for appellant.

Lyndol L. Young, of Los Angeles, as amicus curiae on behalf of appellant.

F. Murray Keslar, of Los Angeles, for plaintiff and respondent.

TRAYNOR, Justice.

Respondent Esther Heaton fractured her left arm in the course of her employment as a masseuse. Her employer carried workmen's compensation insurance with appellant Associated Indemnity Corporation, and respondent was treated by a doctor selected by appellant. The doctor, without taking an X-ray of respondent's arm, diagnosed and treated for a sprain. The arm did not knit, and by the time another doctor discovered the fracture, it became necessary to remove the head of the radius, and the arm was permanently disabled.

On January 20, 1942, respondent brought an action against the doctor for malpractice and recovered a judgment for \$20,000, which was later reduced to \$8,000. Actions against other doctors were dismissed. On August 19, 1942, the Industrial Accident Commission found that respondent had a permanent disability of 16¼ per cent and awarded her \$1,625 in permanent disability benefits, and appellant paid the award. Before the trial of the malpractice action, appellant filed an application under section 3856 of the Labor Code* for a lien upon any judgment that might be recovered in the action. Respondent's motion to strike the application was granted, a demurrer by the doctor thereto was sustained without leave to amend, and a judgment of dismissal was entered. This appeal followed.

Appellant contends that by virtue of its alleged lien, it has a right to reimbursement out of the proceeds of the judgment against the doctor for that part of the award, allegedly amounting to \$1,425, and for that part of the medical expenditures, allegedly totalling \$246.05, exceeding the disability benefits and medical payments to which respondent would have been entitled had there been no malpractice.

[1,2] The payment of an award that includes compensation for negligent treat-

* "The court shall first apply, out of the entire amount of any judgment for any damage recovered by the employee, a sufficient amount to reimburse the employer for the amount of his expenditures for compensation. If the employer has not joined in the action or has not brought action, or if his action has not

been consolidated, the court, on his application shall allow, as a first lien against the entire amount of any judgment for any damages recovered by the employee, the amount of the employer's expenditures for compensation." Labor Code, § 3856.

ment of an injury, and the payment of a judgment for damages caused by the same treatment, would amount to double recovery. In this state, however, a double recovery is precluded by the provision that the employer or his insurance carrier may obtain a lien against the entire amount of any judgment for any damages recovered by the employee for "the amount of [his] expenditures for compensation." Labor Code, § 3856; *San Bernardino County v. Industrial Acc. Comm.*, 217 Cal. 618, 627, 628, 20 P.2d 673; *Evans v. Los Angeles R. Corp.*, 216 Cal. 495, 498, 14 P.2d 752; *Jacobsen v. Industrial Acc. Comm.*, 212 Cal. 440, 447, 299 P. 66. The expenditures for "compensation" for which a lien is allowed the employer or his insurance carrier include expenditures for all benefits conferred on the employee by sections 3201-6002 of the Labor Code (Labor Code, § 3207), and therefore include expenditures for medical and hospital treatment (*ibid.*, § 4600; *Pacific Emp. Ins. Co. v. Industrial Acc. Comm.*, 66 Cal.App.2d 376, 380, 152 P.2d 501), as well as for disability benefits awarded. Lab.Code, §§ 4650-4663.

[3] Respondent contends that the award did not include compensation for disability caused by the malpractice. The award was made on August 19, 1942, over seventeen months after the last of the doctor's treatments. The fact that the award was based on the condition of the injury after the treatments and the subsequent operation, is established beyond dispute by the finding that respondent's injuries included "permanent disability consisting of loss of head and neck of radius of minor forearm.
* * *

[4-6] Respondent also contends that her cause of action against the doctor for malpractice was separate and distinct from her claim for workmen's compensation, and that the aggravated injury resulting from the negligent treatment by the doctor was not incurred in the course of her employment (Labor Code, § 3600(b)) since she was not rendering any service to her employer at the time of the treatments. She concludes that even if compensation for the injuries caused by the malpractice was included in the award, the commission, by including such compensation, exceeded its jurisdiction. Recovery of compensation is not conditional upon the employee's rendering service to the employer at the time of the injury. *California Cas. Indemnity*

Exch. v. Industrial Acc. Comm., 21 Cal.2d 461, 465, 132 P.2d 815, and cited cases. It has been settled by decisions in tort actions that the aggravation of injuries by the negligence of a doctor is within the scope of the risk created by the original tortious act. *Ash v. Mortensen*, 24 Cal.2d 654, 657, 150 P.2d 876; *Dewhirst v. Leopold*, 194 Cal. 424, 229 P. 30; *Blackwell v. American Film Co.*, 189 Cal. 689, 209 P. 999; *Boa v. San Francisco-Oakland Term. Rys.*, 182 Cal. 93, 187 P. 2; *Fields v. Mankato Elec. Traction Co.*, 116 Minn. 218, 133 N.W. 577; see *Rest., Torts*, §§ 457, 872; *Prosser on Torts*, 362; 39 A.L.R. 1268. The same rule applies in this state in workmen's compensation cases: " * * * 'under the great weight of authority the employer is liable for all legitimate consequences following an accident, including unskilfulness or error of judgment of the physician furnished as required, and the employee is entitled to recover under the schedule of compensation for the extent of his disability, based on the ultimate result of the accident, regardless of the fact that the disability has been aggravated and increased by the intervening negligence or carelessness of the employer's selected physician.' The reasonableness of this principle is patent." *Fitzpatrick v. Fidelity & Casualty Co. of New York*, 7 Cal.2d 230, 234, 60 P.2d 276, 278; *Dillard v. City of Los Angeles*, 20 Cal.2d 599, 604, 127 P.2d 917, 128 P.2d 537; *Nelson v. Associated Indemnity Corporation*, 19 Cal.App.2d 564, 66 P.2d 184; see *Drengwitz v. Lincoln Park Coal & Brick Co.*, 317 Ill. 302, 148 N.E. 79, 39 A.L.R. 1276; *Parchefsky v. Kroll Bros.*, 267 N.Y. 410, 196 N.E. 308, 98 A.L.R. 1387; *Vasel v. Jardine Min. Co.*, 110 Mont. 82, 100 P.2d 75, 127 A.L.R. 1108; 139 A.L.R. 1010; 71 C.J. 641 et seq.

Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P. 24, on which respondent relies, is clearly distinguishable, since it involved a refracture of the old break after the employment had ceased. *Cf. Head Drilling Co. v. Industrial Acc. Comm.*, 177 Cal. 194, 170 P. 157; *Shell Co. of California v. Industrial Acc. Comm.*, 36 Cal. App. 463, 172 P. 611; *Shaw v. Owl Drug Co.*, 4 Cal.App.2d 191, 40 P.2d 588; *Brown v. Beck*, 63 Cal.App. 686, 220 P. 14; *Rest., Torts*, § 460. *Smith v. Golden State Hospital*, 111 Cal.App. 667, 296 P. 127, on which respondent also relies, held that receipt of compensation for addition-

al injuries caused by malpractice does not bar recovery by the employee from the negligent doctor in an action for damages. Language in that case that negligence in the treatment of an injury is not within the scope of the risk created by the injury is inconsistent with the Fitzpatrick, Dillard and Nelson cases, *supra*, and is disapproved.

[7, 8] Respondent contends that the present appeal has become moot on the ground that her judgment has been fully satisfied and that no lien can therefore attach thereto. Appellant filed its notice of appeal, however, before the doctor satisfied respondent's judgment. If an employee has obtained a judgment against a third person for his compensable injury, "No satisfaction of such judgment in whole or in part shall be valid without giving the employer notice and a reasonable opportunity to perfect and satisfy his lien." Labor Code, § 3858. The employer is denied such an opportunity if, during the pendency of his appeal, the judgment is satisfied and no arrangement is made to protect the lien. The doctor could not therefore destroy the lien by satisfying the judgment.

Since appellant is entitled to a lien, the motion to strike should have been denied and the demurrer overruled.

[9] The contention has been advanced that even if appellant is entitled to a lien, only the Industrial Accident Commission has jurisdiction to fix the amount thereof. Section 5300 of the Labor Code provides that proceedings for "the recovery of compensation, or concerning any right or liability arising out of or incidental thereto" shall be "instituted before the commission and not elsewhere, except as otherwise provided in Divisions IV and V." It is provided in division IV of the Labor Code that the court has jurisdiction to determine the amount of the lien. Under chapter 5 of division IV, pt. 1, an employer or his insurance carrier may obtain reimbursement for expenditures in compensating his employee for an injury caused by a third person by bringing an action against such person (Labor Code, § 3852), by joining in an action brought by the employee (Labor Code, § 3853), or, if both actions were brought independently, by consolidating them (Labor Code, § 3853), or by claiming a lien on a judgment for any damages recovered by the employee (Labor

Code, § 3856). These remedies are expressly within the jurisdiction of the court. Thus sections 3856 and 3857 provide: "The court shall first apply, out of the entire amount of any judgment for any damage recovered by the employee, a sufficient amount to reimburse the employer for the amount of his expenditures for compensation. If the employer has not joined in the action or has not brought action, or if his action has not been consolidated, the court, on his application shall allow, as a first lien against the entire amount of any judgment, for any damages recovered by the employee, the amount of the employer's expenditures for compensation." Labor Code, § 3856. "The court shall, upon further application at any time before the judgment is satisfied, allow as a further lien the amount of any expenditures of the employer * * * subsequent to the original order." Labor Code, § 3857. It clearly appears from these provisions that the court has jurisdiction to fix the amount of the lien. *Jacobsen v. Industrial Acc. Comm.*, 212 Cal. 440, 448, 299 P. 66.

[10-12] When the Industrial Accident Commission has made an award fixing the compensation to which the employee is entitled, the award will govern any later determination as to what was payable as compensation under the award. An award, however, may relate only to part of the compensation, such as disability benefits, leaving uncovered such expenditures as those for medical and hospital treatment. Frequently compensation is paid by the employer without proceedings in the Industrial Accident Commission. In such cases the court in ascertaining the amount of the lien, must determine what amount was or will be properly expended in fulfillment of the employer's duty to compensate the employee. *Moreno v. Los Angeles Transfer Co.*, 44 Cal.App. 551, 554, 186 P. 800; see *Jacobsen v. Industrial Acc. Comm.*, *supra*, 212 Cal. 440, 448, 229 P. 66. In the present case the commission determined the amount of the disability benefits to which respondent was entitled under the act, but it did not determine what part thereof was attributable to the aggravation of respondent's injury caused by the doctor's malpractice. Since respondent was entitled to compensation for the injury including such aggravation, the commission had no reason to determine to what extent respondent's disability was caused by the malpractice, or the amount of com-

pensation payable for disability so caused. Awards for disability are based on the ultimate result of the accident; " * * * the employee is entitled to recover under the schedule of compensation for the extent of his disability, based on the ultimate result of the accident, regardless of the fact that the disability has been aggravated and increased by the intervening negligence or carelessness of the employer's selected physician." *Fitzpatrick v. Fidelity & Casualty Co.*, supra, 7 Cal.2d 230, 234, 60 P.2d 276, 278; *Dillard v. City of Los Angeles*, supra, 20 Cal.2d 599, 604, 127 P.2d 917, 128 P.2d 537; *Nelson v. Associated Indemnity Corporation*, supra, 19 Cal.App.2d 564, 66 P.2d 184; see *Parchefsky v. Kroll Bros., Inc.*, 267 N.Y. 410, 417, 196 N.E. 308, 98 A.L.R. 1387; 27 Cal.Jur. 423. Whether or not there was malpractice had to be determined in the action against the doctor. Given this determination, it remains to be determined what aggravation of the original injury resulted from the malpractice. The amount of appellant's lien is equal to the amount of compensation paid or payable, including medical expenditures not covered by the award, that was attributable to the malpractice. In other words the amount of the employer's lien is limited to the amount that he is required to pay because of the malpractice.

[13] The employer's lien attaches to the "entire amount" of a judgment "for any damages." Labor Code, § 3856. The Legislature so defined the lien (*Stats.1931*, p. 2370, *Deering's Gen.Laws 1931*, Act 4749) after this court held that the lien of the employer under the former statute did not attach to that part of a judgment representing damages for the employee's pain and suffering, and suggested that the difficulties of segregating the elements of the employee's recovery "might well call for further legislative action on the subject." *Jacobsen v. Industrial Acc. Comm.*, supra, 212 Cal. 440, 449, 299 P. 66, 69. Under the statute as amended, it is clear that the employer's lien attaches to the entire judgment and that it is no longer necessary to segregate the part thereof that represents damages for pain and suffering. *Pacific Gas & Electric Co. v. Industrial Acc. Comm.*, 8 Cal.App.2d 499, 504, 47 P.2d 783.

The judgment of dismissal is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.

WEST PUB. CO. v. McCOLGAN, Franchise
Tax Com'r.
Sac. 5741.

Supreme Court of California, in Bank.
Feb. 27, 1946.

Rehearing Denied March 28, 1946.

1. Taxation ⇐117

A "franchise tax" is a tax imposed upon a corporation for right or privilege of being a corporation or doing business in a corporate capacity.

See Words and Phrases, Permanent Edition, for all other definitions of "Franchise Tax".

2. Commerce ⇐69(1)

A franchise tax is inapplicable to a corporation engaged exclusively in interstate commerce.

3. Commerce ⇐72

A tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, does not conflict with the commerce clause.

4. Commerce ⇐72

The provision of Corporation Income Tax Act making tax inapplicable to income that a corporation must include in measure of tax under the Bank and Corporation Franchise Tax Act, and allowing an offset for the tax imposed under the Bank and Corporation Franchise Tax Act, does not discriminate against interstate commerce as applied to a foreign corporation doing an interstate business, where tax burden imposed by the latter act is at least equal to that imposed by the Corporation Income Tax Act. *Gen.Laws, Acts 8488, 8494a; U.S.C.A.Const. art. 1, § 8, cl. 3.*

5. Commerce ⇐72

A tax does not discriminate against interstate commerce if other related taxes impose equal burdens on local commerce. *U.S.C.A.Const. art. 1, § 8, cl. 3.*

6. Commerce ⇐72

The Corporation Income Tax Act, as applied to a foreign corporation doing an interstate business, does not discriminate against interstate commerce because it subjects part of foreign corporation's income to double taxation, in that the corporation's entire net income was taxable in state of its

domicile. Gen.Laws, Act 8494a; U.S.C.A. Const. art. 1, § 8, cl. 3.

7. Taxation Ⓒ47(2)

Taxation in one state is not an immunization against tax in other states. U.S.C.A.Const. art. 1, § 8, cl. 3.

8. Taxation Ⓒ363½

A taxpayer cannot complain of alleged errors in computation of tax liability under Corporation Income Tax Act when it refused to avail itself of its administrative remedies to prevent or correct such errors. Gen.Laws, Act 8494a, § 18(a).

9. Taxation Ⓒ363½

Taxpayer which was a foreign corporation doing an interstate business could not complain that its business was a unitary business and that its income was not allocated to state and others in conformity with Corporation Income Tax Act, where it had failed to furnish information without which allocation could not be made. Gen. Laws, Act 8494a, § 13.

10. Taxation Ⓒ104

Income derived from activities in state in furtherance of an interstate business has a "source within state" within Corporation Income Tax Act, in view of provision defining income from sources within state as including income from any activities carried on in state. Gen.Laws, Act 8494a.

See Words and Phrases, Permanent Edition, for all other definitions of "Source Within State".

11. Constitutional law Ⓒ283
Taxation Ⓒ54

The Corporation Income Tax Act does not deny due process of law as applied to a foreign corporation exclusively engaged in interstate commerce and which had not qualified to do an intrastate business in California and which shipped its products into the state pursuant to orders taken by its employees, where such employees devoted their entire time to soliciting orders, receiving payments, and performing other services for the corporation, so that the corporation received protection or benefits which would justify the imposition of the

tax. Gen.Laws, Act 8494a; U.S.C.A. Const. Amend. 14.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by the West Publishing Company against Charles J. McColgan, as Franchise Tax Commissioner, etc., for refund of corporation income tax collected, wherein the defendant filed a counterclaim. Judgment for defendant, and plaintiff appeals.

Affirmed.

John W. Preston, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and John L. Nourse and James E. Sabine, Deputy Attys. Gen., for respondent.

TRAYNOR, Justice.

Plaintiff, a Minnesota corporation, with its principal place of business in St. Paul, Minnesota, is engaged in the business of selling law books and other publications throughout the United States and in foreign countries. It has not qualified to do intrastate business in California.

During 1937, 1938 and 1939 it shipped books and other publications into this state pursuant to orders taken here by its employees. During this time it had four regularly employed solicitors in this state who devoted their entire time to plaintiff's business. Its California employees were authorized to receive payments on orders taken by them, to collect delinquent accounts, and to make adjustments in case of complaints by customers. The employees were given space in the offices of attorneys in return for the use of plaintiff's books stored in such offices. In legal newspapers and periodicals published and circulated in California, plaintiff advertised as its local offices those occupied by its employees. It refused to file returns under the California Corporation Income Tax Act, Stats.1937, ch. 765, p. 2184, as amended by Stats.1939, ch. 1049, p. 2902, Deering's Gen.Laws, Act 8494a,* for the taxable years 1937, 1938 and 1939, or to furnish any information re-

* Section 3 of the act, as enacted in 1937, provides: "There shall be levied, collected and paid for each taxable year, a tax at the rate of four per cent upon the net income of every corporation derived from sources within this State on or after January 1, 1937; provided, how-

ever, that the income of any corporation which is included in the measure of the tax imposed by the Bank and Corporation Franchise Tax Act, Statutes 1929, Chapter 13, as amended, shall not be subject to the tax imposed by this act. Income from sources within this State

quested by the Bank and Corporation Franchise Tax Commissioner (hereinafter referred to as commissioner). The commissioner, pursuant to section 18(a) of the act, made assessments based upon his estimate of the amount of net income derived by plaintiff from sources in California. The commissioner collected part of the amounts so assessed pursuant to the withholding procedure provided in section 25 of the act, and plaintiff brought this action to obtain a refund of the amounts so collected. Defendant filed an answer as well as a counterclaim for the unpaid part of the assessment. The trial court entered judgment for defendant and plaintiff appeals.

Plaintiff contends that the tax in question is unconstitutional on the grounds that California cannot impose a tax on any part of the net income of a foreign corporation engaged exclusively in interstate commerce and that the tax discriminates against interstate commerce and violates the due process clause of the Fourteenth Amendment to the Constitution of the United States. It also contends that it has no income from sources in California within the meaning of the act.

[1,2] The Corporation Income Tax Act is complementary to the Bank and Corporation Franchise Tax Act. Stats. 1929, ch. 13, p. 19, as amended, Deering's Gen.Laws, Act 8488. The subject of the tax under the first is net income. Under the second it is the privilege of exercising corporate franchises in this state. "A franchise tax is a tax imposed upon a corporation for the right or privilege of being a corporation or doing business in a corporate capacity." *Pacific Co., Ltd. v. Johnson*, 212 Cal. 148, 154, 155, 298 P. 489, 492; *Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389, Ann.Cas.1912B, 1312. Such a tax is inapplicable to a corporation engaged exclusively in interstate commerce for "a state may not impose a charge for the enjoyment of a right granted by the federal constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce * * * although it may tax the property used in, or the income derived from, that commerce, so long as the taxes are not discriminatory." *Murdock v. Pennsylvania*, 319 U.S. 105, 113, 63 S.Ct. 870, 87 L.Ed. 1292, 146 A.L.R. 81; *General Trading Co. v. State Tax Comm.*,

322 U.S. 335, 338, 64 S.Ct. 1028, 1030, 88 L.Ed. 1309, 1319; *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 56-58, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876; *Western Live Stock v. Bureau*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944; *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 45 S.Ct. 477, 69 L.Ed. 916, 44 A.L.R. 1219; see, also, *Cheney Bros. Co. v. Massachusetts*, 246 U.S. 147, 38 S.Ct. 295, 62 L.Ed. 632; *Ozark Pipe Line Co. v. Monier*, 266 U.S. 555, 45 S.Ct. 184, 69 L.Ed. 439; *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218, 53 S.Ct. 373, 77 L.Ed. 710; *Atlantic Lumber Co. v. Commissioner*, 298 U.S. 553, 555, 56 S.Ct. 887, 80 L.Ed. 1328.

[3] In relying on the foregoing cases for the proposition that a foreign corporation engaged within a state solely in interstate commerce is immune from net income taxation by that state, plaintiff overlooks the distinction made by the United States Supreme Court between a tax whose subject is the privilege of engaging in interstate commerce and a tax whose subject is the net income from such commerce. It is settled by decisions of the United States Supreme Court that a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, does not conflict with the commerce clause. *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 326, 329, 38 S.Ct. 499, 62 L.Ed. 1135, Ann.Cas.1918E, 748; *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 64 L.Ed. 445; *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 119, 120, 41 S.Ct. 45, 65 L.Ed. 165; *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm.*, 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282; *Atlantic Coast Line R. Co. v. Doughton*, 262 U.S. 413, 416, 43 S.Ct. 620, 67 L.Ed. 1051; *Butler Bros. v. McCollgan*, 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991. A state "may tax net income from operations in interstate commerce, although a tax on the commerce is forbidden, *United States Glue Co. v. Oak Creek*, 247 U.S. 321, 38 S.Ct. 499, 62 L.Ed. 1135, Ann.Cas.1918E, 748; *Shaffer v. Carter*, supra. Congress may levy a tax on net income derived from the business of exporting merchandise in foreign commerce, although a tax upon articles exported is prohibited by constitutional provision * * * *Peck & Co.*

includes income from tangible or intangible property located or having a situs in this State and income from any activ-

ities carried on in this State, regardless of whether carried on in intrastate, interstate or foreign commerce."

v. Lowe, 247 U.S. 165, 38 S.Ct. 432, 62 L. Ed. 1049; Barclay & Co. v. Edwards, 267 U.S. 442, 447, 45 S.Ct. [135] 348, 69 L.Ed. 703." People of State of New York ex rel. Cohn v. Graves, 300 U.S. 308, 313, 314, 57 S.Ct. 466, 468, 81 L.Ed. 668, 108 A.L.R. 721. "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business. * * * *A tax may be levied on net income wholly derived from interstate commerce.*" *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 46, 60 S.Ct. 388, 392, 84 L.Ed. 565, 128 A.L.R. 876, *italics added*. State power to impose a tax on net income wholly derived from interstate commerce was recently reaffirmed in *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 656, 62 S.Ct. 857, 86 L.Ed. 1090; see, also, *International Harvester Co. v. Wisconsin*, 322 U.S. 435, 442, 64 S.Ct. 1060, 88 L.Ed. 1373. Such power is so well recognized that appeals questioning it are dismissed by the United States Supreme Court for want of a substantial federal question. *Memphis Natural Gas Co. v. State Tax Comm.*, 323 U.S. 682, 65 S.Ct. 440; *Id.*, *Miss.*, 19 So.2d 477; *Parke Davis & Co. v. Cook*, 323 U.S. 681, 65 S.Ct. 436; *Id.*, 198 Ga. 457, 31 S.E.2d 728, 156 A.L.R. 1360.

The use of income as the measure rather than the subject of the tax in the Bank and Corporation Franchise Tax Act is in conformity with a method of taxing national banks authorized by section 5219 of the United States Revised Statutes, 12 U.S.C.A. § 548, that permits the inclusion of income in the measure of the tax that could not be made the subject of the tax. *Pacific Co., Ltd. v. Johnson*, 212 Cal. 148, 298 P. 489; *Id.*, 285 U.S. 480, 52 S.Ct. 424, 76 L.Ed. 893; *Educational Films Corp. v. Ward*, 282 U.S. 379, 51 S.Ct. 170, 75 L.Ed. 400, 71 A.L.R. 1226; *Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389, Ann.Cas.1912B, 1312. The use of income as the subject of the tax in the Corporation Income Tax Act is in conformity with the decisions of the United States Supreme Court, cited above, that a state may tax net income from interstate commerce even though it cannot tax the privilege of engaging in interstate commerce. Before the enactment of the Corporation Income Tax Act, foreign corporations engaged in interstate business within the state without

being subject to a tax burden comparable to the franchise tax imposed on domestic corporations and other foreign corporations competing in the same market. The Corporation Income Tax Act removed that discrimination.

[4, 5] There is no discrimination against interstate commerce in the provision of the Corporation Income Tax Act making the tax inapplicable to income that a corporation must include in the measure of the tax under the Bank and Corporation Franchise Tax Act and allowing an offset for the tax imposed on the corporation under that act. This provision precludes a double burden on corporations subject to the latter act. The tax burden imposed by the Bank and Corporation Franchise Tax Act is at least equal to that imposed by the Corporation Income Tax Act. It is settled that a tax does not discriminate against interstate commerce if other related taxes impose equal burdens on local commerce. *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 52 S.Ct. 631, 76 L.Ed. 1232; *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245, 48 S.Ct. 230, 72 L.Ed. 551; *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814; *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586.

[6, 7] Nor is there any merit to the contention that the act discriminates against interstate commerce on the ground that it subjects part of plaintiff's income to double taxation, given the taxability of plaintiff's entire net income in the state of its domicile. Taxation in one state is not an immunization against taxation in other states. *State Tax Comm. v. Aldrich*, 316 U.S. 174, 62 S.Ct. 1008, 86 L.Ed. 1358, 139 A.L.R. 1436; *Curry v. McCanless*, 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339, 123 A.L.R. 162; *Graves v. Elliott*, 307 U.S. 383, 59 S.Ct. 913, 83 L.Ed. 1356; *Guaranty Trust Co. v. Virginia*, 305 U.S. 19, 59 S.Ct. 1, 83 L.Ed. 16. Taxation by states in which a corporation carries on business activities is justified by the advantages that attend the pursuit of such activities. *State of Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 446, 61 S.Ct. 246, 85 L.Ed. 267, 130 A.L.R. 1229. "Income may be taxed both by the state where it is earned and by the state of the recipient's domicile. Protection, benefit, and power over the subject matter are not confined to either state." *State Tax Comm. v. Aldrich*, *supra*, at page 178 of 316 U.S., at page 1010 of 62 S.Ct., 86 L.Ed.

1358, 139 A.L.R. 1436; *Curry v. McCannless*, supra, at page 367 of 307 U.S., at page 900 of 59 S.Ct., 83 L.Ed. 1339, 123 A.L.R. 162.

[8,9] Plaintiff contends that the tax is void on the ground that it was imposed on the gross receipts from its business in interstate commerce. Section 18(a) of the act provides: "If any taxpayer, upon notice and demand by the commissioner, fails or refuses to make and file a return required by this act, the commissioner is authorized to make an estimate of the net income and to compute and levy the amount of the tax due under this act from any available information." Plaintiff was repeatedly requested to furnish information before the assessment but refused to do so. The record discloses that the commissioner's only information as to plaintiff's income from California sources related to its gross sales to California customers. This information was not furnished in any return made by the taxpayer. It was acquired by the commissioner from the State Board of Equalization, which had been informed by plaintiff's accountants that its gross revenue from California sources averaged \$160,000 a year. To cover the possibility that the actual amount of its gross income attributable to California that would have been revealed on a return would be higher than this amount, the commissioner estimated that \$200,000 represented such income. Net income is defined by the act as gross income less the deductions allowed. The commissioner estimated that plaintiff's deductions would amount to 80 per cent of its gross income and computed the tax on an estimated net income of \$40,000. There is no proof that these estimates were too high, and there is nothing in the record to discount the possibility that they might even be too low. No question was raised either in the claim for refund filed with the commissioner or in the pleadings filed in this action concerning the amounts of the assessments; plaintiff merely contended that no tax could be validly imposed. It chose this way of challenging the state's authority to impose the tax, taking the risk that if such authority existed its position in court would be that of a delinquent taxpayer that has failed to exhaust its administrative remedies. *Alexander v. State Personnel Board*, 22 Cal.2d 198, 137 P.2d 433. If the commissioner erred in his computation, the error could easily have been avoided by giving him the necessary information at the outset, or it could have been

corrected by giving the necessary information upon the filing of the claim for refund. Plaintiff cannot complain of alleged errors in the computation of tax liability, when it refused to avail itself of its administrative remedies to prevent or correct such errors. *Universal Consol. Oil Co. v. Byram*, 25 Cal.2d 353, 361, 362, 153 P.2d 746; *Dawson v. Los Angeles County*, 15 Cal.2d 77, 81, 98 P.2d 495; *Los Angeles, etc., Co. v. Los Angeles County*, 162 Cal. 164, 168, 121 P. 384, 9 A.L.R. 1277; *People v. Keith Railway Equipment Co.*, 70 Cal.App.2d 339, 346, 347, 161 P.2d 244; *People v. Richardson*, 37 Cal.App.2d 275, 281, 99 P.2d 366; *Alexander v. State Personnel Board*, supra; *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; *Gorham Mfg. Co. v. State Tax Comm.*, 266 U.S. 265, 45 S.Ct. 80, 69 L.Ed. 279; see 51 Am.Jur. 698-699. The same answer must be given to plaintiff's contention that its business was a unitary business and that its income was not allocated to this state and others in conformity with section 13 of the act. See *Butler Bros. v. McColgan*, 17 Cal. 2d 664, 111 P.2d 334, affirmed 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991. Allocation under section 13 could not be made without the information that plaintiff alone could supply. "Litigants may not, by refusing or neglecting to submit issues of fact to such agencies, by-pass them, and call upon the courts to determine in a suit such as this, matters properly determinable originally by such agencies." *People v. Keith Railway Equipment Co.*, 70 Cal.App.2d 339, 346, 161 P.2d 244, 249.

[10] Plaintiff contends that it has no income from sources in California within the meaning of the act on the ground that income derived from activities in furtherance of a purely interstate business does not have a source within this state. This conclusion is contrary to the express provision of the act that "income from sources within this State includes * * * income from any activities carried on in this State, regardless of whether carried on in intrastate, interstate or foreign commerce." All of the cases cited by plaintiff (*Department of Treasury v. International Harvester Co.*, 221 Ind. 416, 47 N.E.2d 150, 152; *Commissioner of Internal Revenue v. Piedras Negras Broadcasting Co.*, 5 Cir., 127 F.2d 260; *Compania General de Tabacos v. Collector of Internal Revenue*, 279 U.S. 306, 49 S.Ct. 304, 73 L.Ed. 704; *Commissioner of Internal Revenue v. East Coast Oil Co.*

S.A., 5 Cir., 85 F.2d 322, involved statutory construction rather than constitutional power, and none of them involved a statute like the act in question which expressly defines income from sources within the state as including income from any activities carried on in the state.

[11] Plaintiff contends that the tax violates the due process clause of the Fourteenth Amendment of the Constitution of the United States on the grounds that the state is without jurisdiction of the person, property, or business of the plaintiff, and that it gives plaintiff no protection, opportunities, or benefits that would justify a tax. The record shows without conflict that plaintiff engages in substantial income-producing activities in California. It has local offices here as well as employees who devote their entire time to soliciting orders, receiving payments, adjusting complaints, collecting delinquent accounts, and performing other services for plaintiff. This state provides a market in which plaintiff operates in competition with local law-book publishers. Plaintiff's agents receive the same protection and other benefits from the state as agents carrying on business activities for a principal engaged in intrastate business. The state protects plaintiff's business transactions within its borders and maintains courts in which plaintiff enforces payment for the sale of its publications. In *West Publishing Co. v. Superior Court*, 20 Cal.2d 720, 128 P.2d 777, certiorari denied 317 U.S. 700, 63 S.Ct. 524, 87 L.Ed. 559, it was held that by virtue of these activities plaintiff is present in this state and subject to the jurisdiction of its courts. See, also, *Frene v. Louisville Cement Co.*, 77 U.S. App.D.C. 129, 134 F.2d 511, 146 A.L.R. 926. "The activities which establish its 'presence' subject it alike to taxation by the state and to suit to recover the tax." *International Shoe Co. v. Washington*, 66 S.Ct. 154, 161.

The *International Shoe* case, *supra*, settles any doubt as to the validity of the tax in question under the due process clause. That case held that a Delaware corporation was subject to suit in the courts of the State of Washington and was liable under the statutes of that state for contributions to the state unemployment compensation fund. The corporation also contended that the state statute violated the commerce clause, but the court held that there was no basis for that contention in view of a federal statute providing that "No per-

son required under any State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce. * * *" 26 U.S.C.A. Int.Rev.Code, § 1606(a).

The activities of the *International Shoe Company* in the State of Washington, which served as the constitutional basis for the imposition of the tax there involved were less extensive than the activities of plaintiff in this state. The corporation's Washington activities are described by the United States Supreme Court as follows: "Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than \$31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals is reimbursed by appellant. The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f.o.b. from points outside Washington to the purchasers within the state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections." 66 S.Ct. 154, 157. Although the corporation's only activities in the State of Washington were those of its salesmen as described above, and although those activities were exclusively in interstate commerce, the court nevertheless held that the tax did not violate the due process clause. This holding

disposes of plaintiff's contention that a state cannot exact a tax from a foreign corporation engaged exclusively in interstate commerce without violating the due process clause. It also disposes of the contention that a corporation carrying such activities as plaintiff's in California receives no protection or benefits that would justify a tax: "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. * * * the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. * * * " 66 S.Ct. 154, 160. The court held that the State of Washington had constitutional power to impose the tax and to subject appellant to suit to recover it, and concluded its opinion with the statement quoted above that "* * * The activities which establish its 'presence' subject it alike to taxation by the state and to suit to recover the tax."

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and SPENCE, JJ., concurred.



73 Cal.App.2d 580

FRIIS-HANSEN v. THOMPSON.
Civ. 3170.

District Court of Appeal, Fourth District,
California.

MARCH 19, 1946.

1. Evidence ⇨383(7)

The statute listing as a conclusive presumption the truth of the facts recited, from recital in a written instrument between parties thereto or their successors in interest by a subsequent title, does not

apply to the recital of a consideration. Code Civ.Proc. § 1962, subd. 2.

2. Evidence ⇨383(7)

Fact that bill of sale executed by defendant to plaintiff covering equipment at service station specified a consideration of \$650, did not preclude defendant from showing by parol or extrinsic evidence that actual consideration for the written agreement was something other than consideration recited therein. Code Civ.Proc. § 1962, subd. 2.

3. Accord and satisfaction ⇨26(3)

Evidence supported finding that equipment at service station leased by plaintiff from defendant was turned over to plaintiff as accord and satisfaction for an indebtedness found due arising out of advanced rentals paid by plaintiff under lease and his being evicted before expiration of lease because of sale of property under a trust deed.

4. Appeal and error ⇨1010(1)

A finding of fact which has substantial evidentiary support may not be disturbed on appeal. Civ.Code, §§ 1521, 1523.

5. Appeal and error ⇨1050(1)

Where issue between parties was whether equipment at service station leased by plaintiff from defendant was turned over to plaintiff by defendant as an accord and satisfaction for indebtedness found due or whether equipment was sold to plaintiff for consideration of \$650 as recited in bill of sale, admission of testimony as to value of equipment, only in so far as it had an indirect bearing in attempting to determine the probability of what was said the night the agreement was purported to have been made respecting the accord and satisfaction, was not prejudicial to plaintiff.

6. Appeal and error ⇨1050(1)

Where both plaintiff and defendant previously testified as to value of articles specified in bill of sale without objection, plaintiff was not prejudiced by admission of other evidence over objection substantiating such testimony as to value.

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action by M. Friis-Hansen against Helen P. Thompson to recover amount of an ad-

vance under a lease of service station property upon plaintiff's being evicted following sale of the real property under a trust deed. From a judgment for defendant, the plaintiff appealed. Upon death of the defendant after appeal was perfected, Reynold Thompson, administrator of the estate of Helen P. Thompson, deceased, was substituted as party defendant in her stead.

Affirmed.

L. Kenneth Say, of Fresno, for appellant.

Wild, Carlson & Reeve, of Fresno, and A. D. Christensen, of Selma, for respondent.

GRIFFIN, Justice.

Plaintiff, M. Friis-Hansen, on August 1, 1933, in writing, leased service station property in Fresno from Helen P. Thompson (hereinafter referred to as defendant) for a period of five years. He paid as advance rental \$2,000, which sum was to apply on any rental which might become due in excess of \$100 per month. On November 15, 1936, plaintiff was evicted because of the sale of the real property under a trust deed.

The pleadings admit the receipt of the \$2,000 and that plaintiff was in arrears in rent in the sum of \$59.26 when he was evicted. This action was for the return of the difference, i. e., \$1,940.74.

Defendant owned the equipment at the service station and, together with one Schuler, executed a chattel mortgage thereon. It was given as security, or as a guarantee to plaintiff of repayment to him for any losses that he might sustain by reason of having guaranteed the account of Schuler with the General Petroleum Corporation. Schuler was a tenant of plaintiff on the oil station premises. On October 2d, 1934, defendant, due to the fact that he was losing money under the \$100 per month rental required, by letter, allowed plaintiff three months rental for each \$200 paid on the lease.

Reynold Thompson, son of the defendant and admittedly her agent in the transaction, testified that plaintiff, in the fall of 1937, in the presence of a Mr. Brown, talked to him and asked about the money still owing plaintiff on the advance under the lease; that he (Thompson) said that he would turn over all of the service station equipment to plaintiff "in return for a settlement in full of any monies that might

be owed to him in any connection with the deal, by my mother or myself or any one of us connected with it"; that they "made a settlement that way * * * that Mr. Hansen was to take all of the equipment, covered by the mortgage, and also the equipment that was not covered by the mortgage, such as rest-room facilities, hoses, greasing equipment, flood lights, plumbing and pipes, in settlement in full for any money they might owe him."

On October 26, 1937, defendant wrote plaintiff a letter giving him "permission to take possession of the personal property included in the mortgage" for the purpose of enforcing the terms of the chattel mortgage. On the same day a bill of sale was drawn by Mr. Hansen and on November 22, 1937, it was signed by defendant Mrs. Thompson. The bill of sale recites: "In consideration of the sum of Six-Hundred Fifty and No/100 Dollars to her in hand paid by M. Friis-Hansen" defendant sells certain described personal property (service station equipment) to Hansen. Admittedly, the \$650 was never paid to her.

Thompson further testified that all the equipment described in the mortgage was turned over to Hansen "and more too"; that on one occasion prior to October 6, 1937, he had a prospect for the sale of part of the service station equipment but that Hansen would not release it; that the \$650 mentioned in the bill of sale was just an amount they agreed upon in settlement of all claims; that the value of the property described in the chattel mortgage was "not less than \$2500". Later, plaintiff sold one tank for \$400. Many other tanks, pumps, and a 12 by 36 foot steel building were included as part of the personal property mentioned therein.

Mr. Brown testified that he was present on one occasion when the son of defendant and Mr. Hansen were discussing the disposition of the service station equipment; that he did not remember the entire conversation but did remember Thompson saying "Friis was getting a lot more than he felt he should have got"; that soon thereafter Hansen took possession of the equipment and moved it away. Hansen "didn't remember" any such conversation or agreement but did testify that Mr. Thompson claimed to have a buyer for the equipment for \$700 or \$750 and that to save foreclosure sale expenses he agreed to sell it for him and to retain all over \$650; that the price of \$650 was its market

value and it was the amount of consideration that was to be recited in the bill of sale, and credit was to be given defendant for that amount which would leave a balance due plaintiff in the sum of \$1,290.74. When the bill of sale was produced in court showing that there was a consideration of \$650 recited therein, counsel for plaintiff moved to amend his complaint seeking a balance of \$1,290.74 instead of \$1,940.74, allowing defendant credit for that amount.

The case was not tried until February 21, 1944, over seven years after the execution of the bill of sale. The witnesses had difficulty in trying to remember the substance of the several conversations or transactions. The trial judge exercised considerable patience with the parties in an endeavor to learn the true facts. He found that defendant held the \$2,000 paid by plaintiff under the lease subject to a credit of \$59.26 for unpaid rent; that defendant was the owner of certain described personal property which was subject to the chattel mortgage and that in "1938" plaintiff agreed to and did receive and accept such property from defendant in full and complete satisfaction of any claim set up in plaintiff's complaint and of all her liability or indebtedness to plaintiff. Judgment was entered for defendant accordingly. Plaintiff appealed.

Since the appeal was perfected defendant died and Reynold Thompson has been appointed administrator for her estate and substituted as party defendant in her stead.

[1,2] It is plaintiff's argument on appeal that the court erred in holding that plaintiff accepted the personal property described in the bill of sale as an accord and satisfaction for the indebtedness found due under the lease. The main argument is that the bill of sale specifies a consideration of \$650 and that therefore parol or extrinsic evidence cannot be admitted to show actual consideration for the written agreement to be something other than the consideration recited therein, citing *Arnold v. Arnold*, 137 Cal. 291, 70 P. 23. We see no merit to this argument. Section 1962, subdivision 2 of the Code of Civil Procedure, provides that the following presumptions are deemed conclusive: "The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not

apply to the recital of a consideration." See, also, *Wurdeman v. Waller*, 88 Cal. App. 393, 263 P. 558; *Hendrick v. Crowley*, 31 Cal. 471. In the latter case it was held that the consideration of a written instrument cannot be contradicted or shown to be different by parol testimony, *when thereby the legal effect of the instrument to pass the entire interest, according to the purpose therein designated, would be defeated*. This same principle was enunciated in *Arnold v. Arnold*, supra, cited by plaintiff. In the instant case the legal effect of the instrument was not thereby varied nor defeated. Title to the property passed to plaintiff in accordance with the purpose therein designated.

It is next argued that in order to support the finding on the theory of accord and satisfaction it becomes necessary to disregard all of the testimony on that phase of the case save and except the testimony of Reynold Thompson; and that the trial court totally disregarded the testimony of plaintiff's witnesses.

[3,4] There are conflicts in some of the testimony. The trial court evidently believed the evidence produced by defendant. The finding that there had been an accord and satisfaction, although based upon conflicting testimony, has substantial evidentiary support. Secs. 1521, 1523, Civ. Code. Under familiar rules, such finding may not be disturbed on appeal. *Wurdeman v. Waller*, supra.

[5,6] Without objection, both plaintiff and Reynold Thompson testified as to the value of the articles specified in the bill of sale. Thereafter, other evidence was produced, over objection, substantiating this testimony as to value. The trial court admitted it "only in so far as it had an indirect bearing in attempting to determine the probability of what was said the night the agreement was purported to have been made respecting the accord and satisfaction." No prejudicial error resulted from this ruling, particularly after both parties, without objection, had previously testified on the subject. *Cashman v. Harrison*, 90 Cal. 297, 27 P. 283; *Williams v. Hawley*, 144 Cal. 97, 102, 77 P. 762; 10 Cal.Jur. p. 932, sec. 199.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

73 Cal.App.2d 588

In re GILLETT'S ESTATE.
Civ. 12966.

District Court of Appeal, First District,
Division 1, California.

March 21, 1946.

Rehearing Denied April 20, 1946.

Hearing Denied May 16, 1946.

1. Witnesses ⇨59

A proceeding in which estate of husband is asserting and wife is resisting a claim of the estate against wife is an "action by one spouse against the other" within exception to statute excluding testimony of one spouse for or against the other without the consent of such other. Code Civ.Proc. § 1831.

See Words and Phrases, Permanent Edition, for all other definitions of "Action By One Spouse Against the Other".

2. Husband and wife ⇨24

Where husband delivered to wife a check signed in blank and wife thereafter filled up check for sum of \$5,000, there arose a rebuttable presumption that wife had authority to fill check in for that amount. Civ.Code, § 3095.

3. Bills and notes ⇨60

Burden to overcome presumption that person who filled up blanks in check had authority to do so is upon person questioning such authority. Civ.Code, § 3095.

4. Appeal and error ⇨989

When a judgment is attacked as being unsupported by evidence, power of appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trial court or jury, and where two or more inferences can reasonably be deduced from the facts, reviewing court is without power to substitute its deductions for those of trial court.

5. Executors and administrators ⇨506(3)

Where testator, before his death, signed a blank check which executrix filled up for \$5,000 and cashed, on exceptions to account of executrix for not including \$5,000 in estate, evidence sustained finding that filling up blanks in check was unauthorized and that sum should have been added to estate.

6. Executors and administrators ⇨506(3)

In proceedings on objections to account of executrix for failure to include in estate \$5,000 which executrix had obtained prior to testator's death by filling up blanks in a check signed by testator, it was not necessary to prove unsoundness of mind, fraud or undue influence in order to show that action of executrix in filling up and cashing check was unauthorized.

7. Executors and administrators ⇨470

In the matter of an executrix accounting to the estate which she is administering, claim of laches cannot be sustained.

8. Courts ⇨200½

Title to property cannot be tried in probate proceedings as between the estate or heirs or devisees and a stranger to the estate.

9. Courts ⇨200½

Superior court, in exercise of its probate jurisdiction, may try and determine, as an incident to final account of an executor, title to personal property claimed by executor in his own right.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Proceedings in the matter of the estate of James N. Gillett, deceased, wherein Effie G. Newton, individually and as executrix of decedent's estate, filed objections to the final account of Isabella Gillett as co-executrix. From a judgment sustaining the objections, Isabella Gillett, individually and as executrix, appeals.

Affirmed.

Hart H. North, of San Francisco, for appellant.

Elliott Johnson and John L. Reith, both of Oakland, for respondent.

SCHOTTKY, Justice pro tem.

James N. Gillett, former Governor of California, died April 20, 1937. He was survived by his widow, the appellant herein (whom he married in 1898), and by a son and two daughters by a former marriage, one of which latter is the respondent. By his will and codicil thereto he bequeathed \$5,000 and his law library to his son. The will declares that all of his property except certain lots in Eureka was commu-

nity property, and his portion thereof and all his separate property he gave and devised to his daughters, two-thirds to the respondent Effie G. Newton and one-third to Ethel Whitehorn, the other daughter. The estate amounts to some \$200,000. Appellant and respondent were appointed executrices of the will.

The will was admitted to probate, two accounts were rendered and settled, and partial distribution was had. Final distribution of the estate was delayed by reason of certain litigation not involved here. On June 18, 1943, the appellant, Isabella Gillett, filed her third and final account and report and petition for final distribution. Respondent Effie Newton did not join in this petition, but filed objections to the final account, the one involved on this appeal being "the failure of said Isabella Gillett, as Executrix, to account to said estate, or otherwise, for the sum of \$5,000, or any part thereof, received by her pursuant to the cashing of a certain check for \$5000 from the account of said deceased on or about the date of the death of said deceased." This was the first time that the check had been mentioned by respondent in any proceeding in the matter of the estate.

When the objections came up for hearing in the probate court, the matter was referred to a referee and a full hearing had before him. In view of the fact that the court adopted the report and findings of the referee as its own findings, we shall set forth the portion of said report relating to the objection hereinbefore set forth and involved in this appeal.

"In substance, the evidence showed that several months prior to the death of James N. Gillett, deceased, he signed a blank check and gave it to his wife, Isabella Gillett, without the date, payee or amount of money being filled in, the check bearing only his alleged signature. This check was on an account belonging to the deceased in the Anglo California National Bank of San Francisco. The evidence showed that this check was for the specific purpose of repaying to Mrs. Gillett loans which Mrs. Gillett claimed she had advanced at the request of the deceased to J. F. Whitehorn, the husband of the deceased's daughter by a previous marriage, and for the specific purpose of building an elevator in the house.

"The Federal Estate Tax Return, filed by the executrices, one of whom was Isa-

bella Gillett, with the United States Government on or about January 12, 1938, lists in Schedule G, referring to transfers during decedent's life, the following:

"On April 9, 1937, the deceased gave to his wife, Isabella Gillett, the sum of \$5000 for the following purposes, to-wit:

"\$2000 in payment of a like sum previously advanced by her for his account and at his instance and request; \$3000 to be used in making changes in their residence, her property; to-wit, building a passenger elevator.' * * *

"Mrs. Gillett in her testimony before the Referee stated, in effect, that the \$2000 advancement was made to her step-son-in-law at the request of her husband, the deceased, when he felt that Mr. Whitehorn would probably repay the money loaned by Mrs. Gillett while he would not repay the sums if loaned by the deceased, who had advanced large sums of money to his son-in-law over a considerable period of time and had never been repaid for any of these loans. There was admitted into evidence a copy of a promissory note, dated July 28, 1934, in the sum of \$1515, payable to the order of Mrs. J. N. Gillett, and signed by J. F. Whitehorn. Isabella Gillett testified that there was an original loan, dated July 28, 1930, in the sum of \$1000; that there was interest at 6% due to July 28, 1934 in the sum of \$240.00, and a loan made on July 12, 1932, in the sum of \$275.00, all of which were included within this July 28, 1934 note of \$1515.00. Mrs. Gillett testified that the amount of \$1275 advanced by her, being the \$1515.00 note less the \$240.00 interest, was the only advancement contained in the \$2000, as set forth in the Estate Tax Return. She did not explain the discrepancy between this sum of \$1275 and the \$2000 stated in said Return.

"The evidence also showed that on the 28th day of July 1930, the deceased paid to Isabella Gillett the sum of \$1025 which Mrs. Gillett testified possibly could have been the repayment to her of the \$1000 advanced by her at the deceased's request on said July 28, 1930. She would not deny that this repayment was so made to her. The evidence further shows that on July 20, 1932, the deceased reimbursed Isabella Gillett in the amount of \$900, the check stub bearing the notation 'House expense, J. F. W., Dr. B. ac', the J. F. W. being the initials of Mr. Whitehorn, the

deceased's son-in-law, and Isabella Gillett testified that it was possible that in the \$900 was the \$275 which she had advanced to the son-in-law on July 20, 1932. She would not deny that such was the fact. There is further evidence that, due to many requests which the son-in-law had made upon the deceased for money, Isabella Gillett and the deceased arranged a plan between themselves whereby, instead of the deceased making advances to the son-in-law, Isabella Gillett should make the advances and they felt that would restrict the amount of money which the son-in-law would thus be able to obtain. This plan was carried out and, as the deceased from time to time reimbursed Isabella Gillett for expenses advanced, the inference is very strong and the Referee concludes, that the \$1000 and the \$275 thus advanced by Isabella Gillett to the son-in-law were repaid to Isabella Gillett by the deceased on July 28, 1930 and July 20, 1932 respectively. It is therefore concluded, that the \$2000 out of the \$5000 claimed by Mrs. Gillett to have been a repayment to her of the moneys advanced to the son-in-law was in fact only \$1275, and that it had previously been repaid to her by the deceased, and that, therefore, the entire \$2000 was an asset of the deceased's estate at the time of his death.

"There was introduced on behalf of Mrs. Gillett, an alleged copy of a letter sent to J. F. Whitehorn, which Hart H. North states is entirely in the handwriting of the late Mr. Gillett, and is dated January 27, 1937, which carries the statement, 'The letter Mrs. Gillett wrote to you will show how much you owe her, which is, as I remember, a little over \$1700.00.' This was introduced for the purpose of showing that the deceased admitted that there was a sum of money still owing from Mr. Whitehorn to Mrs. Gillett. Your Referee, however, does not feel that this is conclusive, for Mr. and Mrs. Gillett had agreed upon a plan whereby Mrs. Gillett was to theoretically loan the money and make Mr. Whitehorn believe this, with the hope that Mrs. Gillett would have a better chance of collecting than Mr. Gillett would, and this alleged copy of a letter by Mr. Gillett to Mr. Whitehorn can mean no more than the fact that up to January, 1937, Mr. Gillett was still continuing with the original plan agreed upon between him and his wife. There is nothing in the letter, or in the evidence, which shows that

the deceased had not previously reimbursed Mrs. Gillett for the money advanced by her to Mr. Whitehorn.

"Regarding the remaining \$3000 of the \$5000 check, she stated in her Estate Tax Return that this \$3000 was to be used in making changes in their residence, her property, to-wit, building a passenger elevator. Mrs. Gillett testified that to date, more than six years after her husband's death, she has not built that elevator; and, when questioned as to whether she had ever obtained estimates on the cost of such an elevator, she stated that they had never received an absolute estimate, but they believed it would cost \$2000. Here, again, there is a discrepancy of \$1000 in what she herself estimates the elevator would cost and the \$3000 she specified in the Estate Tax Return. Further, as has already been stated, this elevator has not been built, and there is no evidence to the effect that she is going to build it at any time in the future. Your Referee, therefore, concludes that she has also failed to establish her right to the \$3000 for the purposes which she specified, and that it is an asset of the estate.

"In connection with the \$5000 check, she testified that the check was signed many months—more than five—before the deceased's death; that at the time the check was filled in she had no further conversations with the deceased about the check; that a few days before the deceased's death, she filled in the blank check in her own handwriting with the date, the amount of \$5000 and herself as payee, and that the check cleared through the bank on which it was drawn on the date of his death."

Following the filing of the referee's findings and report the court in its decree of settlement of final account and of final distribution adopted the same as its own findings, and ordered that appellant pay to said estate said sum of \$5,000 together with interest at 7% per annum from April 20, 1937, or that said amount be deducted from her distributive share of said estate.

This appeal is from said decree, and the question involved is whether or not the court erred in requiring appellant to pay the said sum of \$5,000 to the estate. The appeal is presented upon a settled statement.

Appellant makes two main contentions, which are: "1. That the referee erred

in overruling the objection of counsel to the examination of appellant as to communications and conversations between herself and her deceased husband; 2. That the evidence is absolutely insufficient to support the findings of the referee which were approved and confirmed by the trial judge."

Appellant makes an earnest argument in support of her contention that the referee erred in overruling appellant's objections to her examination as to communications between herself and her deceased husband. She quotes the following portion of section 1881 of the Code of Civil Procedure: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person can not be examined as a witness in the following cases: 1. A husband can not be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; * * *." However, appellant fails to quote the clause of section 1881 following the above quotation, which reads as follows: "but this exception does not apply to a civil action or proceeding by one against the other * * *."

[1] Appellant also cites numerous cases stating the well-settled rule that communications between husband and wife are privileged, but, as pointed out by respondent, each of these was either an action between a stranger and one of the spouses, or a criminal case, and was not an action "by one against the other." We do not believe that either reason or authority justifies appellant in her apparent assumption that the instant proceeding is not by one spouse against the other, because it seems clear to us that a proceeding in which the estate of the husband is asserting and the wife is resisting a claim of the estate against the wife, is an action or proceeding by one spouse against the other within the meaning of section 1881.

This view is supported by the case of Savings Union Bank & Trust Co. v. Crowley, 176 Cal. 543, 169 P. 67, which was an action by the executor of an estate to collect dividends on certain stock held by the widow. The widow testified that the stock was delivered to her as security for

four notes given to her by her husband as evidence of his indebtedness to her. The Supreme Court said (176 Cal. at page 547, 169 P. at page 68): "The remaining point made by appellant is that the court erred in permitting respondent to testify to declarations of her husband concerning the delivery of the notes and certificates of stock to her, on the ground that by the law of this state neither spouse can, without the consent of the other, testify as to any communications made by one to the other during marriage, citing section 1881, subd. 1, Code of Civil Procedure. Respondent contends that no decision in this jurisdiction has extended the restriction beyond confidential communications, and by reason of the freedom of contract between husband and wife either should be allowed to testify freely to business communications. Section 1881 declares that the rule there stated, excluding testimony by one spouse of declarations by the other made during marriage, 'does not apply to a civil action, or proceeding by one against the other.' The Civil Code (section 158) provides that 'either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried.' *The protection of the right to contract with each other respecting their separate property requires that each should be allowed to testify concerning such contracts, in case of an action between them thereon. This is such an action or proceeding within the meaning of section 1881, and the prohibition therein does not apply.* Under that section, the wife can testify to communications made to her by her husband constituting the contract between them, or affecting her rights thereunder. *Emmons v. Barton*, 109 Cal. [662], 669, 42 P. 303, was not a case of that character, and what is there said has no application here." (Italics added.) The case just quoted from was cited and followed in *Durrell v. Bacon*, 138 Cal.App. 396, 32 P.2d 644. That was an action by a surviving husband against the administrator of his deceased wife's estate to quiet title to real property which had been deeded to the wife by a third person as her separate property, and it was held that parol evidence that the property was purchased with both separate and community funds under an agreement that it should be community property, was admissible. The opinion states (138 Cal.App. at page

403, 32 P.2d at page 647): "Appellants also complain that the conversations between Mr. and Mrs. Durrell were privileged communications under the provisions of subdivision 1 of section 1881 of the Code of Civil Procedure. Savings Union Bank, etc., Co. v. Crowley, 176 Cal. 543, 169 P. 67, we believe, is analogous in this behalf to the present case, and is authority for the admission of the evidence objected to in this case."

Also, in *Tobias v. Adams*, 201 Cal. 689, 258 P. 588, an action by the administrator of the estate of a judgment creditor to set aside certain conveyances made by a husband to his wife which it was claimed were made in fraud of creditors, the defendants, the husband and wife, set up in their answer a written contract by which the husband had relinquished certain property to the wife, and it was held that by pleading the agreement and introducing evidence upon it, the defendants had waived the privilege. There the court said (201 Cal. at page 700, 258 P. at page 592): "Besides, the communications stricken out in this case were not such communications as are privileged anyway. *Poulson v. Stanley*, 122 Cal. 655, 658, 55 P. 605, 68 Am. St.Rep. 73; *Savings Union Bank, etc., Co. v. Crowley*, 176 Cal. 543, 547, 169 P. 67."

In support of her contention that the evidence is insufficient to support the findings, appellant makes the following sub-points: (1) The presumption is that deceased intended to make a gift to appellant of the amount of the check. (2) Fraud is never presumed, and every presumption is in favor of fair dealing. (3) Since the fund was community property, appellant is under no obligation to pay the amount of the check to the estate. (4) The referee and the trial court were not at liberty to disregard uncontradicted testimony. These points are all inter-related and will be covered by our discussion of the sufficiency of the evidence.

The check involved here was admittedly signed in blank by deceased. Section 3095 of our Civil Code (which is in conformity with the Uniform Negotiable Instruments Law) provides: "Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper

may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time."

In *Madden v. Gaston*, 137 App.Div. 294, 121 N.Y.S. 951, at page 952, the court said: "The production of the checks by the plaintiff raised a presumption of a valid and intentional delivery of them to her by the maker. Section 35 of the Negotiable Instruments Law (chapter 38 of the Consolidated Laws.) Such delivery operated as prima facie authority to fill up the blanks for any amount. Section 33 of the Negotiable Instruments Law. The learned trial court was, therefore, wrong in holding that it was incumbent upon the plaintiff to prove her authority to fill up the blanks, *as the statute imposes the burden upon the defendant to show the agreement, and that its terms have been violated, if that be claimed * * **" (Italics added.) (See other cases cited in 5 U.L.A., Part 1, sec. 14, p. 153.)

And in *Davidson v. Lanier*, 71 U.S. 447, at page 456, 4 Wall. 447, at page 456, 18 L. Ed. 377, the Supreme Court of the United States said: "The delivery of a bill of exchange signed and indorsed in blank only authorizes the receiver, as between himself and the drawer and indorser, to fill it up in conformity with the authority given him. If there has been no agreement, the authority is general; if there has, it must be pursued. The burden of proof that there was an agreement, and that its terms have been violated, is, in such a case, upon the defendant; but if he can make the proof it will avail him."

[2, 3] We believe, therefore, that under said section 3095 of the Civil Code, when it appeared that Governor Gillett had delivered to appellant a check signed in blank and she thereafter filled it in for the sum of \$5,000, there arose a rebuttable presumption that she had authority to fill it in for that amount. It then became the burden of the respondent to overcome that presumption. If there is in the present record evidence that is sufficient to sustain the finding that appellant had no such authority, then the decree appealed from must be affirmed.

We have hereinbefore set forth the report of the referee. We have studied the record carefully and believe that the facts set forth in said report are supported by the record. The appellant was the only witness who testified with reference to the check involved in this appeal. Appellant argues that her testimony was uncontradicted and unimpeached and that the referee was not justified in rejecting it and that "the record is destitute of any evidence that, at the time of the delivery of the check, the deceased was of unsound mind, that any fraud or undue influence was practiced upon him, or that the appellant received the check otherwise than as a conveyance 'without any strings to it.'"

The referee held that appellant's testimony "was vague," "inconsistent and evasive," and that her answers were "indirect and parrying." He also attached considerable importance to the fact that the check, although shown to have been in the possession of appellant during the administration of the estate, was not produced at the hearing, although its production was demanded. For these reasons the referee stated in his report that he disbelieved the testimony of appellant.

[4] It is a rule too well established to require the citation of authorities that when a judgment is attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court or jury. And where two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

[5] While it is true that the burden was upon respondent to show that appellant had no authority to fill in the blank check for \$5,000, we cannot hold, upon the record here, that there is no substantial evidence to support the finding of the referee and the decree of the court. Appellant testified and the estate tax return signed by her stated that \$2,000 of the \$5,000 was to repay her for moneys she had loaned to the son-in-law of the deceased at his request, but check book stubs which were in appellant's writing were sufficient evidence to justify the referee in inferring that appellant had been reimbursed by deceased for these loans long

prior to the time she received the blank check. From this the referee had a right to conclude that the deceased had given appellant no authority to include the \$2,000 in the amount of the check. As to the remaining \$3,000 which made the check's total \$5,000, the estate tax return stated and the testimony of appellant was that the \$3,000 was included in the check for the purpose of building a passenger elevator in the family residence. However, at the time of the hearing, which was at least six years after she received the check, the elevator had not been built and there was no explanation of the delay or any testimony that she intended to build it. Furthermore, appellant at no time testified as to what the deceased told her at the time he gave her the check as to its purposes or as to the amount for which it should be filled out, her counsel objecting to her answering such questions. She did, however, testify that she had no further conversation with the deceased at the time she filled in the check. Again in one portion of her testimony, in answer to questions by her own counsel, appellant testified:

"Q. Mrs. Gillett, was this \$5000 received by you from Governor Gillett based on any claim that you had against him?

"The Witness: A. As I understood it, Mr. North, it was a voluntary presentation.

"Q. Well, you made no claim against him? A. No, I had not been making any claim against him."

In another part of her testimony appellant stated: "I think that I have said that I believe that my husband may have had many thoughts in his mind when he gave me that—I think you call it—a blank check. I believe I felt I was entitled to something. In a way, he was giving his money away so lavishly, and my husband and I lived very simply at home. We didn't have the luxuries of some people, and I feel that, all things considered, he just had a feeling that he—I believe that my husband thought in a way, this is only a belief on my part because he was very loath to express some things, and I think my husband may have had in his mind the thought that his course in some respects had not been fully ethical * * *."

It is apparent that counsel for appellant had adopted the theory that any statements made by deceased relative to the check were inadmissible, and had based his entire defense of appellant's action in filling in and

cashing the check upon that theory. At the hearing before the referee he objected constantly to such questioning and even advised appellant to decline to testify. This attitude caused the hearing to be continued several times and prolonged it unnecessarily, and in view of the fact that the referee correctly concluded that such statements were admissible, it is only natural that the refusal of appellant to testify freely as to them would be calculated to excite the suspicion and distrust of the referee. It may well be that if appellant had in simple and direct language freely related all of the conversations and discussions between deceased and herself relative to the check, she might have convinced the referee that she was authorized to fill in the check as she did. However, we must take the record as we find it, and while we may feel that appellant might have been placed in a more favorable light in the hearing before the referee, yet having in mind the limited function of an appellate tribunal, we cannot say that the findings of the referee and the trial court lack substantial support in the record.

[6] We deem it unnecessary to dwell upon appellant's statement that the record is destitute of any evidence that at the time of the delivery of the check the deceased was of unsound mind or that any fraud or undue influence was practiced upon him. The objection to the account was that appellant had failed to account to the estate for the \$5,000 received by her pursuant to the cashing of the check. The referee found that appellant was not authorized by deceased to fill in and cash said check and that her action in doing so was a conversion of the assets of the deceased, and the judge of the probate court confirmed and adopted said finding. It was not necessary to prove unsoundness of mind, fraud, or undue influence in order to show that the action of appellant in filling in and cashing the check was unauthorized, and no attempt was made to do so.

[7] Nor do we deem it necessary to dwell upon the claim made by appellant for the first time in her closing brief, that respondent is barred by laches. This is not a case of a controversy between two individuals but is a matter of an executrix accounting to the estate which she is administering. In such a proceeding the claim of laches cannot be sustained.

[8, 9] One other point may require clarification. It is intimated, but not urged, by appellant, that there may be some doubt as to whether or not the superior court sitting in probate had jurisdiction to pass upon the question of appellant's right to the proceeds of the check upon the settlement of the account. It is, of course, the rule in California that title to property cannot be tried in the probate proceedings as between the estate or heirs or devisees, and a stranger to the estate. In *re Estate of Inghilleri*, 27 Cal.App.2d 664, 81 P.2d 568; *McCarthy v. McCarthy*, 205 Cal. 184, 270 P. 211; *Bauer v. Bauer*, 201 Cal. 267, 256 P. 820; In *re Estate of Wenks*, 171 Cal. 607, 154 P. 24; In *re Estate of Klumpke*, 167 Cal. 415, 139 P. 1062. But it is equally well settled in California that the superior court in the exercise of its probate jurisdiction may try and determine, as an incident to the final account of an executor, title to personal property claimed by the executor in his own right. In *re Estate of Roach*, 208 Cal. 394, at page 395, 281 P. 607, at page 608, the Supreme Court said: "It is now well settled that the court, sitting in probate, is clothed with jurisdiction to hear and determine, as against an administratrix the amount of money or property of the estate that has come into her hands, for the purpose of charging her therewith, and in determining that question to determine all issues necessarily incidental thereto. *Stevens v. Superior Court*, 155 Cal. 148, 99 P. 512; [In *re*] *Estate of Fulton*, 188 Cal. 489, 205 P. 681; *Bauer v. Bauer*, 201 Cal. 267, 256 P. 820, 821; [In *re*] *Estate of Kelsch*, 203 Cal. 613, 265 P. 214. In the case of *Stevens v. Superior Court*, supra, where an executor alleged that the testator, prior to death, had transferred certain money to him in his individual capacity, which he claimed as his individual property, it was held that the probate court had power to determine the title." See also *Bernhard v. Bank of America Nat. Trust & Savings Ass'n*, 19 Cal.2d 807, 122 P.2d 892; *Waterland v. Superior Court*, 15 Cal.2d 34, 98 P.2d 211; *Stevens v. Superior Court*, 155 Cal. 148, 99 P. 512; *Bauer v. Bauer*, supra; In *re Estate of Ginsberg*, 11 Cal.App.2d 210, 53 P.2d 397.

In view of the foregoing the decree of settlement of the third and final account and of final distribution is affirmed.

PETERS, P. J., and WARD, J., concur.

73 Cal.App.2d 585

GILLIES et al. v. BRENT et al.
Civ. 3611.

District Court of Appeal, Fourth District,
California.

March 20, 1946.

Hearing Denied May 16, 1946.

1. Appeal and error ⇨346(1)

The rule extending time for appeal where motion to vacate judgment or to vacate judgment and enter a new and different judgment is not acted on within 120 days after entry of judgment does not refer to vacating a judgment merely for the purpose of granting a new trial, but refers to vacating a judgment or vacating a judgment and entering a new and different judgment on other grounds and for other purposes. Code Civ.Proc. §§ 657, 663, 663a; Rules on Appeal, rule 3(b).

2. Appeal and error ⇨346(1)

Where only notice filed of motion to vacate judgment was usual notice of intention to move for new trial which was so entitled, stated statutory grounds for new trial, and indicated intention to seek vacation of judgment only for purpose of granting a new trial, rule extending time for appeal when motion to vacate judgment or vacate judgment and enter new and different judgment is not acted on within 120 days was not applicable, and, notice of appeal not having been filed within 30 days after denial of motion for new trial, appeal must be dismissed as having been taken too late. Code Civ.Proc. §§ 657, 663, 663a; Rules on Appeal, rule 3(a, b).

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Action by F. A. Graham Gillies, also known as F. A. G. Gillies, and another, against Earl H. Brent and Pearl L. Brent, husband and wife, and others, wherein defendants filed a cross-complaint. From an adverse judgment, plaintiffs appeal and defendants move to dismiss the appeal.

Appeal dismissed.

Edward T. Lannon and Jesse George, both of San Diego, for appellants.

Monroe & McInnis, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is a motion to dismiss the appeal on the ground that it was taken too late, notice of appeal having been filed more than sixty days after entry of the judgment and more than thirty days after the denial of a motion for a new trial.

The judgment was entered on March 15, 1945, and notice thereof was served and filed on March 16. Notice of intention to move for a new trial was served and filed on March 22, 1945, and was denied on April 9, 1945. Notice of this order was served and filed on April 16, 1945, and notice of appeal was served and filed on June 8, 1945.

In opposition to the motion to dismiss, the appellants contend that the filing of the notice of appeal on June 8, 1945, was within 120 days of the date of the entry of the judgment and, therefore, within the time for appeal as extended by subd. (b) of rule 3 of the Rules on Appeal. Subd. (a) of rule 3, where a motion for a new trial is denied, extends the time for appeal from the judgment until thirty days after denial of the motion. Subd. (b) provides that where a motion to vacate a judgment or to vacate a judgment and enter a new and different judgment is not acted on within 120 days after entry of the judgment, the time for appeal from the judgment is extended until 120 days after entry of the judgment.

The only notice of motion which was here filed is entitled "Notice of Intention to Move For a New Trial." It states that the plaintiffs and cross-defendants "intend to move the court to vacate and set aside the judgment and decision of the court heretofore rendered in the above cause and to grant a new trial of said cause upon the following grounds, to wit:" This is followed by a statement of most of the statutory grounds for granting a new trial, as set forth in section 657, Code Civ. Proc.

The appellants rely on this notice as being a notice of intention to make two motions, (1) a motion to vacate and set aside the judgment and (2) a motion to grant a new trial. They state in their supporting affidavit that both an oral motion to vacate and set aside the judgment and a motion for a new trial were made on April 9, 1945; that the court then denied the motion for a new trial; but that the court has never

ruled on the motion to vacate and set aside the judgment. It is, therefore, contended that they had, under rule 3(b), 120 days from the date of the judgment in which to file notice of appeal. The record before us does not show that two separate motions were made on April 9, and the affidavit filed in support of respondents states that the matter was presented entirely as a motion for a new trial and that it was not suggested at any time that any other motion was pending or that any other matter remained for consideration.

[1] The one notice of motion which was filed was not only entitled as a notice of intention to move for a new trial, but its wording indicates an intention to seek a vacation of the judgment only for the purpose of granting a new trial, and on the grounds provided therefor. The form used is one which is commonly used in notices of a motion for a new trial. There is, of course, a sense in which vacating and setting aside a judgment is a necessary and concurrent part of granting a new trial. Rule 3(b) does not refer to vacating a judgment in this sense and merely for the purpose of granting a new trial, but refers to vacating a judgment or vacating a judgment and entering a new and different judgment on other grounds and for other purposes. That rule was intended to extend the time for taking an appeal when such a motion is properly made and not to change the authorization or requirements otherwise provided for the making of such a motion.

Section 663, C.C.P., authorizes the vacating and setting aside of a judgment and the entry of another and different judgment on the ground that the conclusions of law are inconsistent with or not supported by the findings of fact. Section 663a provides that the party intending to make such a motion must, within ten days after notice of the entry of judgment, serve and file a notice of his intention to so move, designating the grounds of the motion "and specifying the particulars in which the conclusions of law are not consistent with the finding of facts." Admittedly, this was not done here. Assuming that rule 3(b) is also applicable to other possible situations where it is desired to move to vacate a judgment without asking to have another and different judgment entered, the proper procedure would necessarily have to be followed and the appropriate grounds stated as a basis for the re-

lief sought. Nothing of the kind was done here, the only notice filed being the usual one of an intention to move for a new trial.

[2] Nothing here appears to make rule 3(b) applicable and the matter is governed by rule 3(a). It follows that the notice of appeal, not having been filed within thirty days after the denial of the motion for a new trial, was filed too late and was not within any extension of time permitted by the statutes or by the rules. The appeal must, therefore, be dismissed. Estate of Hanley, 23 Cal.2d 120, 142 P.2d 423, 149 A.L.R. 1250.

The motion is granted and the appeal is dismissed.

MARKS and GRIFFIN, JJ., concur.



73 Cal.App.2d 511

**CANAVAN v. COLLEGE OF OSTEOPATHIC
PHYSICIANS AND SURGEONS.**

Civ. 15158.

District Court of Appeal, Second District,
Division 2, California.

March 13, 1946.

Rehearing Denied April 2, 1946.

Hearing Denied May 9, 1946.

1. Contracts ⇨143

Where any uncertainty exists in a written contract, the first rule to be observed is that its interpretation must be determined by its own language, and from all of it. Civ.Code, §§ 1638, 1639.

2. Contracts ⇨170(1)

Where sources outside of a written contract need to be consulted in its interpretation, resort may be had to the acts whereby the parties gave their own interpretation to it, when such acts were positive and deliberate and done in an attempted compliance with terms of the contract.

3. Contracts ⇨169

An ambiguous contract should be construed in the light of the circumstances under which it was made.

4. Contracts ⇨147(1)

The court, in construing an ambiguous contract, must consider it in its entirety

and give to each clause the qualification evidently intended by the authors, including the purpose, nature, and subject matter as well as the preliminary negotiations.

5. Contracts ⇨153

A contract must receive such interpretation as will make it definite, reasonable, and operative, and such construction is permissible as will make it valid. Civ.Code, § 1643.

6. Colleges and universities ⇨10

In action against college to recover damages for breach of a contract of employment as associate professor and head of research department, evidence in the form of correspondence fortified by testimony regarding conduct of parties sustained finding that minds of parties had met in a written contract of employment.

7. Colleges and universities ⇨8

The possibility that associate professor and head of research department might have become at some future time incapable of performing the services for which he was employed furnished no ground for his rejection or discharge on the second day of his appearance at college.

8. Master and servant ⇨3(2)

Employment implied ability of servant to perform the required services.

9. Contracts ⇨147(1)

The law imputes to a contractor an intention in accordance with the reasonable meaning of his words and acts, and judges his intent thereby.

10. Contracts ⇨147(2)

Courts will not be controlled by an unexpressed state of mind in arriving at intention of a party to a contract.

11. Contracts ⇨16

Evidence which tends to show a concurrence in the actual understanding of the parties is controlling in determining whether the minds of the parties have met in a contract of employment.

12. Appeal and error ⇨173(6)

In action against college to recover damages for breach of a contract of employment as associate professor and head of research department, contention that professor misrepresented physical condition, if made for purpose of demonstrating that a fraud was committed on the college, was not a proper subject for review by the

Court of Appeal, where no fraud was alleged and no attempt was made to prove one.

13. Colleges and universities ⇨10

In action against college to recover damages for breach of a contract of employment as associate professor and head of research department, evidence sustained finding that professor had disclosed in correspondence his true physical condition, and that minds of the parties had met on subject of professor's ability to perform the services required.

14. Colleges and universities ⇨10

In action against college to recover damages for breach of a contract of employment as associate professor and head of research department, evidence that, on second day after professor's arrival at college pursuant to contract of employment, president of college stated that he had changed his mind, that he had made a mistake, and that he could possibly be ready for professor a year later, and that he requested a statement of expenses incurred by professor in making journey to college, was sufficient to indicate a clear intention to dispense with professor's services in violation of the contract of employment, and sustained finding that contract had been breached. Labor Code, § 2924.

15. Colleges and universities ⇨10

Where it was found upon substantial evidence that reasonable diligence had been exercised to obtain other employment after breach by college of a contract of employment as associate professor and head of research department, judgment for damages awarding a year's salary properly included interest from due date of each monthly installment; action having come on for trial after all installments due under the contract had become payable. Civ.Code, § 3287.

16. Damages ⇨67

Every judgment awarding damages certain or capable of being made certain by calculation on a particular date may include interest from that date.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by William P. Canavan against the College of Osteopathic Physicians and Surgeons, a corporation, to recover dam-

ages resulting from breach of a contract of employment. Judgment for plaintiff, and defendant appeals.

Affirmed.

Finlayson, Bennett & Morrow, by John C. Morrow, all of Los Angeles, for plaintiff and respondent.

Charles E. Hobart, of Los Angeles, for defendant and appellant.

MOORE, Presiding Justice.

Respondent sued defendant college for damages suffered as the result of a breach of contract of employment as associate professor of tropical diseases and as head of the department of research. From a judgment for one year's salary with interest defendant appeals on the grounds: (1) There was no contract in that the minds of the parties did not meet; (2) respondent falsely represented his physical condition; (3) no breach was proved; (4) interest is not allowable.

A Contract Created by Definite Mutual Promises.

Prior to the events herein enumerated appellant maintained in the city of Los Angeles a school for teaching osteopathy and related subjects. In July 1943 President Henley of the college wrote the American College Bureau, a Chicago employment agency, in his search for a man experienced in bacteriology and qualified to do research in tropical diseases. On August 8, 1943, respondent, then employed at Chester, Pennsylvania, wrote the college that he had been apprised by the bureau of the available position in bacteriology and stated, "I am vitally interested * * * would be delighted to sign on the dotted line provided the salary is commensurate." Four days later the bureau wrote President Henley that they were sending him the papers of respondent, "who is exceedingly well prepared for bacteriology. He has a physical handicap. Before he had a hunting accident he was a vigorous, athletic man. Of course, since the accident he is a very much handicapped man, but I think this should in no way affect his teaching ability * * *. He has done a great deal of research and writing."

The bureau's letter conveying the information that respondent was very much handicapped was received by appellant about eight days prior to President Henley's first letter to respondent under date of August 24, in which he stated that re-

spondent's "background interests us very much, particularly your experience in the School of Tropical Medicine at Puerto Rico * * *. We have purchased a large lot with two houses on it, one to be used as an animal house for tropical medicine and the other as laboratory facilities, according to the desires of the man who takes charge of the program. We are in a position to offer \$3,600 per year. Would this salary interest you? * * * We are in search of a man in pathology and some-one for tropical medicine and parasitology. If you are interested and we could come to an agreement, how soon could you take up your responsibilities? May I hear from you as soon as is convenient." Promptly upon receipt of appellant's first letter to him respondent, on August 28, addressed the following to President Henley:

"In reply to your letter of August twenty-fourth: I am pleased with your offer, with the quality of your official academic staff and your plans for the new Institute of Tropical Disease. In this letter I wish to seek nomination for the tropical medicine and parasitology position you have vacant that you wrote about. Your offer of \$3600.00 will be satisfactory to me for a nine or ten months academic year. However, I ask \$4000.00 per annum if it is to be an academic year of twelve months. * * *

"I can wind up my affairs within two weeks and possibly be in your state in approximately that time limit from the moment that I have received definite assurance that I am employed by you and have written my assent. But first, please let me know if you have any objections to employing one who is physically handicapped if such does not impose any restrictions on his ability to carry out the responsibilities of the position.

"Enclosed please find a recent photo and the only copy of a recommendation that I have at hand. * * *"

By that letter Dr. Canavan made it clear that he desired the position described by Dr. Henley at the salary specified and that he could go to Los Angeles within two weeks after his employment was certain. Although Dr. Henley had made no reference to the subject respondent emphasized his physical handicap by demanding to know whether there were "any objections to employing one who is so physically handicapped," and enclosed a commenda-

tory letter which repeated the fact of his crippled condition.

In his reply to respondent's inquiry, on September 9 President Henley in a letter to respondent not only clarified appellant's position with respect to the immateriality of the physical handicap but indicated that he deemed it a probable advantage. That letter in part is as follows:

"We were very pleased to receive your letter indicating your desire to serve on our staff. You mention a physical handicap. As long as it does not interfere with your research abilities, we would not have any objections whatever. In fact, we can think of some physical handicaps which would even improve one's ability as a research worker.

"We are able to offer you \$3,600 per year for a ten month academic year. It might be possible for you to pick up some money in the Graduate School teaching in their intensive courses which are offered twice each year. We could not guarantee that, but it is possible, depending upon the subject matter of the course. * * *

"The program is yours as soon as you report for work. * * *"

Having accepted the offer of appellant by his letter of September 15 respondent proceeded promptly to make preparations for his departure for his new home. But in his anxiety concerning the effect his physical condition might have upon appellant, while waiting for his transportation on September 26 he directed a letter to appellant with a view of ascertaining whether President Henley had any "reservations in mind as to the desirability" of having a person so afflicted to serve the college. After commenting in full upon his unavoidable delays the letter proceeds:

"As I have not gotten any transportation as yet, in the enforced delay I am wondering if you too will turn me down because I am on crutches. I would not want to come out there and find that I have to come right back. Accordingly, I am taking this time to find out if you have any objections or reservations in mind as to the desirability of having me with you. There will be plenty of time to receive your reply and I await your reaction re the above as to whether I shall cancel my RR reservation or not.

"Please do not hesitate to be frank in your reply. * * *"

Reassurance promptly came to respondent in the form of a telegram from Dr. Henley on October 5: "If you can do the work a handicap no obstacle." This was followed by Dr. Henley's letter of October 4th the contents of which affirmed the immateriality of respondent's handicap if he could do the work, and declared that: (1) Many of the finest lecturers in medical schools have been crippled; (2) his chief obligation would be in research; (3) respondent's ability to do the work can be judged only by himself; (4) his title would be Associate Professor of Tropical Medicine and Head of the Research Department of the Institute of Tropical Disease.

In his reply to that letter respondent wrote the college on October 9, saying: "There is no question in my mind. I can do the work * * *. You have removed the last obstacle * * * namely, that possibly you would not want me on crutches * * *. I have a Brown-Sequard modified syndrome due to partial lesion of the cord * * *. As for stairs * * * I cannot negotiate a flight unassisted * * *. Hence you note I am preparing to move west and I am pulling up stakes here as I expect to be with you a long time * * *. O. K. then, everything's settled. I'll come as soon as I can."

The language employed by these men shows that the minds of the parties met upon the essential factors of respondent's employment. That understanding is evidenced by respondent's acceptance on September 15 of appellant's offer on September 9. Appellant outlined the nature of the duties to be performed, the salary to be paid and positively declared that the position was available as soon as respondent could report for work. The acceptance was a succinct affirmation of the offer and his promise to depart as soon as transportation was available. The subsequent correspondence formed no part of the contract but merely served to interpret the letters which had composed it. If the college entertained a doubt that the physical handicap would make respondent undesirable for the position, such decision should have been immediately communicated to respondent. Silence then implied a concurrence with the sentiments of respondent's final letter.

In addition to the fact that the intention of the parties to effect an employment is

found in their correspondence, other evidences seal the verdict. In a letter to the bureau under date of September 22 appellant declared that it had employed respondent. Its failure to answer respondent's letter of October 9 was an approval of its contents and confirmation of the agreement already reached. If others had successfully performed such services in a wheelchair, Dr. Henley reasoned that respondent could do as well. He was employed for his intellectual worth, not for his pedal agility.

If the language of the letters lacks further clarification the conduct of the parties on the arrival of respondent at the college on October 20 will make their mutual purpose clear. Then, Dr. Henley was glad to see Dr. Canavan. Dr. Bell, an instructor, had just remarked that respondent would soon arrive "and we had better get ready for him." Dr. Henley then informed respondent that "they had no laboratory set up; that it was his program and it would be for him to set it up as he wanted it; that the college had some equipment but they did not know what he would require." Also on the following day Dr. Henley told respondent that he believed respondent could do the work if he had the place set up and ready. No conversation could have shown more definitely that appellant then understood that the correspondence constituted a binding contract.

[1-6] If any uncertainty exists in a written contract the first rule to be observed is that its interpretation must be determined by its own language (Civil Code, secs. 1638, 1639) and from all of it. *Hunt v. United Bank and Trust Co.*, 210 Cal. 108, 291 P. 184. If other sources need be consulted resort may be had to the acts whereby the parties gave their own interpretation to it, when such acts were positive and deliberate and done in an attempted compliance with the terms of the agreement. *Barnhart Aircraft, Inc., v. Preston*, 212 Cal. 19, 24, 297 P. 20. Conceding the language of the correspondence to be susceptible of more than one construction, yet under the rules governing the interpretation of ambiguous writings it must be held that a binding agreement of the parties hereto was reached prior to respondent's departure from Pennsylvania. An ambiguous contract should be construed in the light of the circumstances under which it was made. *McIlmoil v. Frawley Motor Co.*, 190 Cal. 546, 552, 213 P. 971; *In re Prather's Estate*, 183 Cal. 314, 318, 191 P. 521. Also, in construing

such an instrument the court must consider it in its entirety and give to each clause the qualification evidently intended by the authors, including the purpose, nature and subject matters as well as the preliminary negotiations. The task of construing a contract is further lightened by the rules (1) that it must receive such interpretation as will make it definite, reasonable and operative (Civil Code, sec. 1643), and (2) that such construction is permissible as will make it valid (6 Cal.Jur. p. 268). In view of the conduct of the parties at the first meeting of respondent and President Henley, the finding that the parties "entered into a contract of employment in writing" comes to this court with a fortification which does not ordinarily accompany a finding of the existence of a contract the construction of which is derived from the four corners of a written document. *Eggert v. Pacific States Savings and Loan Co.*, 57 Cal.App.2d 239, 136 P.2d 822; *Thew v. Thew*, 35 Cal.App.2d 691, 695, 96 P.2d 826.

[7,8] Appellant's contention is that the letter of September 9 is a conditional offer. Its language does not reasonably convey such meaning. The court found that plaintiff was able to perform the required services and that he was physically fit to perform them; that performance was not made a condition precedent to the contract but that the offer was made to respondent and was accepted by him. Canavan promised to render specific services for a definite period; appellant promised to pay him a specified salary. The possibility that respondent might have become at some future time incapable of performing the services for which he was employed furnished no ground for his rejection or discharge on the second day of his appearance at the college. Should such inability have been disclosed at a subsequent date the opportunity would then be at hand for a rescission of the contract. A discharge cannot be based upon a hope or fear that the employee will at a later time become disqualified. His employment implies his ability (39 C.J. 122, 161); the testimony proves it and the court found it to be a fact.

[9-11] The law imputes to a contractor an intention in accordance with the reasonable meaning of his words and acts and judges his intent thereby. Courts will not in deriving one's intention be controlled by an unexpressed state of mind. *Zurich General Accident and Liability Assurance Co. Ltd. v. Industrial Accident Comm.*, 132

Cal.App. 101, 103, 22 P.2d 572. The test applied in the cited case was not that the mill operator did not intend to employ the applicant but whether the operator's conduct was such as to lead the applicant acting as a reasonable man to believe that in fact he was being employed. Evidence which tends to show a concurrence in the actual understanding of the parties is controlling. *McConnell v. Lamontagne*, 82 N. H. 423, 134 A. 718.

In support of his contention that the minds of the parties never met, since Dr. Henley had in mind a man physically fit, appellant cites *Blake v. Mosher*, 11 Cal. App.2d 532, 54 P.2d 492. It is not authority. There the only writing was a memorandum acknowledging receipt for a partial payment for the chattels to be purchased, containing a statement that the balance was payable \$2000 cash and \$2000 "in a note well secured." The writing was "absolutely blank as to the terms and conditions" of the \$2000 note and the minds of the parties never met upon the terms and conditions of the proposed instrument.

The Charge of False Representations.

[12, 13] The contention of appellant that respondent misrepresented his physical condition is not a proper subject for review by this court. If it is made for the purpose of demonstrating that a fraud was committed on the college, it is out of place because no fraud was alleged and no attempt was made to prove one. *Security First National Bank v. Stock*, 32 Cal.App. 2d 586, 591, 90 P.2d 337. If it is made for the purpose of showing that the minds of the parties never met upon the subject of respondent's ability to perform the services he had promised to perform, such contention is a stultification in view of the language of the correspondence and the construction given to it by the parties. Whether respondent was handicapped by a "Brown-Sequard modified syndrome"—modified for his betterment or for his detriment—the trial court found that he was in all respects qualified to perform his contract. If he did not disclose his true condition by his letter of September 9 as well as by that of September 26, English is an ineffective vehicle for conveying intelligence.

The Contract Was Breached.

[14] Appellant's contention that respondent "wholly failed to show a breach of contract" is founded upon a disregard of

the court's finding and of respondent's testimony which contradicted that of Dr. Henley and his two associates. Respondent arrived in Los Angeles on October 19 pursuant to his contract, and on the next day called at the college and conversed amiably with his prospective associates about his duties. After he had stated that he would require a handrail to negotiate the stairway, Dr. Henley ordered that adjunct to be installed and asked Dr. Canavan to give his trunk check and ration book to the secretary. On being advised that the cost of the necessary equipment would be \$3000, Dr. Henley agreed that such expense was reasonable and would be provided. While respondent was on the campus on October 21st he was called to the office of Dr. Henley who said: "I am sorry. I have changed my mind. I have made a mistake in your case. I have not been able to evict the tenant from the house in which you were to work." The president then extended his remarks about his difficulties and concluded that he could "possibly be ready" for respondent a year later. He commented upon the problems of respondent's getting around and of his taking too much time in travel between the restaurant and his home. He then requested a statement of expenses incurred in making the journey. Dr. Canavan declared his desire to remain, but to no avail. While the words of the president were few, they were effective. What he said and did was sufficient to indicate a clear intention to dispenze with respondent's services (*Percival v. National Drama Corporation*, 181 Cal. 631, 185 P. 972) in violation of the contract of employment and of section 2924, Labor Code, which inhibits the termination of employment for a specified term except in case of a wilful breach of duty, of habitual neglect of, or continued incapacity to perform, a duty.

Respondent Entitled to Interest.

[15, 16] Finally, appellant assigns as error that part of the judgment awarding interest. Respondent was awarded a year's salary with interest on each monthly installment commencing with November 21, 1943. There was no error in the award of interest. While the breach occurred on October 21, 1943, and the action was filed April 14, 1944, it came on for trial in December 1944, after all installments due under the contract had become payable. It having been found upon substantial evi-

dence that respondent had exercised reasonable diligence in his endeavors to obtain other employment, he was entitled to interest on each monthly payment from and after the particular day on which his right of recovery arose. Civil Code, sec. 3287. Every judgment awarding damages certain or capable of being made certain by calculation on a particular day may include interest from that day. Boardman Co. v. Petch, 186 Cal. 476, 484, 199 P. 1047. That case declares also that a servant may recover stipulated wages for a year if his contract is for the year and he is unjustly prevented from performance by his employer. Interest would be payable from the due date of each installment. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154, is not pertinent. There the action was tried before the end of the contract period and the credits that might have become due the employer could not yet be known.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.



WILLIAMS v. FIELD TRANSP. CO. et al.*
Civ. 15104.

District Court of Appeal, Second District,
Division 2, California.

March 13, 1946.

As Corrected April 4, 1946.

Rehearing Denied April 10, 1946.

Hearing Granted May 9, 1946.

1. Automobiles ⇨242(2)

Where truck driver was in sole charge of loading heavy 16-inch iron pipes onto truck in a yard where the pipes awaited removal, assisted by employees of yard proprietor, and in some unaccountable manner a pipe fell from the truck onto and injured one of the employees, doctrine of res ipsa loquitur was applicable in action against truck driver and owner for injuries sustained.

2. Negligence ⇨121(2)

In action for personal injuries, where only general negligence is alleged and the

instrumentality which caused the injury was under the exclusive control of defendant, and the accident is of the variety that does not occur in the ordinary course of events if proper care by defendant had been exercised, the doctrine of res ipsa loquitur applies, and, unless defendant so explains the accident as to rebut the inference of negligence, plaintiff is entitled to recover.

3. Negligence ⇨121(2)

That defendant does not know the cause of the accident resulting in injury to plaintiff is not an explanation of the accident which would rebut the inference of negligence arising from application of doctrine of res ipsa loquitur.

4. Negligence ⇨136(6)

Where jury has been properly instructed with reference to res ipsa loquitur doctrine, it is ordinarily question for jury to determine whether the prima facie case has been overcome by defendant.

5. New trial ⇨66

In action in which doctrine of res ipsa loquitur has been applied, if the jury has ignored the instructions on the doctrine and returned a verdict for defendant, a motion for new trial is properly granted if no exculpatory evidence was introduced.

6. Appeal and error ⇨1024(4)

Where there is substantial conflict in the evidence, the action of the trial court in vacating judgment in favor of defendant is conclusive upon appellate court.

7. New trial ⇨71

In action for personal injuries in which doctrine of res ipsa loquitur was applicable, evidence tending to exculpate defendant supplied no more than a conflict of evidence, and hence order granting plaintiff a new trial after verdict for defendant was not an abuse of discretion.

8. Automobiles ⇨204

Where driver of defendant's truck was in sole charge of loading heavy 16-inch iron pipes onto the truck assisted by employees of the proprietor of the yard where pipes were situated, and in some manner a pipe fell from the truck onto one of the employees as he walked by the truck in the conduct of his duties, no negligence on part of employee which would bar recovery for injuries was shown.

* Subsequent opinion 171 P.2d 722.

9. Negligence ⇨65

A workman is held to no higher degree of care than the fair average of his trade.

10. Automobiles ⇨201(8)

Where plaintiff was following the directions of his employer in assisting in the loading of 16-inch pipes on defendant's truck, which loading operations were under the control of the defendant truck driver, any concurrent negligence of plaintiff's employer did not bar the employee's right of recovery from defendants.

11. Negligence ⇨61(2)

The negligence of one of two joint tort-feasors does not exculpate the other.

12. Negligence ⇨121(2)

The applicability of the *res ipsa loquitur* doctrine is not rendered doubtful by virtue of the fact that there may have been concurrent negligence on the part of plaintiff's employer.

13. Automobiles ⇨204

Where plaintiff was assisting defendant truck driver and defendant owner in loading 16-inch pipes on truck under the directions of the truck driver, plaintiff did not assume such risks as the negligence of truck driver in selecting improper stringers on which to lay the pipes, or in conveying the pipes to the truck by crane, or in securing the pipes when placed.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Willie Williams against Field Transportation Company and others for personal injuries sustained by plaintiff while unloading pipes from a truck. From an order granting plaintiff a new trial, after verdict and judgment for defendants, defendants appeal.

Order affirmed.

Kenneth J. Murphy, of Los Angeles, for appellants.

Herlihy & Herlihy, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Action for damages for personal injuries wherein the doctrine *res ipsa loquitur* was invoked. From the order granting a new trial after verdict and ensuing judgment in their favor, defendants appeal. It is con-

tended that the court abused its discretion in (1) that the evidence was not sufficient to establish defendants' neglect and (2) that plaintiff's own negligence contributed to his injuries.

Events at the Scene of the Injury.

A Sterling truck and trailer of defendant company operated by defendant Brown called at the yard of the Industrial Engineering Company, hereinafter referred to as Industrial, from which forty 16-inch pipes, 40 feet in length were to be transported. All parties engaged in the loading operation were employees of Industrial except Brown. The truck and trailer were equipped with bolster, blocks, stakes, chains and binders—but both are treated as one unit and hereinafter referred to as "the truck." After having heard the suggestion of the yard superintendent, Mr. Trimmell, as to the advisable method of loading his cargo, Brown parked his truck on a level space indicated by Carl Cokely, crane operator. He headed westward parallel with and south of the crane which stood south of and parallel with the pipe rack. The crane's 30-foot boom pointed easterly and operated in a horizontal arc in conveying pipe from the rack to the truck. A cable comprised of loadlines hung from the boom and at its extremity was attached a spreader bar at each end of which was a hook suspended by a rope. One of these hooks was inserted into each end of a pipe in the loading process and was removed when the pipe came to rest on the truck. The spreader with its dangling hooks was then returned to the rack whence the loading process was repeated.

Brown as truck operator commanded the loading operations. Standing by the cab facing the east he received the west end of the pipe, placed it securely on the truck, then released the strain and removed the hook. Plaintiff was one of the two tag-line men. As the boom moved a pipe to the truck he held on to his rope until the pipe was released by Brown. After a pipe had been deposited on the truck he regained and held to his hook as it returned to the rack. In doing so he could go no convenient route other than easterly, between the truck and the crane. One John Martin was the tag-line man in charge of the east end of the pipe. He released his hook just as that at the west end was disengaged by Brown. Prior to the commencement of the loading Trimmell suggested to Brown that he load

by the pyramiding method, thereby necessitating three trips for the 40 pipes. Brown preferred to use the tier method whereby he could convey 20 pipes in one load. Of the two the pyramiding method was the more nearly safe by reason of the fact that after the first row had been laid each pipe thereafter was held secure by two pipes beneath it, whereas in the tier method after five pipes had been placed a stringer was placed on top and near each end of the pipes. Immediately prior to the accident stringers had been placed on top of the second row and the fatal pipe was brought over by the crane under the guidance of the tag-line men and lowered to a point at which Brown took plaintiff's hook and guided the pipe to a position of his own selection. After removing the hook Brown handed it to plaintiff who proceeded easterly about 15 feet on his eastward course beside the truck when he was struck by the eleventh pipe which had rolled off the north side.

The Jury and the Instruction.

Although the jurors were instructed to apply the doctrine of *res ipsa loquitur* they returned a verdict for defendants. The finding implied by such verdict was that defendants gave such an explanation of the accident as exculpated them. If such explanation appears in the record the trial court erred in granting a new trial. If it is not found, the ruling was correct and the order should be affirmed.

The Facts Undisputed.

The testimony is uncontradicted that a truck driver selects his own method of loading his truck. Brown chose the tier method, called also strip or liner method, knowing it to be more dangerous; he directed the west end of each pipe to rest; he had taken hold of the pipe before it fell; it is understood that such pipe should be always placed in the center of the load and be secured by the operator, and Brown understood that such was his duty; but there was evidence that instead he placed it near the north edge and removed the hook as soon as the strain was released from the cable that held it. There was no connection between the pipe and the crane after the hooks were taken out. The pipe's weight was then on the truck; in order for plaintiff to receive the hook from Brown he had to stand between the crane and the truck, and usually the tag-line men direct the hooks back to the stack of pipe; unless the empty hooks are stead-

ied they are likely to hook into equipment or men who may be in the way.

Brown used 1" x 6" timbers for the stringers to support the row of five pipes of a total weight of 7500 pounds, whereas it is the customary and safe practice for truck operators to use 2" x 6" stringers with 2" x 4" blocking. He directed the tag-line men when to release the pipes and where to place them. Martin did not remove his hook from the pipe until directed to do so by Brown. Thereupon Martin while holding his hook walked toward the rack. On the occasion of the accident he had proceeded 10 feet to the north of the truck when the eleventh pipe rolled onto plaintiff who had followed the easterly course by the side of the truck pursuant to the orders of the yard foreman.

Plaintiff did not know why the pipe rolled off. Brown made no explanation of the event. The reasonable inference is that a stringer was too weak or the pipe was placed obliquely across the stringers, or was carelessly placed too near the edge of the truck. If the east end of the pipe rolled off first, as claimed by appellants, that does not excuse Brown. It was his duty to put each pipe in a secure position. In defense of his conduct of the operations Brown attempted to shift the blame for the accident onto plaintiff because he had remarked to Williams that it was dangerous to walk beside the truck. But Williams was not told by Brown that the latter would have stringers too weak or that a pipe would be placed in a wrong position. Although the driver may have scotched his end of the pipe, that did not suffice to keep the pipe secure if the east end might roll off the stringer. Martin was subject to Brown's orders in the loading process in so far as the placement of the pipes on the truck and the releasing of the hooks were concerned.

Res Ipsa Doctrine Correctly Applied.

[1-3] Where the driver of a truck is in sole charge of loading heavy 16-inch iron pipes onto his truck in a yard where the pipes await removal and is assisted by the employees of the yard's proprietor, and in some manner a pipe falls from the truck onto and injures one of such employees and the injured man is unable to account for the cause of the pipe's falling, the doctrine of *res ipsa loquitur* is applicable. *Michener v. Hutton*, 203 Cal. 604, 612, 265 P. 238, 59 A.L.R. 480; *Helms v. Pacific Gas and Electric Co.*, 21 Cal.App.2d 711, 713, 70 P.2d 247; *Windas v. Galston &*

Sutton Theatres, Inc., 35 Cal.App.2d 533, 535, 96 P.2d 170. Where in an action for personal injuries only general negligence is alleged and the instrumentality which caused the injury was under the exclusive control of defendant and the accident is of the variety that does not occur in the ordinary course of events if proper care by the defendant has been exercised, the doctrine of *res ipsa loquitur* applies; and unless defendant so explains the accident as to rebut the inference of his negligence plaintiff is entitled to recover. And that the defendant does not know the cause is no explanation. Ireland v. Marsden, 108 Cal.App. 632, 643, 291 P. 912; Cooper v. Quandt, 105 Cal.App. 506, 508, 288 P. 79; Druzanich v. Criley, 19 Cal.2d 439, 444, 122 P.2d 53.

No Abuse of Discretion.

[4-7] Where the jury has been properly instructed with reference to the *res ipsa* doctrine it is ordinarily a question for the jury to determine whether the *prima facie* case has been overcome by the defendant. Helms v. Pacific Gas & Electric Co., *supra*; Druzanich v. Criley, *supra*. But if in an action in which the doctrine has been applied the jury has ignored the instruction and returned a verdict for the defendant, the motion for a new trial is properly granted if no exculpatory evidence was introduced. Furthermore, where there is a substantial conflict in the evidence the action of the trial court in vacating the judgment in favor of defendant is conclusive upon the appellate court. Ireland v. Marsden, *supra*, Cooper v. Quandt, *supra*; Gordon v. Roberts, 162 Cal. 506, 508, 123 P. 288. And if any evidence was received which tended to exculpate the defendant it supplied no more than a conflict of evidence. Under such circumstances, as in the instant case, it cannot be said that the order granting a new trial was an abuse of discretion. McCole v. Merchants Express Corporation, 19 Cal.App.2d 149, 150, 64 P.2d 1130.

No Contributory Negligence.

[8,9] But appellants contend that the evidence shows that plaintiff was himself negligent and that such negligence contributed to his injuries. No act of plaintiff has been suggested that might reasonably be deemed a lack of care in the performance of his duties. It was not negligence for the tag-line man to walk the route prescribed by his superiors in the work of di-

recting the cargo of the crane to its repository or to rely upon the truck driver to exercise reasonable care in proportion to the perils attendant upon his labors. The evidence is sufficient to show that in the conduct of his duties respondent was not required either to inspect the truck, the stringers, the position in which each pipe was placed, or to inquire of Brown whether he was using stringers of sufficient weight or was securing each pipe in its place on the truck. A workman is held to no higher degree of care than the fair average of his trade. Webber v. Bank of Tracy, 66 Cal. App. 29, 36, 225 P. 41; Thomas v. Southern Pacific Co., 116 Cal.App. 126, 2 P.2d 544. Brown knew that it was the custom of tag-line men in a loading operation such as that here involved to pursue the method and course followed by respondent. He made no objection to the conduct of respondent as he carried the tag-line in loading the first ten pipes. If there was another course that might have with safety been followed it is not shown to have been suggested by defendants.

[10-12] It is true that in the performance of his duties respondent followed the directions of Industrial. However, the concurrent negligence of the latter does not bar Williams' right of recovery from appellants. Conceding the negligence of one of two joint tort-feasors does not exculpate the other. Jones v. Hedges, 123 Cal.App. 742, 12 P.2d 111; Herron v. Smith Bros., Inc., 116 Cal.App. 518, 2 P.2d 1012. Neither is the applicability of the *res ipsa* doctrine rendered doubtful by virtue of the fact that there may have been concurrent negligence on the part of Industrial. Kierman v. Herbert M. Baruch Corporation, 20 Cal.App.2d 289, 66 P.2d 748; Juchert v. California Water Service Co., 16 Cal.2d 500, 106 P.2d 886; Strock v. Pickwick Stages System, 107 Cal.App. 298, 290 P. 482; Willard v. Valley Gas and Fuel Co., 180 Cal. 561, 182 P. 32.

[13] Respondent could not have assumed such risks as the negligence of Brown in selecting the stringers, in conveying the pipes to the truck, or in securing them when placed. Scott v. Sheedy, 39 Cal.App.2d 96, 102 P.2d 575; Muskin v. Gerun, 46 Cal.App.2d 404, 116 P.2d 105; Jones v. Hedges, *supra*.

The order is affirmed.

McCOMB and WILSON, JJ., concur.

73 Cal.App.2d 569

PERRY v. PIOMBO et al.

Civ. 12930.

District Court of Appeal, First District,
Division 1, California.

March 19, 1946.

Hearing Denied May 16, 1946.

1. Trial ⚡296(3)

Trial court's statement in giving instructions in action for personal injuries sustained by pedestrian when struck by truck to the effect that jury was not concerned with rights of anybody to be on private way where accident occurred because owner of premises was not a party to the action, though unnecessary, was not prejudicial in view of instructions that each party was under a duty of exercising ordinary care under all the circumstances.

2. Appeal and error ⚡761

District Court of Appeal need not consider alleged error in refusing instructions requested in personal injury action where only reason urged in support of alleged error was contention that without such instructions, jury was not in a position to determine reciprocal rights and duties of the parties.

3. Negligence ⚡138(4)

An instruction on sudden peril is applicable only where at least two courses of action were present after danger was perceived and where no negligence is chargeable to the person to whom such courses of action were open.

4. Automobiles ⚡246(58)

Refusing instruction on sudden peril requested by 15 year old pedestrian suing for injuries suffered when run over by rear wheels of truck, was not error where pedestrian, when he perceived his danger, was too near truck to avoid accident and evidence did not indicate that truck driver was aware of pedestrian's imminent danger.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Richard Perry, a minor, by William Perry, his guardian ad litem, against A. L. Piombo and others, individually and as copartners doing business under the firm name and style of Piombo Bros. Company, and others for personal

injuries sustained by minor plaintiff when struck by a truck. From a judgment entered upon a verdict in favor of defendants, plaintiff appeals.

Judgment affirmed.

Gregory, Hunt, Melvin & Faulkner and A. J. Zirpoli, all of San Francisco, for appellant.

John J. Taheny, of San Francisco, for respondent Triple S. Trucking Co.

T. H. Matimore, of San Francisco, for respondent Pearson.

Robert L. Lamb, of San Francisco, for respondents A. L. Piombo, Bernard Piombo and John Verdino.

WARD, Justice.

This is an appeal by plaintiff, a minor, by his guardian ad litem, from a judgment entered after a verdict in defendants' favor in an action for personal injuries. Plaintiff relies for reversal on alleged errors in the giving of and the refusal to give certain instructions. As no claim that the evidence is insufficient to support the verdict is involved, only those facts are stated which are necessary to understand the points raised on appeal.

The plaintiff, a fifteen year old boy, was injured when he was struck and run over by the rear wheels of a truck driven by defendant Pearson. The accident happened on the property of the Southern Pacific Company in South San Francisco. The plaintiff had proceeded to the depot with some friends who were to pick up newspapers for distribution. Pearson was driving a 28 foot dump truck, consisting of a truck and trailer attached. He turned to the right from Grand Avenue across the railroad parking lot next to the depot toward the railroad private vehicle way, which paralleled a spur track. The evidence indicates that defendant Pearson intended to turn left across the spur track and park the truck near a restaurant. The plaintiff was walking west across the parking lot. Apparently he was preoccupied with some molding clay which he had in his hand. The other boys were arguing relative to the distribution of the papers. Suddenly one of the boys looked up, saw the plaintiff just about to walk into the side of the truck and shouted "look out." The plaintiff evidently turned and backed into the vehicle and the rear wheels of the truck ran over him. The truck and trailer,

which operated with considerable noise, stopped immediately, with its front end slightly turned across the spur track, when the driver heard shouts that he had run over some one. There is testimony that the truck was not going more than four or five miles an hour, and other testimony that it was traveling 12 or 15 miles an hour. The driver had been delayed crossing the main line tracks by a train and had just started up across the main tracks and completed the turn into the way paralleling the spur track when the accident happened.

The plaintiff suffered a skull fracture and remembered nothing immediately preceding or following the accident. However, he testified that he had often visited the premises, knew the general situation of the railroad depot, the location of the parking area and the way used by vehicles which paralleled the spur track.

Appellant asserts that during the giving of the instructions a statement was made by the trial court which tended to take away from the jury the theory of his case, namely, that Pearson had no actual business upon the way or lane used by the Southern Pacific Company as a depot for the delivery of freight, etc., and that he did not use due care in entering or driving in the lane. In support of this position it is contended that plaintiff had a right to be upon the premises and that the complained of "statement" during the giving of instructions was improper "without at least some comment on the correlative rights and duties of all parties involved." The comment reads as follows: "Some suggestion has been made here—and I am sure that counsel for plaintiff had no intention or purpose of misleading you—that Pearson had no business on the premises: I have no comment to make upon what Pearson was doing there, but you are not to take that as any indication that Pearson had no right on the premises. We are not concerned, in this case, as to whether anybody had any rights on the premises of the Southern Pacific Company because they are not here in this action, and it is not our affair."

[1] A description of the area where the accident occurred appears in the record. There is no evidence that the use of the strip or thoroughfare by the public had been prohibited. The statement of the court to the effect that the rights of "anybody" to be on the premises "is not our

affair" was unnecessary, but it does not appear to be an improper comment on the relative rights and duties of the respective parties and certainly is not prejudicial in view of instructions that each party was under a duty of exercising ordinary care under all the circumstances. The jury was properly instructed upon these matters prior and subsequent to the "comment."

[2] The court refused to give two instructions requested by plaintiff. The first referred to "ordinary care" that should be exercised by plaintiff while "standing on private property," and the second referred to the right of the plaintiff using ordinary care to be at the scene of the accident, and the right of defendant Pearson to be on Grand Avenue using ordinary care. It is claimed that without these instructions, in view of the first comment, the jury was not in a position to pass upon and determine the reciprocal rights and duties of the boy plaintiff and the driver defendant. No further supporting reason why the refusal was error appears. Points raised in this manner do not call for consideration. *Miller v. Dollar Steamship Lines, Inc.*, 19 Cal.App.2d 206, 214, 64 P.2d 1163. However, the question of the respective rights of the parties has been considered heretofore, including the duty of each party to use ordinary care under the circumstances. The court instructed:

"Negligence is the doing of something which an ordinarily prudent person would not have done, in similar circumstances, or the omission to do something which such ordinarily prudent person would have done, under similar circumstances. When one acts as an ordinarily prudent person would have acted under the circumstances, here related to you, it cannot be said that he was negligent. Naturally, there cannot be any rule or yard stick by which you can say that, in every case, this is, or this is not, an act of negligence, but it always has to be, and the conduct of the parties must be, judged with relation to the time, and the place, and all of the circumstances surrounding the particular act. * * *

"Now, this boy you have seen, you have heard his age, you have heard what occupations he has been engaged in, you have heard of his standing in school, you see his size. The same rule, of course, does not apply in ascertaining whether he is guilty of contributory negligence as would be a grown or matured person, but you are to take into consideration all of those

circumstances in ascertaining what would be reasonably prudent upon the part of a person his age, and of his apparent mental equipment."

[3, 4] Lastly, the appellant complains of the court's refusal to give an instruction on sudden peril. The form of the instruction is immaterial in this case. Cases in which such an instruction is applicable involve situations where at least two courses of action are present after the danger is perceived and where no negligence is chargeable to the person to whom those courses of action are open. 9 Cal. Jur., 10 yr. Supp. 763; 8 Cal. Jur., 10 yr. Supp. 414. Under the facts as related in the transcript of evidence, at the time the boy plaintiff perceived his danger, if he ever perceived it, he was so near the truck that he could not avoid the accident. There is no evidence indicating that defendant Pearson ever knew or should have known of the imminent danger to plaintiff.

For the foregoing reasons the judgment is affirmed.

PETERS, P. J., and SCHOTTKY, J. pro tem., concur.



73 Cal.App.2d 453

In re MULFORD.

Cr. 4000.

District Court of Appeal, Second District,
Division 3, California.

March 7, 1946.

1. Husband and wife ⇨293½

The Code section authorizing court to require husband or wife to give reasonable security for providing maintenance for the other under court order does not authorize court to order a defendant in a separate maintenance action to give security by undertaking, or otherwise, for payment of support money, attorney's fees and costs in advance of any order or judgment fixing sums to be paid. Civ.Code, § 140.

2. Husband and wife ⇨293½

Where defendant, in a separate maintenance action, after issuance of an order to show cause regarding temporary support, costs and attorney's fees, was brought into court on a summary hearing regarding bond to guarantee further appearance and compliance with any order that might be entered, before any order was made on the order to show cause, order directing the giving of security was invalid as premature. Civ.Code, § 140.

3. Arrest ⇨19

The courts have no inherent power to order the arrest and incarceration of citizens and their jurisdiction in such matters is limited by the Constitution and statutory enactments. Code Civ.Proc. § 478 et seq.

4. Husband and wife ⇨291

Where court, in a separate maintenance action, after an order to show cause regarding temporary support, costs and attorney's fees had been issued, ordered defendant's arrest and plaintiff had not given security for payment of defendant's costs and damages by reason of the arrest if it proved to be wrongful or without sufficient cause, and arrest was not for a cause enumerated in the Code section pertaining to causes for civil arrest, order for defendant's arrest was in excess of court's jurisdiction. Code Civ.Proc. §§ 478, 479, 482.

5. Husband and wife ⇨291

Where record disclosed that defendant in separate maintenance action uttered only a mild protest that a bond was unnecessary to secure his future appearance and compliance with an order of the court for temporary support, costs and attorney fees, order of arrest purporting to have a basis in defendant's refusal to furnish the undertaking was unwarranted. Civ.Code, § 140; Code Civ.Proc. §§ 478, 479, 482.

6. Husband and wife ⇨291

Where court, in a separate maintenance action, makes an order for the giving of security by defendant even under circumstances which give validity to the order, a peremptory order for the arrest and confinement of defendant until the order is complied with is invalid. Civ.Code, § 140; Code Civ.Proc. §§ 478, 479, 482.

7. Husband and wife ⚭293½

Order for the confinement of defendant in separate maintenance action until he gave security for his further appearance in court and his compliance with any order which might be made on an order to show cause regarding temporary support, costs and attorney's fees, no opportunity to obey order to give security having been given defendant, was not sustainable under power of court to enforce compliance by contempt proceedings. Civ.Code, § 140; Code Civ. Proc. §§ 478, 479, 482.

8. Trial ⚭21

Summary proceeding in separate maintenance action instituted for the purpose of procuring defendant's incarceration until he had given security for his future appearance and compliance with order which might be issued pursuant to an order to show cause regarding temporary support, costs and attorney fees, was one in which defendant was about to be deprived of his liberty and, hence, was one in which he was entitled to be represented by counsel, so that denial of right to counsel vitiated proceeding. Civ.Code, § 140; Code Civ.Proc. §§ 478, 479, 482.

Original proceeding in the matter of the application of Louis K. Mulford, for a writ of habeas corpus.

Petitioner discharged.

Paul G. Breckenridge and George W. Manierre, both of Los Angeles, for petitioner.

Fred Howser, Dist. Atty., and Jere Sullivan and Robert G. Wheeler, Deputy Dist. Attys., all of Los Angeles, for respondents.

PER CURIAM.

Upon petition of Louis W. Mulford a writ of habeas corpus was issued, directed to the sheriff of Los Angeles County, and pending the hearing the petitioner was ordered released on bail. Hearing thereon was had this day on the petition and the return thereto and upon certain evidence introduced at the hearing, from all of which it was made to appear to the court that the petitioner is held in custody by said sheriff under and by virtue of an order of commitment to the county jail, made by a judge of the Superior Court of Los Angeles County under the following circumstances:

Elizabeth H. Mulford, wife of petitioner, instituted in said county an action for separate maintenance; upon her application, through her attorney, William Ellis Lady, there was issued on February 26, 1946, an order directing petitioner to appear in said court on March 8, 1946, to show cause why he should not be ordered to pay sums for the temporary support of the plaintiff, and for costs and attorney's fees; it was stated in the affidavit for the order to show cause that plaintiff was employed by the United States Government at Denver, Colorado, at a salary of \$150 per month, but that her health was such that she would not be able to retain her position and it was stated that petitioner herein has an income of \$4,000 per month, or thereabouts. Upon application of the plaintiff the court also issued its order, directed to the sheriff, that petitioner be forthwith arrested and brought before said court. Petitioner was arrested on February 28 and brought into court. A summary hearing was had for the purpose, as stated by the court, of determining whether petitioner should post a bond for his further appearance and as security that he would obey any order that the court might make in the action for the support of his wife. At that time petitioner requested the services of an attorney and objected to proceeding without one, but his objection went unheeded.

From the evidence taken it appeared that the wife is 51 years of age, the husband 72; that the parties were married in 1934 and have been separated for the past six years; that defendant is not engaged in business; that he has investments in stocks and bonds and a stamp collection, all of unstated value. There was no evidence that petitioner intends or is about to leave the state of California, or that he does not intend to comply with any order which the court may make in the action.

During the course of the hearing petitioner was interrogated by the judge and answered as follows:

"Q. What property or assets do you have in the State of California at the present time? A. Your Honor, I would like to defer this thing and have an attorney before I answer your questions. Unless I am compelled to it, I am not prepared to answer it now.

"Q. I am not compelling you to answer any question. The only issue I am trying to determine now is whether or [not] you

should post a bond for your further appearance * * * A. I will be here.

"Q. * * * and your liability. A. Yes, I can, but I hope it will not be necessary.

"Q. You are able to post a bond, are you? A. Yes, if it is not too big a bond I am, but why make me that trouble? I will be here in Court."

At the conclusion of the hearing the court made an order, as follows: "That the defendant, Louis K. Mulford, shall forthwith post a bond in the sum of \$10,000 cash, or \$10,000 approved surety bond, or \$20,000 approved personal surety bond conditioned as provided by sec. 140 of the Civil Code, to the effect that he will pay or comply with any lawful order made by this Court in regard to support for the plaintiff, his wife, or in regard to attorney's fees and costs that he may lawfully be ordered to pay in the above entitled action, and it appearing to the court that the defendant has failed to furnish said bond, it further appearing that the said defendant has the ability to furnish said bond as ordered; Now Therefore, said defendant Louis K. Mulford, is remanded to the custody of the Sheriff of the County of Los Angeles, to be confined in the county jail until said bond as heretofore required is posted and until released by this Court after posting of said bond."

On March 5th the court made an amended order which recited that it appeared from petitioner's testimony that he has no assets in the state of California except an automobile of small value; that he "refused to answer many relevant and material questions" upon the hearing; that the court observed petitioner while on the witness stand and his conduct and attitude at the time, and it was stated that the court found that petitioner has the ability to comply with any reasonable order that the court may make for support, attorney's fees and costs. The order followed the general terms of the first order but added a provision that the undertaking specify that the petitioner would "immediately" perform and comply with any order that might be made; that the undertaking be approved by a judge of the Superior Court and that, in case of failure of petitioner to pay, resort be had to the said undertaking. No hearing has been had upon the order to show cause and no order has been made that defendant pay any sum of money to plaintiff.

The amended order, like the first one, recited that the court was acting under section 140 of the Civil Code. This section reads as follows: "The court may require the husband or wife, as the case may be, to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case."

[1,2] The court derives no authority from this section to order a defendant in a separate maintenance action to give security by undertaking, or otherwise, for the payment of sums for support, attorney's fees and costs, in advance of any order or judgment fixing the sums to be paid. The order for the giving of security was invalid.

[3,4] The order for petitioner's arrest was likewise invalid and in excess of the jurisdiction of the court. There is no inherent power in the court to place citizens in jail. The legislature makes the law on that subject within constitutional limitations. Jurisdiction of the courts in the matter of arrest is limited by the Constitution and statutory enactments. Chapter 1, part 2, title 7, Code of Civil Procedure, deals with the matter of arrest in civil actions. Section 478 declares that "No person can be arrested in a civil action, except as prescribed in this code." Section 479 enumerates the cases in which civil arrest may be had, and section 482 forbids the making of an order of arrest until the plaintiff has given security for the payment of defendant's costs and damages by reason of the arrest if the same be wrongful or without sufficient cause. It is sufficient to say that the state of facts disclosed by the record does not fall within any of the cases specified in section 479. The order of arrest was made without exacting a bond of plaintiff as required by section 482.

[5-8] The order of arrest purports to have a basis in the refusal of petitioner to furnish the undertaking; it is recited in the order that he has failed to furnish the bond although he has ability to do so. It appears from the transcript of the hearing that petitioner did not refuse to give bond, but that he only uttered a mild protest to the effect that a bond was unnecessary. He was nevertheless hustled off to jail forthwith. Even if the court

had made an order for the giving of security under circumstances which would have given validity to the order, a peremptory order of confinement until the order had been complied with would have been invalid. There can be no such thing as a failure or refusal to obey an order of court on the part of one who has been given no opportunity to obey it. The order in question is not sustainable under the power to enforce compliance by contempt proceedings. Furthermore, the summary proceeding which was instituted for the purpose of procuring petitioner's incarceration until he had given bond was one in which he was about to be deprived of his liberty and in which he was entitled to be represented by counsel.

It is unnecessary to discuss the interdiction of section 15, Article I of the Constitution against imprisonment for debt, or to inquire whether the order is invalid for reasons in addition to those already stated.

Petitioner is ordered discharged and his bail is exonerated.



73 Cal.App.2d 466

VALLERA v. VALLERA.

Civ. 15011.

District Court of Appeal, Second District,
Division 1, California.

March 8, 1946.

Hearing Denied May 6, 1946.

1. Marriage ⇨54

Evidence failed to establish alleged oral agreement between man and woman living together as husband and wife to pool their earnings and share equally in joint accumulations so as to entitle woman on termination of relationship to share in property acquired by man, in absence of showing that woman ever gave him any money or that they pooled any money or had a joint bank account.

2. Marriage ⇨54

Testimony that man and woman living together as husband and wife agreed to jointly support her children by an illicit as-

sociation with another man and give them a proper education and man permitted woman and children to use his name while they lived together was insufficient upon which to base an inference that man and woman agreed to pool earnings and share equally in joint accumulations so as to entitle woman on termination of relationship to share in property acquired by man.

3. Continuance ⇨7

Granting or refusing a continuance is a matter in the discretion of trial court.

4. Appeal and error ⇨1043(7)

Plaintiff was not prejudiced by court's refusal to continue trial until defendant's deposition could be taken where defendant was present at trial and was examined by plaintiff. Code Civ.Proc. § 2055.

5. Witnesses ⇨16

Trial court having found against plaintiff on issue of existence of alleged oral agreement between plaintiff and defendant to pool their earnings and share equally in joint accumulations did not err in refusing to require defendant to produce records of corporation in which defendant owned stock described in subpoena duces tecum served on defendant.

6. Appeal and error ⇨1071(6)

Plaintiff's complaint of trial court's failure to make specific findings of fact as to all allegations contained in amended complaint was without merit where trial court besides making findings with respect to basic issue expressly found that, except as expressly found to the contrary, all allegations of amended complaint were untrue.

7. Trial ⇨45(1)

Where existence of alleged oral agreement to pool earnings and share equally in joint accumulations was basic issue in suit for accounting, testimony by plaintiff as to contents of letter received from defendant which plaintiff claimed had been destroyed was properly excluded in absence of offer of proof from which court could determine contents of letter or any suggestions that letter referred to alleged agreement which manifestly it did not, since agreement was expressly alleged to have been oral.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Suit by Marian Vallera against Concezio Vallera, also known as Joe Vallera, for separate maintenance, which was denied, whereupon plaintiff with leave of court filed an amended complaint seeking an accounting of the joint earnings of plaintiff and defendant and an award of one-half thereof. From a judgment that she take nothing by her amended complaint, plaintiff appeals.

Judgment affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Zagon, Aaron and Sandler and Robert Kingsley, all of Los Angeles, for respondent.

YORK, Presiding Justice.

The instant appeal grows out of litigation extending over a period of years: The plaintiff, relying on a common law marriage contracted between herself and the defendant in Michigan on December 16, 1938, brought an action on July 17, 1940, for separate maintenance and for a division of community property which she alleged was worth \$60,000. In that action the trial court found against the existence of a common law marriage and that for at least three years after May, 1936, the relation between the parties was meretricious; that between January 30, 1933, and December 15, 1938, defendant was married to Ethel Chippo Vallera; that plaintiff knew from the beginning of her relations with defendant that he was married and under legal disability to enter into a marriage contract with her; also, that while the marriage between defendant and Ethel Chippo Vallera was dissolved on December 15, 1938, neither plaintiff nor defendant learned thereof until November, 1939; that on July 6, 1940, defendant entered into a valid marriage with Lido Cappello, who was named in the complaint as co-respondent. The court concluded that plaintiff and defendant had never been husband and wife and that plaintiff was not entitled to maintenance. It was adjudged and decreed that there was no community property and that "all property acquired by plaintiff and defendant herein since December 16, 1938, and prior to July 6, 1940, is held by plaintiff and defendant as tenants in common, each owning an undivided one-half thereof, save and except such property as either may have acquired by gift, devise, bequest or descent."

In passing upon an appeal by defendant from the above quoted portion of the judgment, the supreme court in *Vallera v. Vallera*, 21 Cal.2d 681, 684, 134 P.2d 761, 762, held that "a woman living with a man as his wife but with no genuine belief that she is legally married to him", does not acquire "by reason of cohabitation alone the right of a cotenant in his earnings and accumulations during the period of their relationship"; and reversed that portion of the judgment from which said appeal was prosecuted. However, said court in the cited case made the following statement (21 Cal.2d at page 685, 134 P.2d at page 763): "Plaintiff's lack of good faith in alleging the belief that she had entered into a valid marriage would not, however, preclude her from recovering property to which she would otherwise be entitled. If a man and woman live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property."

Thereafter, relying upon such language, appellant filed in the superior court a notice of motion for leave to file a proposed amended complaint, which complaint alleged an agreement between the parties not only "to enter into a marriage with each other and become husband and wife, but they agreed to live together as husband and wife and to pool their earnings and share equally in their joint accumulations"; and that pursuant to their joint efforts they accumulated property totaling in value between \$75,000 and \$100,000. Plaintiff prayed for an accounting of the joint earnings and for an award of one-half thereof. Said court made and entered its order granting the motion and authorizing the filing of the proffered complaint. Upon appeal by the defendant from that order, this court sustained the trial court and dismissed the appeal on the ground that the order from which it was taken was nonappealable. *Vallera v. Vallera*, 64 Cal.App.2d 266, 272, 148 P.2d 694.

Thereafter, on August 14, 1944, the cause went to trial upon plaintiff's second amended complaint for an accounting and for other relief, and the answer thereto. From the judgment that plaintiff take nothing by said complaint, this appeal is prosecuted.

The only issue presented for determination at the instant trial was the truth or falsity of appellant's allegation in her second amended complaint that shortly after

the parties became acquainted in April, 1936, "they orally agreed to live together as husband and wife and to pool their earnings and share equally in their joint accumulations."

In an attempt to prove that such an agreement existed, appellant testified that while she, her two children and respondent were residing together on El Centro Avenue in Los Angeles in April of 1939, she had a conversation with respondent concerning placing the children in school under the name of Vallera, at which time respondent stated that "we would start all over again and put the children in school, establish a home, and do the best we can on what moneys we accumulated, or whatever we had accomplished. We would save and have something when we got older, and put the children through school and give them the proper education, which we did so." In answer to the question, "Did you work during the time that you were at the El Centro place?" (between early in April and the latter part of November, 1939), appellant stated: "I worked for the United Artists' Studios, and I worked for Joe (respondent) until he went in partnership with Mr. Nickoloff, and he told me to stay home"; that she helped him out at the store when respondent was short a cashier and that she also acted as hostess when he had to be away; that she ran the household and he ran the business, i. e., the Italian Kitchens, and when she substituted for someone at the store, he did not pay her, but said, "it was as much mine as it was his, and I should look after it as though it was my own, with full interest." Appellant also testified that the expense of maintaining the home came from the business; that "We worked and established a home, and he said what money we had, what money we accumulate, the things we accumulate, put it together so we would have something when we got older, and give the children a proper education. * * * I said, 'I will do it.'" That thereafter, "We saved what we could * * * and bought an automobile, and the things we needed, food, clothing, and paid the necessary bills."

For the purpose of attacking her credibility, appellant was impeached on cross-examination by evidence that at the former trial of this action and at the hearing on an order to show cause in re attorney's fees and allowance for support, she had

made statements which were inconsistent with her testimony at the instant trial.

Respondent denied having made either in substance or effect any of the statements attributed to him by appellant with respect to any agreement to pool their earnings and share in the accumulation thereof, and testified that he heard of such agreement for the first time at the trial herein. Respondent further testified that he married Lido Cappello in June of 1940, and that shortly thereafter he received a letter from appellant, a portion of which read as follows: "Joe, I don't like to do this now that you are married. I don't want to cause you any trouble, but if you will be so kind and let me have a few dollars, please, I will appreciate it very much. What money I had, I spent it looking for work. I am working but it isn't so good. Please help me until I get started. Then I will not bother you any more. I will leave you alone, for I do want you to be happy, believe me, Joe, please."

At the conclusion of the trial, the court, in deciding against appellant, commented as follows: "I do not find that at any time the plaintiff gave any money to the defendant, or that they pooled any money, nor was there any joint account in any bank, and I have traced it carefully so far as their arrival in California is concerned, and the amount of money that they had. If he has been prosperous since 1940, that is no concern of this Court. That is a situation the Court cannot control. I cannot find any dollars and cents for your client (the plaintiff)."

In connection with her contention that the evidence presented does not support the judgment, appellant urges that "Any agreement of the kind and character mentioned by the Supreme Court in its majority opinion in this matter (Vallera v. Vallera, 21 Cal.2d 681, 685, [134 P.2d 761]) * * * is and must be implied from the facts as shown by the record notwithstanding the ipsi dixit of the defendant that he did not enter into or intend to enter into any such agreement or arrangement."

[1,2] From an examination of the reporter's transcript, it becomes readily apparent that the evidence produced by appellant falls far short of proving the agreement claimed by her. Her testimony to the effect that she and respondent were jointly to support her children, the issue of an

illicit association with another man, were to give them a proper education, and that respondent permitted her and the children the use of his name while they were living together, is insufficient upon which to base an inference that she and respondent agreed to pool their earnings and that she herself was to share in respondent's savings. Moreover, the letter which appellant wrote to respondent after they had separated, hereinabove quoted, negatives any implication that respondent agreed to share with appellant accumulations resulting from his business ventures. The judgment rendered by the trial court is supported by substantial evidence.

[3,4] Appellant makes the point that the court erred in refusing to continue the trial until the deposition of respondent could be taken. It is well settled that the granting or refusal of a continuance is a matter in the discretion of the trial court. In the instant cause, no prejudice resulted to appellant by the denial of a continuance, for the reason that respondent was present at the trial and was examined by her under section 2055 of the Code of Civil Procedure.

[5] Appellant also urges that the court erred in refusing to require respondent to produce the documents described in the subpoena duces tecum served upon him, i. e., records of the Italian Kitchen Corporation. Since the court found against appellant on the basic issue of the existence of the agreement, it necessarily followed that she had no right to the corporate stock and hence no possible concern with the operation of the corporation itself.

[6] Appellant complains of the court's failure to make specific findings of fact as to all the allegations contained in the second amended complaint. The court made its findings with respect to the basic issue,—the agreement, and also expressly found "That, except as herein expressly found to the contrary, all of the allegations of the second amended complaint herein are untrue."

[7] The court properly denied appellant permission to testify as to the contents of a letter received by her from respondent after his arrival in Los Angeles from Detroit, which letter she claimed had been destroyed. Appellant made no offer of proof from which the court could determine the contents of the letter in question, and

no suggestion was offered that the letter referred in any manner to the alleged agreement between the parties. Manifestly, it did not make such reference, because the agreement was expressly alleged to have been oral.

An examination of the reporter's transcript containing five hundred seventy-six pages reveals that the trial herein was conducted in a fair and impartial manner and was free from prejudicial error.

For the reasons stated, the judgment is affirmed.

DORAN, and WHITE, JJ., concur.

Hearing denied; CARTER, J., dissenting.



73 Cal.App.2d 528

PEOPLE v. ALVAREZ.

Cr. 3974.

District Court of Appeal, Second District,
Division 2, California.

March 13, 1946.

Hearing Denied April 11, 1946.

1. Abortion ☞3

Criminal law ☞507(6)

Girl on whom abortion was performed was not a "principal" or an "accomplice", as defined by statutes, of one charged with employing an instrument with intent to procure a miscarriage, and her testimony was competent without corroboration. Pen. Code, §§ 31, 274, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice" and "Principal".

2. Abortion ☞3

Criminal law ☞507(1)

Prosecutrix' sister-in-law, who purchased catheter with which abortion was performed, was not a "principal" or an "accomplice", as defined by statutes, of one charged with employing an instrument with intent to procure a miscarriage, and her testimony was competent without corroboration. Pen.Code, §§ 31, 274, 1111.

3. Abortion ☞3

Criminal law ☞507(1)

Prosecutrix' sister, who buried fetus, was not a "principal" or an "accomplice",

as defined by statutes, of one charged with employing an instrument with intent to procure a miscarriage, and her testimony was competent without corroboration. Pen. Code, §§ 31, 274, 1111.

4. Criminal law — 507(1)

The fact that a witness may be punishable for cooperating with an accused in an illegal transaction does not make him an "accomplice" within meaning of statute defining an accomplice and requiring corroboration. Pen. Code, § 1111.

5. Abortion — 11

Evidence sustained conviction for violation of statute making it a felony for anyone to employ on a woman an instrument with intent to procure a miscarriage. Pen. Code, § 274.

6. Criminal law — 508(1)

Even though purchase by prosecutrix' sister-in-law of catheter with which abortion was performed, or burial of fetus by prosecutrix' sister was deemed an active part in illegal operation making them accomplices of one charged with abortion, so as to require corroboration of their testimony, still their testimony was competent to corroborate that of prosecutrix. Pen. Code, §§ 274, 1108, 1111.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Sophie Alvarez was convicted of abortion with a prior conviction, and she appeals.

Judgment affirmed.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Robert Wheeler, Deputy Dist. Atty., both of Los Angeles, for plaintiff and respondent.

Philip S. Schutz, of Los Angeles, for defendant and appellant.

MOORE, Presiding Justice.

Defendant appeals from a judgment of conviction of abortion with a prior conviction of the same crime for which she served a term in the state prison. Her sole contention is the insufficiency of the evidence to support the judgment.

The prosecutrix was 16 years of age at the time of the crime and her name is Rebecca. Her sister is named Rayette and her sister-in-law is Martha. Rebecca testified that in order to conceal the fact of her

pregnancy and to procure an abortion she took quarters in the home of Martha. She had resided there three days when she espied appellant walking along the sidewalk. Having resolved to engage someone to effect an abortion she hailed the woman from the street about 2 o'clock in the afternoon of May 2 and inquired as to her availability. Martha, who had known appellant for a year, witnessed the conversation. Rebecca requested appellant to do something for her pregnancy. The interview terminated with appellant's promise to return later in the day and Rebecca's promise to pay her \$10 then \$15 on the following day. Before departing appellant told them to procure a catheter and to give Rebecca a dose of mineral oil. During the afternoon Martha obtained the catheter and assembled pans and lysol. No person visited the home prior to appellant's return at six o'clock. The latter proceeded to boil a solution of soapy water and lysol containing the catheter. Having had Rebecca lie upon a bed, appellant injected the solution into her body and after withdrawing the catheter administered a douche. She instructed the girl to walk around for two hours, collected the \$10 and departed, promising to return on the morrow for the balance of her bill. Pains seized the victim about 2 a.m. and continued until the afternoon when a well-formed, eight-inch fetus was born. After the aborted birth Rebecca had chills and was removed to a hospital about midnight of May 3.

Martha duplicated the foregoing testimony of Rebecca with the exception of the birth, at the time of which she was not present. In addition she disclosed that she did not arrange for appellant to perform an operation. Having heard the agreement of Rebecca and appellant, Martha awaited the latter's return. When she arrived at six o'clock appellant stated that she was going to perform an abortion. The soapy fluid was injected by use of a syringe which Rebecca had obtained from a neighbor. On May 3 appellant called for the \$15. During the day Rebecca suffered cramps.

Rayette saw Rebecca in labor in the afternoon of May 3. At 2:30 p.m. she saw her sister give birth to the fetus which she buried. On advice of appellant, who arrived just prior to the birth, she gave the suffering girl aspirin tablets. About 3:30 p.m. she left for her own home

only to return at 11 o'clock to convey Rebecca to the hospital.

Appellant contends that the testimony of the three women was not competent to convict her. She argues that so to hold would effectively nullify the intentment of section 31 of the Penal Code as construed with section 1111; that they are all principals within the meaning of section 274.

[1-3] Section 31 defines principals as (1) those concerned in the commission of the crime who advise or encourage its commission and (2) those who aid and abet in its commission, as well as (3) those who actually commit the offense. It is readily seen that neither Rebecca nor her sisters were principals in the crime charged against appellant, who "did * * * feloniously * * * employ an instrument upon the person of Rebecca with * * * intent * * * to procure the miscarriage of * * * Rebecca * * *." That Martha purchased the catheter, prepared the room for the operation and allowed appellant to come to her home expressly for the operation, does not make her and Rebecca principals with appellant in the violation of section 274, Penal Code. That section makes it a felony for anyone to employ on any woman an instrument with intent thereby to procure the miscarriage of such woman. The employment of the catheter to effect an abortion was by appellant alone. The fallacy of appellant's argument becomes clear when an accusation under section 275 against Rebecca is considered. This section makes it a felony for any woman to solicit or take drugs or to submit to any operation with intent thereby to procure a miscarriage unless necessary to preserve life. In order to have constituted either Martha or Rayette as an accomplice it would have been necessary to name Rebecca in the accusation under section 275 for having submitted to the operation. But no one was accused under section 275, while appellant was alone brought to trial under section 274 for using an instrument on Rebecca. When she undertook the operation she knew that her victim was in good health and was pregnant. She agreed to render the service for \$25, instructed Martha to purchase a catheter, later returned, performed the unlawful act, douched the girl and told her to take mineral oil. The fetus having passed within 24 hours, Rebecca was confined to the hospital for three weeks.

[4] The judgment is supported by not only the plain letter of the statute but also by the decisions of *People v. Clapp*, 24 Cal.2d 835, 151 P.2d 237, and *People v. Wilson*, 25 Cal.2d 341, 153 P.2d 720. In the *Clapp* case it was urged that the members of the family who were present and giving comfort to the aborted woman were accomplices of the offender. Such contention was rejected. They could not have been guilty of the offense on trial inasmuch as they were not "liable to prosecution for the identical offense charged against the defendant on trial." Penal Code, sec. 1111. The fact that a witness may have been punishable for co-operating with the accused does not make him an accomplice. *People v. Clapp*, 24 Cal.2d at page 838, 151 P.2d 237. In the *Wilson* case it was held that the husband of the victim was subject to prosecution for the offense charged against the defendant because he played an active part in effecting the abortion. But his wife was not an accomplice and therefore her testimony was competent to corroborate his, and his testimony could corroborate hers.

[5,6] Since Rebecca was not punishable for the offense for which appellant was on trial, her testimony went before the court below with no vices except such as might have been inherent in it, to be determined by the court. Under both of the cited cases she was not a principal or an accomplice, but her testimony aided by that of Martha and Rayette, who were not accomplices of defendant, was sufficient if believed to support the conviction. See Penal Code, sec. 1108. Even though the purchase of the catheter by Martha or the burial of the fetus by Rayette were deemed such "an active part" in the operation as to make them accomplices of defendant, still under the *Wilson* case the testimony of both of them was competent to corroborate that of Rebecca. Penal Code, sec. 1108.

As to the adequacy of their testimony to corroborate Rebecca, the most that could be said to its disfavor is that it was a question for the trial court to determine whether they were accomplices. *People v. Darrow*, 212 Cal. 167, 169, 298 P. 1. In the *Darrow* case the trial court submitted to the jury the question of whether the witness who paid defendant's fees was an accomplice. Such action was approved since the evidence did not conclusively establish the relation of the witness as that

of an accomplice even though he administered the anæsthetic through two operations on successive days.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



73 Cal.App.2d 532

PEOPLE v. KNIGHT.

Cr. 3981.

District Court of Appeal, Second District,
Division 2, California.

March 13, 1946.

Hearing Denied April 11, 1946.

1. Criminal law ☞997

An affidavit of attorney, setting forth a statement allegedly made by inmate in penitentiary purportedly confessing that he was the party who committed the crime for which petitioner had been convicted, was not worthy of serious consideration in support of petition for writ of error coram nobis, especially as statement was allegedly made to attorney on April 19, 1941, and attorney did not depose before a notary until March 6, 1944.

2. Criminal law ☞997

A writ of error coram nobis will not relieve a petitioner from consequences arising after judgment of conviction, nor is it available to one who discovers new evidence pertaining to merits of issues already adjudicated nor will it lie where another adequate remedy is provided.

3. Criminal law ☞997

The use of writ of error coram nobis is limited to those situations in which the remedies provided by statute, such as motion for new trial and arrest of judgment, appeal, and motion to recall remittitur, are not available.

4. Criminal law ☞997

A writ of error coram nobis is used by courts which rendered judgment under attack to grant relief from oppression to which petitioner may have been subjected by application of duress, fraud, or excusable mistake which if known at time of

trial would have prevented entry of such judgment.

5. Criminal law ☞997

A writ of error coram nobis may supplement, but not supersede or be substituted for, statutory methods of correcting unjust judgments in criminal actions.

6. Criminal law ☞997

A writ of error coram nobis cannot serve office of bringing before trial court evidence of a fact that existed at time of the trial, inasmuch as such evidence may be brought to attention of the court by motion for new trial.

7. Criminal law ☞997

Affidavit of attorney, in regard to incidents occurring at trial at which petitioner was convicted, for purpose of showing that petitioner did not have a "fair and impartial trial", presented nothing that could not have been presented on motion for new trial, and could not be made basis for issuance of a writ of error coram nobis.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Harry Knight was convicted of robbery with a deadly weapon, with a prior conviction of murder, and, from an order denying his petition for a writ of error coram nobis, he appeals.

Affirmed.

Harry Knight, in pro. per., appellant.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant having been convicted at Los Angeles in 1940 of robbery with a deadly weapon, with a prior conviction of murder, his appeal was affirmed by this court May 19, 1941. 44 Cal.App.2d 887, 113 P.2d 226. Two years after such affirmance he petitioned the Third District Court of Appeal for a writ of habeas corpus on the ground that his conviction had been obtained by the use of perjured testimony. His petition was denied on January 27, 1944, and a hearing was duly denied by the Supreme Court on February 10, 1944. Ex parte Knight, 62 Cal.App.2d 582, 144 P.2d 882. On August 13, 1945, he filed his "Motion, In the Nature of the Writ of Error Coram Nobis." It was heard by the court below

and denied October 2, 1945. This appeal is from such denial.

[1] The motion was accompanied by an ex parte affidavit of attorney Paul Tapley which sets forth a statement allegedly made to him on April 19, 1941, by one Braulio Galindo, a fellow inmate of appellant in Folsom penitentiary. Galindo thereby purportedly confessed that he is the party who on June 24, 1940, committed the crime for which appellant had been convicted. An extra-judicial confession is weak enough when made before an officer empowered to administer the oath, but when voluntarily reported by a person to whom it was voluntarily made it does not rise to the dignity of a legal document worthy of serious consideration. Moreover, in this instance whatever value the "confession" may have had in the service of appellant it was already stale when Tapley deposited before the notary on March 6, 1944.

Further to support the motion, on the day of the argument attorney A. Brigham Rose presented his own affidavit to "amplify and supplement the moving papers." By this document the affiant attempted by a review of the incidents occurring at the trial of appellant to show that the latter did not have a "fair and impartial trial." It is averred that appellant was prejudiced by the questions of the prosecuting attorney repeatedly propounded to the prospective jurors on their voir dire examination; that appellant's acting counsel "by the form of plea interposed" made the prior conviction of appellant for murder "the important subject of inquiry"; that appellant was "deprived of procedural due process" by failure of his former counsel to advise him with respect to his "admission or denial of a prior conviction," and the legislative safeguards for the protection of appellant's rights "were frittered away"; that appellant was prejudiced by the opening statement of the district attorney that he expected to prove that "defendant had boasted of killing some 16 or 18 people," in that it made the subject of prior conviction "the important issue in the case before the jury had even been selected"; that the victim of the robbery immediately after the crime "failed to hint, suggest or identify the defendant * * * as the perpetrator of the crime but * * * described a person then and there who bears resemblance to * * * confessor Braulio Galindo"; that the court gave not the

slightest consideration to the testimony of deputy sheriff Burroughs, a state's witness who arrived at the scene of the robbery within a few minutes after the robbery. From such averments it is apparent that the grievances of appellant were matters commonly adjudicated by the proceedings on motion for new trial or on appeal and that appellant misconceived the office of the writ which he sought to obtain from the court below, as will presently appear.

[2-7] The writ of error coram nobis will not relieve a petitioner from the consequences arising after judgment of conviction. 24 C.J.S., Criminal Law, § 1606, pp. 147, 149. Neither is it available to one who discovers new evidence pertaining to the merits of the issues already adjudicated; nor will it lie where another adequate remedy is provided. The use of this writ is limited to those situations in which the remedies provided by statute such as motions for new trial and arrest of judgment, appeal, and motion to recall remittitur are not available. *People v. Superior Court*, 28 Cal.App.2d 442, 444, 82 P.2d 718; *People v. McConnell*, 20 Cal.App.2d 196, 198, 66 P.2d 720. It is used by the court which rendered the judgment under attack to grant relief from oppression to which the petitioner may have been subjected by the application of duress, fraud or excusable mistake which if known at the time of the trial would have prevented entry of such judgment. *People v. Reid*, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435. A popular illustration of its use is that of a prisoner who by duress of the law enforcement officer has been urged to plead guilty and be transported to the state prison as his only means of forestalling mob violence. *People v. Lyle*, 21 Cal.App.2d 132, 136, 68 P.2d 378; *People v. Perez*, 9 Cal.App. 265, 98 P. 870. It may supplement but not supersede or be substituted for the statutory methods of correcting unjust judgments in criminal actions. *Asbell v. State*, 62 Kan. 209, 61 P. 690. It cannot serve the office of bringing before the trial court evidence of a fact that existed at the time of the trial, *Powers v. State*, 168 Miss. 541, 151 So. 730, inasmuch as such evidence can be brought to the attention of the court by motion for a new trial. *People v. Lumbley*, 8 Cal.2d 752, 759, 68 P.2d 354. Nothing is specified in the Rose affidavit that could not have been presented on appellant's motion for a new trial. Its contents might have been made

the subject of special instructions to the jury and presented in arguments to the court for a mistrial or on his motion for a new trial.

The attempt to make use of the writ of error coram nobis in the manner undertaken by appellant is wholly unjustifiable. The order is affirmed.

McCOMB and WILSON, JJ., concur.



73 Cal.App.2d 457

BYRD v. MUTUAL BEN. HEALTH & ACCIDENT ASS'N.

Civ. 14813.

District Court of Appeal, Second District,
Division 1, California.

March 8, 1946.

Hearing Denied May 6, 1946.

1. Estoppel ⇨117

In action for a declaration of rights and duties under health and accident policy, wherein insurer interposed affirmative defense that insured had failed to disclose in application that he was being paid compensation by the United States government on account of injuries sustained in World War I, testimony proffered by insured that application form was filled out by agent of insurer, and that insured gave agent full information concerning his war injury, was admissible to establish an estoppel on part of insurer.

2. Insurance ⇨379(5)

Where application for health and accident insurance was filled out by agent of insurer, the insured was not responsible for omission or negligence in connection with answer to a particular question unless he had actual knowledge of the fact that such answer had been improperly or incorrectly written by the agent.

3. Insurance ⇨379(5)

Where insured acts in good faith and without fault, and by reason of the fraud, mistake, or negligence of a soliciting agent the truthful answers of insured given at the time he applies for health and accident insurance have been omitted or incorrectly

set forth in the form used for informing the insurer of applicant's previous injuries and treatment therefor, the insurer is estopped to set up the omissions in or falsity of such answers as a defense to an action on the policy.

4. Insurance ⇨379(6)

Where application for health and accident insurance is filled out by soliciting agent, and insured makes a complete disclosure to agent of prior injury thereafter relied upon by insurer to show misrepresentation or concealment, and agent, through fraud, mistake, or negligence, omits such complete and truthful answers from the application, provisions in the application limiting the power of an agent and predicated issuance of policy on the written answers to questions in the application would not preclude recovery.

5. Estoppel ⇨115

In action for declaration of rights under health and accident policy, evidence of insurer concerning insured's failure to disclose in application that he had received medical attention for prior injuries was not inadmissible because insurer failed to specifically plead such failure as a defense.

6. Action ⇨6

An action for declaratory relief is an equitable proceeding.

7. Equity ⇨39(1)

Equity does not look with favor upon litigation by piecemeal, and whenever possible will dispose of the entire controversy, will grant complete relief, and will settle and determine all differences between the parties, leaving nothing for future litigation between the same parties and upon the same subject matter.

8. Appeal and error ⇨882(6)

Equity would give consideration to fact that, in view of plaintiff's offer to prove issue about which he thereafter complained, there was no prejudice to him by court's action in determining such issue.

9. Action ⇨6

In action for declaration of rights under health and accident policy, court was empowered to settle all differences between the parties arising from pleadings or raised by the evidence, thereby deciding the whole case and doing complete justice.

10. Appeal and error ⇨1177(5)

Where rejection of proffered testimony by insured that application for

health and accident policy was filled out by soliciting agent required reversal of judgment, cause would be remanded for new trial rather than with directions to enter judgment in insured's favor, since insurer was entitled to an opportunity to examine witnesses whose proffered testimony was included in insured's offer of proof and to challenge the verity of such testimony by contradictory evidence.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Joseph William Byrd against the Mutual Benefit Health & Accident Association for a declaration of the rights and duties of the respective parties under a policy of health and accident insurance issued by defendant to plaintiff. Judgment for defendant, and plaintiff appeals.

Reversed and cause remanded.

Kenneth Sperry and James C. Webb, both of Long Beach, for appellant.

J. Edward Haley, of Los Angeles, for respondent.

WHITE, Justice.

By the instant action for declaratory relief, plaintiff sought a declaration of the rights and duties of the respective parties under a policy of health and accident insurance issued by defendant to plaintiff on November 6, 1942, pursuant to a written application made therefor on October 31, 1942. Such policy provided for the payment to assured of the sum of \$100 per month in the event he should be disabled by accidental means and the further sum of \$50 per month for hospital charges for a period of three months. Thereafter on May 31, 1943, while working at the Craig Shipyards in Long Beach, plaintiff sustained "a fracture-dislocation of the spine" resulting in total disability owing to paralysis of his lower extremities. At the time of the trial herein and for more than three months subsequent to his injury, plaintiff was confined in a hospital. Plaintiff notified his insurer of such injury and the resulting disability and made demand for payment of the indemnity provided by the insurance policy. Upon refusal of insurer to honor his claim, plaintiff instituted the instant action. Defendant insurer interposed an affirmative defense to the effect that said policy was issued entirely in reliance upon written answers to questions

contained in the application for the insurance; that, while plaintiff was asked what injuries he had previously sustained, and what compensation, if any, he had received or was then receiving, he failed to disclose that he was being paid \$22 per month by the United States government on account of injuries he sustained in 1918 in World War I which consisted of a fractured left leg and a flesh wound of the right leg; and that had insurer known of such injuries and compensation, it would have refused to issue the policy in question.

At the trial plaintiff offered to prove the circumstances under which the application for insurance was signed, i.e.: "An advertising circular was received through the mail and the assured tore off a post card, mailed it in to the company in Los Angeles, a few days later the company representative by the name of H. D. Broughton came to the residence of the assured and the application was then filled out, all of the writing in the application except for the signature was in the handwriting of the representative Broughton, and in response to the question, 'Have you ever made any claim for or received indemnity on account of any injury or illness?', the assured replied that he had his index finger hurt on one occasion and that he had received approximately \$50.00 compensation from the California State Industrial Accident Commission or through them, and that when he was in the first World War he had sustained an injury to both of his legs, one being in the nature of a fracture and the other a bayonet wound, and that he had been receiving a pension * * * compensation from the United States Government in the rate of \$15.40 for the first period and then after he married he had received \$22.00 which amount he was receiving at the time the application was filled out; that he did not read over the application after it was filled out by the agent but merely signed his name, and that later the policy was received—sent to him through the mail." Plaintiff also offered to prove by the testimony of his wife, who was present at the time the application was filled out, "that the assured did make a full and complete statement of the fact that he had received these injuries in World War No. 1; that he pulled down his socks and showed his scars to the agent and told the agent about having received some compensation or pension from the United States Government, and that he completely de-

scribed the nature of the injuries and the nature of the treatment which he had received; that the company's agent, in spite of these statements, wrote down * * * the questions and answers which appear in the application for insurance." It was stipulated that the compensation received by plaintiff from the government was in the nature of compensation benefits and not as the result of any war risk insurance; and that if called, plaintiff would testify that the injuries received during the war did not interfere with his work, and that when "the agent was there he rolled down his socks and showed the agent the scars and told the agent * * * how he had gotten them, and that they did not bother him in getting around at all."

The trial court denied plaintiff's offers of proof, sustained objections to the introduction of the above offered evidence and granted a motion to strike "as to all statements or testimony concerning statements made to the agent as not being binding upon the company, by virtue of paragraph 16 on the application for insurance, which is in Plaintiff's Exhibit 1."

The trial court found that by reason of plaintiff's failure to disclose that he was receiving compensation from the government, defendant was entitled to cancel the policy and refund the premiums paid by plaintiff and ordered judgment accordingly. Plaintiff prosecutes this appeal.

It is here urged (1) that the finding of the trial court with reference to appellant's alleged failure to disclose material information called for in the application for insurance is without substantial support in the evidence; (2) that the trial court erred in excluding evidence or the facts and circumstances surrounding the execution of the application; and (3) that the trial court erred in admitting evidence concerning the failure of appellant to disclose medical attention received by him in 1918.

The question and the answer around which the instant controversy revolves read as follows:

"11. Have you ever made claim or received indemnity on account of any injury or illness? Yes. If, so, what companies or associations dates, amounts and causes?"

"1935. Right hand index finger hurt. Approx. three weeks; Approx. \$50 total; California State Comp."

In addition, respondent directs attention to two other questions contained in the ap-

plication and the answers made thereto by appellant, to-wit:

"14. Have you ever received medical or surgical treatment or had any local or constitutional disease not mentioned elsewhere in this application? (Answer to each) No."

"16. Do you hereby apply to the Mutual Benefit Health and Accident Association for a policy to be issued solely and entirely in reliance upon the written answers to the foregoing questions, and do you agree that the Association is not bound by any statement made by or to any agent unless written herein; and do you hereby authorize any physician or other person who has attended or may attend you to disclose any information thus acquired? Yes."

"Dated at Bellflower, this 31st day of October, 1942.

"(Signature of applicant: Joseph W. Byrd."

An examination of the insurance policy, to which a photostatic copy of appellant's application therefor is attached, reveals entirely inadequate space in which to give the details required by said question numbered 11.

In this connection, it is noteworthy that in the form entitled "Affidavit of Claimant as to Accident," wherein claim is made for benefits under the policy, in addition to the query as to whether the insured had made a claim "against any other company," as appears in the application for the policy, the direct question is asked in the affidavit supporting the claim for payments under the policy as to whether the insured "ever received a pension or government compensation, and if so, how much and what for?" This last-named interrogatory does not appear in the application for the policy. It is equally noteworthy that the insured answered this last-named question fully and truthfully by stating that he had and was receiving \$22 monthly from the United States government because of "gunshot wound in World War I." Why such a direct and positive question as to government compensation was not asked in the application for the policy, but appears only in the claim for benefits filed after the accident, remains unexplained.

[1,2] We are constrained to hold that the proffered evidence of the facts and circumstances surrounding the execution of the application for insurance was admissible to establish an estoppel upon the part of the insurer by reason of the conduct of

its agent. The insured was not responsible for the omission or negligence in connection with the answer given to question 11, unless he had actual knowledge of the fact that such answer had been improperly or incorrectly written by the agent of the insurer. There is no claim made that the insured had any actual knowledge of the contents of the application, or that he had been asked to read it, or do anything other than sign his name at the end thereof.

[3] In the instant action, plaintiff offered to prove by the testimony of his wife, corroborated by his own, that he fully, fairly and without reservation or evasion discussed with defendant's agent the injuries received by him in World War I, as well as the receipt by him of "some compensation or pension from the United States government"; that he exhibited to the agent the scars on his leg resulting from such injury; and that he "completely described the nature of the injuries and the nature of the treatment which he had received," but that, notwithstanding such disclosures to the defendant's agent, the latter "wrote down * * * the questions and answers which appear in the application for insurance." When the insured acts in good faith and without fault and by reason of the fraud, mistake or negligence of a soliciting agent the truthful answers of an insured given at the time he makes application for insurance have been omitted or incorrectly set forth in the form used for informing the company of the applicant's previous injuries and treatment therefor, the insurer is estopped to set up the omissions in or falsity of such answers as a defense to an action on the policy.

In Cooley's Briefs on the Law of Insurance (Vol. 3, page 2594) it is said:

"From an examination of the cases the following propositions may be regarded as established by the weight of authority: Where the insured, in good faith, makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent, or merely medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured,

though it is so stipulated in the application or policy."

In commenting upon the correctness of this statement, our supreme court, in the case of *Lyon v. United Moderns*, 148 Cal. 470, 476, 83 P. 804, 807, 4 L.R.A.,N.S., 247, 113 Am.St.Rep. 291, 7 Ann.Cas. 672, had this to say:

"An examination of many of the authorities satisfies us that, while there is some conflict in the cases on some of the matters included in this statement, the great weight of authority is with the statement, as a whole, where the insured acts in good faith, and is himself without fault."

The foregoing rule also finds support in the case of *Menk v. Home Insurance Company*, 76 Cal. 50, 53, 14 P. 837, 839, 18 P. 117, 9 Am.St.Rep. 158, a fire insurance case wherein it is said:

"The only point in the offered testimony was that if the agent, knowing all the essential facts, made out the application for plaintiff, the company cannot take advantage of defective statements contained in it as not complying with the requirements of the company; nor would misstatements be fatal to the claim of plaintiff, which the agent well knew to be false, when he made out the application, received the money of the applicant, and issued the policy.

"The tendency of the decisions is plainly to hold all those conditions waived which, to the knowledge of the agent, would make the policy void as soon as delivered. Otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud. [*Kruger v. Western Fire & Marine*] Ins. Co., [72 Cal. 91], 13 P. 156, [1 Am.St.Rep. 42.]"

To the same effect is the holding in *Hart v. Prudential Insurance Company of America*, 47 Cal.App.2d 298, 301, 117 P.2d 930, and cases cited in *Lyon v. United Moderns*, supra, 148 Cal. at page 476, 83 P. at page 807, 4 L.R.A.,N.S., 247, 113 Am.St.Rep. 291, 7 Ann.Cas. 672. In *Maxson v. Llewellyn*, 122 Cal. 195, 199, 54 P. 732, 734, it is held that oral testimony is not admitted under the foregoing principle to vary or contradict that which is in writing, but proceeds upon the premise that the insurer procured the writing under such circumstances that it is estopped from using it or relying upon its contents against the party who signed it. In the same case, it is held that

the rule above enunciated is applicable to accident insurance, as well as life and fire insurance. In *Maxson v. Llewelyn*, supra, 122 Cal. at page 199, 54 P. at page 734, the supreme court quoted approvingly from *Union, etc., Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L.Ed. 617, wherein it is well said:

"By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and to procure customers, they not unfrequently mislead the insured, by a false or erroneous statement of what the application should contain; or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers. *Rowley v. [Empire] Ins. Co.*, 36 N.Y. 550."

The foregoing decisions, founded as they are in reason and justice, meet our entire approval. Indeed, to hold otherwise would outrage equity and justice and be a blot upon the law.

[4] Respondent places great reliance upon the fact that the written application for the policy issued herein contained the question hereinbefore set forth and numbered 16. If the foregoing facts which plaintiff offered to prove be found true and the court should determine that the insured made a complete disclosure to defendant's agent of all the information now relied upon by defendant to show misrepresentation or concealment, and said agent, through fraud, mistake or negligence, omitted such complete and truthful answers from the application prepared by him, then neither the provisions in the application limiting the power of any officer, agent or representative of the insured, nor the foregoing question numbered 16 supersede the law making the principal liable for the negligent, wrongful or fraudulent acts of its agent, or the law of equitable estoppel. 14 R.C.L. p. 1156; *Ruffino v. Queen Ins. Co.*, 138 Cal. App. 528, 33 P.2d 26, 883; *Morrison v. Mutual Life Ins. Co. of New York*, 15 Cal.2d 579, 588, 589, 103 P.2d 963.

[5-9] We deem it unnecessary to discuss appellant's contention that the trial court erred in admitting evidence concerning his failure to disclose in his application the fact that he received medical attention

for his injuries incurred in 1918 during his military service in World War I, for the reason that, at the trial, appellant offered to prove that he disclosed to respondent's agent not only the fact that he received injuries in 1918 but "the nature of the treatment which he had received for them." Appellant's contention that such evidence was inadmissible because respondent failed to specifically plead as a defense the failure of appellant to disclose the fact that he had received medical attention in 1918 cannot be sustained. An action for declaratory relief is an equitable proceeding. *Adams v. Cook*, 15 Cal.2d 352, 362, 101 P.2d 484. Equity does not look with favor upon litigation by piece-meal, and whenever possible will dispose of the entire controversy between the parties, will grant complete relief, and wherever possible will settle and determine all differences between the parties in the action, leaving nothing for future litigation between the same parties and upon the same subject matter. *Sonnicksen v. Sonnicksen*, 45 Cal.App.2d 46, 52, 113 P.2d 495; *Imperial Mutual Life Ins. Co. v. Caminetti*, 59 Cal.App.2d 494, 498, 139 P.2d 693. Equity will also give consideration to the fact that, in view of plaintiff's offer to prove the very issue about which he now complains, there is no showing of prejudice to him by the court's action in determining such issue. To insist, in an equitable proceeding such as an action for declaratory relief is, and under the facts and circumstances present in the case at bar, that the court committed prejudicial error in admitting evidence concerning the claimed failure of plaintiff to disclose medical attention received by him in 1918, would do violence to the rule enunciated in section 3532 of the Civil Code to the effect that "The law neither does nor requires idle acts." The court was empowered to settle all differences between the parties arising from the pleadings or raised by the evidence, thereby deciding the whole case and doing complete justice. "Equity regards that as done which ought to have been done." 10 Cal.Jur. 505; C.C. 3529; *Union Oil Company v. Reconstruction Oil Co.*, 20 Cal.App.2d 170, 183, 66 P.2d 1215.

We have noted the other contentions made on this appeal, but, in view of the foregoing conclusions at which we have arrived, we deem it unnecessary to discuss them.

[10] Appellant urges that the judgment be reversed with directions to the trial

court to enter judgment in his favor. We do not feel that a reversal with directions is warranted. Respondent should have an opportunity to examine the witnesses whose proffered testimony was included in appellant's offer of proof and to challenge the verity of such testimony by contradictory evidence should respondent be so advised.

For the reasons herein stated, the judgment is reversed and the cause remanded for a new trial.

YORK, P. J., and DORAN, J., concur.



73 Cal.App.2d 564

**GUNN v. SUPERIOR COURT IN AND FOR
LAKE COUNTY et al.**
Civ. 7249.

District Court of Appeal, Third District,
California.

March 18, 1946.

1. Justices of the peace ☞16

On appeal from justice's court to superior court, a transcript of the docket entries is a necessary part of the "transcript and papers on appeal" for certifying and transmitting which the justice is entitled to a fee of \$1 and no more, and he is not entitled to an additional fee for issuing a transcript of the docket. Code Civ.Proc. § 977.

See Words and Phrases, Permanent Edition, for all other definitions of "Transcript and Papers on Appeal".

2. Justices of the peace ☞16, 164(3)

A justice of the peace is not compelled to transmit to the superior court the record on appeal until all requisite fees, including his own, are paid to him, but if he does transmit such record, together with all the fees payable to the clerk of superior court on such appeal, the superior court acquires jurisdiction, and such jurisdiction is not dependent upon the payment to the justice of the fees due the justice if the justice has seen fit to waive them or has failed to exact them. Code Civ.Proc. § 981.

3. Evidence ☞42

Justices of the peace ☞63

It is common knowledge that actions in justice's courts are frequently prosecuted without the aid of legal counsel and the disposition of such cases should not be unduly hampered by technicalities.

4. Justices of the peace ☞164(4)

The superior court had jurisdiction of appeal from judgment of justice of the peace, who, if he considered himself entitled to an additional dollar for issuing transcript on appeal, made no claim therefor but issued transcript which was filed with superior court clerk and transmitted to county clerk the total fees payable to the county clerk alone. Code Civ.Proc. §§ 977, 981.

Mandamus proceeding by James A. Gunn, Jr., against the Superior Court of the State of California, in and for the County of Lake, and the Honorable Benjamin C. Jones, Judge thereof, to compel the Superior Court to set aside an order dismissing an appeal from a judgment entered in the justice's court and to hear the appeal.

Writ of mandate issued.

James A. Gunn, Jr., in pro per., of Kelseyville, for Petitioner.

Charles Kasch, of Ukiah, for respondent.

ADAMS, Presiding Justice.

In a petition for a writ of mandate filed herein it is alleged that a judgment was entered against petitioner in the Justice's Court of No. 5 Township in Lake County on May 17, 1945; that petitioner then filed notice of appeal to the Superior Court of Lake County, paid \$8 in fees to the justice of the peace, and put up \$100 in cash in lieu of an appeal bond; that when the matter came up in the superior court to be set for hearing, it was contended by appellee that the said court was without jurisdiction of the appeal for the alleged reason that the amount paid to the justice of the peace as fees was insufficient; and that the appeal was thereupon dismissed. Petitioner prayed for a writ directing the said superior court to set aside its order of dismissal and to hear the appeal. We issued an alternative writ.

It appears from the record before us, which contains a written opinion by the superior court on the motion to dismiss, that it was contended by appellee, and

agreed by the court, that the amount which should have been deposited with the justice of the peace as fees on the appeal was \$9, to wit: clerk's filing fee, \$6 (Pol. Code, sec. 4300a); law library fee, \$1 (Business & Professions Code, sec. 6321); justice's fee "for certificate and transmitting transcript and papers on appeal," \$1 and "for issuing a transcript of the docket," \$1 (Pol. Code, sec. 4300e).

[1] We are of the opinion that in its computation of the amount necessary to be paid to the justice of the peace on such appeal the trial court erred. Section 977 of the Code of Civil Procedure provides that the record on appeal from a justice's court shall include among other papers "a certified copy of the entries in the docket relating to the action." It thus appears that a transcript of the docket entries is a necessary part of the "transcript and papers on appeal," for certifying and transmitting which the justice of the peace is entitled to a fee of \$1.00, and no more. He is not therefore entitled to an additional fee for issuing a transcript of the docket for such purpose.

Furthermore, even if the additional dollar for issuing the transcript on appeal should have been paid to the justice of the peace, he has made no claim for same, and if he considered that he was entitled to its payment he, nevertheless, issued the transcript and same was filed with the clerk of the superior court with the other papers on appeal; and he transmitted to the county clerk the total fees payable to that clerk, to wit, \$7.00. It was stated in two early cases that a justice of the peace may waive the fees payable to him alone; and where he had sent up the record on appeal the fact that his fees had not been paid was held to constitute no ground for dismissing the appeal. *Bray v. Redman*, 6 Cal. 287; *People v. Harris*, 9 Cal. 571, 573.

[2] Respondent relies upon section 981 of the Code of Civil Procedure, enacted subsequent to the foregoing decisions, which provides that no appeal taken from a judgment rendered in a justice's court in civil matters shall be effective for any purpose whatsoever unless the appellant shall, at the time of filing notice of appeal, pay, in addition to the fee payable to the justice of the peace on appeal, the fees provided by law to be paid to the county clerk; and that in transmitting the papers on appeal, the justice shall transmit to the county

clerk the sum thus deposited for filing the appeal in the superior court. Also, respondent relies upon *Johnson v. Superior Court*, 28 Cal.App. 618, 153 P. 404, in which case it was held that an appeal from a justice's court was properly dismissed because the appellant had paid to the justice of the peace the sum of \$7 only, while, under the statutes then in effect, he should have paid \$9, to wit: County clerk's filing fee, \$5, library fee, \$1, justice's fee for certificate and transmitting papers on appeal, \$1, and clerk's fee for placing the action on the calendar, \$2. Only \$7, instead of \$8, was transmitted to the clerk of the superior court with the papers on appeal, and it was contended by petitioner, in a proceeding to prohibit the superior court from hearing such appeal, that the appellant, in attempting to take his appeal, having omitted "to pay to the justice of the peace the fees *contemplated by said section to be by that officer paid to the county clerk* upon the transmission of the record on appeal to the latter officer, the superior court failed to acquire jurisdiction of the appeal or of the action." (Italics ours.) It was this contention of petitioner that was sustained by this court in that case, when it said, 28 Cal.App. at pages 621, 622, 153 P. at page 405, regarding section 981 of the Code of Civil Procedure: "The section distinctly and positively declares that an appeal from a judgment rendered in a police or justice court in civil matters shall not be *effectual for any purpose* unless the fees referred to therein are, at the time of filing the notice of such appeal, paid by the appealing party to the justice or judge *and* [emphasis ours] by him transmitted, with the papers on the appeal, to the county clerk for filing the appeal in the superior court." That decision does not purport to overrule the decision in *Bray v. Redman*, supra, nor did it involve the question presented here, as to whether the failure of appellant to pay the \$1 assumed to be due the justice of the peace for issuing a transcript of the docket, or the failure of such justice to exact same of appellant, deprived the superior court of jurisdiction to hear the appeal. A reasonable construction of section 981, supra, is that a justice of the peace is not compelled to transmit to the superior court the record on appeal until all requisite fees, including his own, are paid to him, but that, if and when he does transmit such record, together with all the fees payable to the clerk of the superior court on such appeal, such court ac-

quires jurisdiction, and such jurisdiction is not dependent upon the payment to the justice of the fees due him if he has seen fit to waive them or has failed to exact them. Otherwise no superior court would know, when an appeal was filed, whether it had acquired jurisdiction unless and until it had been advised, in some manner outside the appellate record itself, that all fees payable to the justice alone had been paid to him; and a justice, by failure to collect his own fees, or by deliberately waiving them or any of them, could thus deprive the appellate court of jurisdiction.

It was said in *Simmons v. Superior Court*, 30 Cal.App. 252, 254, 157 P. 817, that the purpose of the enactment of section 981 of the Code of Civil Procedure was "to provide for the payment of the clerk's fees at the time of transmitting to the superior court the papers on appeal." (Italics ours.)

It is alleged by petitioner that on learning of the contention of appellee that he had not paid a sufficient amount to the justice of the peace, he tendered an additional one dollar to that official, but that same was returned to him, the justice of the peace stating that he did not have his receipt book with him. It is stated in *Pacific States Corporation v. Superior Court*, 72 Cal.App. 241, 244, 236 P. 938, 939: "It is a recognized principle in court practice that, where a party has done all that the law requires of him in any matter which is a part of the proceedings in an action, he should not be made to suffer by reason of the neglect of an officer of the court to perform an official duty in the completion of that particular proceeding in the action. Therefore, we hold that, when the Pacific States Corporation had paid into the hands of the justice all of the required fees in connection with its notice of appeal, and had given it sufficient undertaking on appeal, the appeal was thereby perfected so as to vest jurisdiction thereof in the superior court. This jurisdiction could not be lost by the mere failure of the justice to transmit the filing fees to the county clerk." Also see *Livermore Sanitarium v. Superior Court*, 39 Cal.App. 2d 569, 571, 103 P.2d 1022.

[3, 4] The principle is stated in *Quint v. McMullen*, 103 Cal. 381, 383, 37 P. 381, that the right of appeal is remedial in its character, and in doubtful cases should always be granted. It is a matter of common knowledge that actions in justice's courts are frequently prosecuted without the aid

of legal counsel, as was the action of petitioner herein; and the disposition of such cases should not be unduly hampered by technicalities.

For the reasons above stated it is ordered that the writ prayed for issue.

PEEK and THOMPSON, JJ., concur.



73 Cal.App.2d 555

**LIBERTY MUT. INS. CO. v. INDUSTRIAL
ACCIDENT COMMISSION OF CALI-
FORNIA et al.**

Civ. 12996.

District Court of Appeal, First District,
Division 1, California.

March 18, 1946.

Hearing Denied May 16, 1946.

1. Workmen's compensation ⇨604

Compensation is awarded where at time of injury employee is performing service growing out of and incidental to employment and is acting within the course of his employment and where the injury is proximately caused by the employment. Labor Code, § 3600(b, c).

2. Workmen's compensation ⇨552

An employee is entitled to compensation for disability proximately caused by industrial injury regardless of whether employee's condition at time of injury was average or subnormal, aggravation of existing infirmity, when such aggravation is proximately caused by employment, being compensable, though a normal man would not have been adversely affected. Labor Code, § 3600(b, c).

3. Workmen's compensation ⇨556

Death of employee which evidence shows and Industrial Accident Commission finds was hastened or produced by industrial injury is compensable, notwithstanding showing that employee would have ultimately died from pre-existing disease. Labor Code, § 3600(b, c).

4. Workmen's compensation ⇨1358

Claimant has the burden of proving that injury arose out of and in course of

employment and was proximately caused thereby. Labor Code, § 3600(b, c).

5. Workmen's compensation ☞609

Injury to be compensable must be proximately caused by the employment. Labor Code, § 3600(b, c).

6. Workmen's compensation ☞1719

Whether employment proximately precipitated collapse of previously diseased heart and proximately caused it to collapse before normal progressive developments would have resulted in collapse was a question of fact. Labor Code, § 3600(b, c).

7. Workmen's compensation ☞1418

That medical experts on whose opinions Industrial Accident Commission must depend in determining whether employment proximately caused injury by aggravating pre-existing diseased condition may be divided in their opinions as to causation or that different schools of thought exist in medical profession is no reason to deny compensation, if Commission finds on competent substantial evidence in accord with those physicians who honestly believe that employment hastened and precipitated the injury. Labor Code, § 3600(b, c).

8. Workmen's compensation ☞1939

Courts must affirm an award of Industrial Accident Commission without weighing conflicting evidence if Commission's findings are supported by competent substantial evidence.

9. Workmen's compensation ☞1418

Opinion of heart specialist based on examination of claimant, tests and electrocardiograms that claimant, having pre-existing heart disease, suffered left coronary artery occlusion with infarction of anterior surface of left ventricle as result of occupational exertion of lifting sacks of peanuts weighing approximately 125 pounds constituted substantial competent evidence to support award of Industrial Accident Commission for resulting disability and preclude disturbance of award by courts, though another specialist expressed contrary opinion as to causation. Labor Code, § 3600(b, c).

10. Workmen's compensation ☞1359, 1939

Disability from heart collapse is not compensable unless claimant proves industrial causation, and if there is substantial, competent and credible evidence that injury was not industrial, and Industrial Ac-

cident Commission so finds, award denying compensation must be affirmed. Labor Code, § 3600(b, c).

11. Workmen's compensation ☞1418

Where there was an unusual exertion and attending physician or autopsy surgeon testifies that unusual exertion was a proximate cause of collapse, though employee was suffering from pre-existing heart condition, employee or his dependents are entitled to compensation as a matter of law, though an expert who did not see or attend employee gives it as his opinion that death or injury was non-industrial. Labor Code, § 3600(b, c).

12. Workmen's compensation ☞1939

Where examining physicians or specialists differ as to whether injury or death was industrial and a competent qualified physician or specialist testifies that in his opinion collapse was proximately caused by employment, and Industrial Accident Commission so finds, the award must be affirmed, though equally competent physician expresses a contrary view. Labor Code, § 3600(b, c).

13. Workmen's compensation ☞569

Where competent substantial evidence shows the causal connection between strain and collapse, the injury or death is compensable, though the strain was one usual to that type of employment. Labor Code, § 3600(b, c).

14. Workmen's compensation ☞1731

In a compensation case, the referee's function is to find the facts and not to declare the law.

Proceeding under the Workmen's Compensation Act by Appio Calabresi, claimant, opposed by Planters Nut and Chocolate Company, employer, and Liberty Mutual Insurance Company, insurance carrier. To review an award of the Industrial Accident Commission of the State of California, granting compensation, the insurance carrier brings certiorari.

Award affirmed.

Leonard, Hanna & Brophy, of San Francisco, for petitioner.

R. C. McKellips and Fred G. Goldsworthy, both of San Francisco, for respondent Industrial Accident Commission.

PETERS, Presiding Justice.

Claimant Calabresi was employed by Planters Nut and Chocolate Co. from September, 1943, to January, 1945. His work consisted of lifting and emptying sacks of peanuts into bins. The sacks weighed from 115 to 125 pounds each, and were required to be raised slightly above hip level and then dumped. The employee worked six days a week and dumped about 150 sacks a day. Late in the afternoon of January 2, 1945, while lifting one of the heavier sacks in the usual routine way, he suffered a severe attack of pain which was later diagnosed as an occlusion of the left coronary artery with infarction of the left ventricle of the heart. Although the employee was unaware of the fact, the medical evidence is in substantial agreement that he had a pre-existing heart disease and that effort and exertion were contra-indicated for a man of his age and physical condition. Prior to his employment with Planters Nut and Chocolate Co. the claimant had been employed at hard physical labor for Sinmons Bed Company. Since January 2, 1945, the employee has been unable to resume work.

The employee was examined by Dr. duBray on January 11, 1945. Based on that examination, upon certain tests, and upon a history of the case, this specialist was of the opinion that the lifting operations of this employee did not accelerate the heart attack, although he admitted that excessive strain might have caused the attack. He was of the opinion, however, that the condition was not industrial in origin and that the work performed did not aggravate the pre-existing condition. He gave it as his opinion that the employee suffered from angina pectoris and not from a coronary occlusion. On cross-examination he admitted that a progressive heart condition as diagnosed by him would be aggravated by hard work, and that if it could be shown that the employee had been subjected to an excessive strain it might change his diagnosis, but he was quite positive in his view that the strain here involved was not excessive, and, in his opinion, did not contribute to the collapse. He frankly admitted that there was a difference of opinion among heart specialists as to the effect of strain on a diseased heart. As put by the doctor "there is some difference of opinion as to whether effort plays any part or not, or strain."

The attending physician was Dr. Onesti, who was called in on the night of the attack. He had known the employee and had been the family physician for many years, and, prior to January 2, 1945, had no reason to believe the employee had heart trouble. He diagnosed the condition as an acute cardiac dilation, and later referred the case to Dr. Kaufman, a heart specialist. Dr. Kaufman examined the patient and made several tests subsequent to the examinations and tests made by Dr. duBray. He was of the opinion that, although the patient undoubtedly had a pre-existing heart condition, the damage existing at the date of his examination was of recent origin and not a condition preceding January 2nd. He based this conclusion on his interpretation of the symptoms, and on his interpretation of the electrocardiograms taken by him and by Dr. duBray. The changes shown by these two electrocardiograms, which he described in detail, indicated to him that the condition was precipitated by the effort expended on January 2nd. He testified that this man suffered from "a rupture of the vessel consequent upon effort." He concluded that the employee "as the result of the episode of January 2, suffered a left coronary artery occlusion with infarction of the anterior surface of the left ventricle and that it arose from and during his occupation."

Based on this evidence the Commission found that on January 2, 1945, the employee "sustained injury arising out of and occurring in the course of his employment, as follows: Aggravation of a pre-existing coronary vascular disease into a disabling condition * * *," and an award was made accordingly.

Petitioner seeks to have this award annulled on the theory that it is unsupported by the evidence. The contention is made that heart cases are compensable only when the evidence shows that the employee as a result of his employment was subjected to an unusual strain or exertion. It is urged that prior cases, and particularly the case of *McNamara v. Industrial Acc. Comm.*, 130 Cal.App. 284, 20 P.2d 53, have established such a rule in this state. Great emphasis is placed on the referee's memorandum which indicates that the referee believed that the *McNamara* case so held, and further believed that the rule of the *McNamara* case had been impliedly overruled in that the Commission had made numerous

awards in such cases and the appellate courts had, without opinion, denied writs. This Court granted the writ in this case, not because of any doubt that the award is amply supported, but in order to consider the contention that there is a conflict in the California authorities on the issue involved.

[1-3] Before directly discussing the prior cases, certain fundamental principles should be restated. Under the Workmen's Compensation Act, subject to certain exceptions not here involved, compensation is awarded "where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment"; and where "the injury is proximately caused by the employment." Labor Code, § 3600, subs. (b and c). It is now too well settled in this state to require extended citation of authority that the employee is entitled to compensation for disability proximately caused by industrial injury regardless of whether the employee's condition at the time of injury was average or subnormal. Thus, an aggravation of an existing infirmity where such aggravation is proximately caused by the employment is compensable, even though a normal man would not have been adversely affected. This rule applies even though it is shown that the employee would have ultimately died from such disease, if the evidence shows and the Commission finds that the injury hastened or produced his death. (See many cases collected 1 Campbell, Workmen's Compensation, § 104, p. 80, particularly in f. n. 115.) Industry takes the employee as it finds him. A person suffering from a pre-existing disease who is disabled by an injury proximately arising out of the employment is entitled to compensation even though a normal man would not have been adversely affected by the event.

[4-6] These principles are elementary. The difficulty that sometimes arises is not in stating the principles but in applying them to particular facts. The burden of proof that the injury arose out of and in the course of the employment, and was proximately caused thereby is on the employee. Not every injury occurring during the employment is compensable. The employment must be the proximate cause of the injury. It is obvious that whether the employment proximately precipitated the collapse of a pre-existing diseased heart and proximately caused it to collapse be-

fore normal progressive developments would have resulted in the collapse is a question of fact. Particularly when as here, the collapse results in disability and not death, so that autopsy reports are not available, ascertaining the true fact is a somewhat difficult problem. The burden of proving that the employment is a proximate cause is on the employee and frequently the employee is unable to sustain the burden of proving industrial causation. But the difficulty of proof is no reason to deny an award if the evidence warrants it.

[7,8] Obviously, the Commission must depend on the reasoned opinions of attending physicians and experts in the field. The fact that experts may be divided in their opinions as to causation, or that different schools of thought exist in the medical profession, is no reason to deny liability if the Commission finds on competent substantial evidence in accord with those doctors who honestly believe that the employment hastened and precipitated the injury. We have frequently read in applications for writs before this Court the divergent views of medical specialists on the effect of strain on a pre-existing diseased heart. There can be no doubt but that there is a respectable school of thought that believes that strain, at least a non-unusual strain, does not adversely affect a pre-existing diseased heart. Other doctors, equally qualified, honestly believe that strain adversely affects such pre-existing condition. The existence of these divergent ideas is what has led the Commission to render, on occasions, what appear to be divergent opinions. Under the referee system, if one referee believes those doctors who do not believe strain adversely affects the pre-existing condition he will decide the case against the employee, while a referee who believes the doctors who testify that the strain involved aggravated the pre-existing condition and precipitated the collapse will decide the case in favor of the employee. The Commission, on occasion, has adopted the findings of referees who have, on almost identical facts and opinions, decided separate cases contrary to each other. This may be an unfortunate situation but it is not one that the courts can cure. The judges of the appellate court are not qualified nor permitted to choose between conflicting expert medical opinions. The issue involved is obviously one of fact, and until the Commission adopts, or the Legislature compels, a more

consistent policy the courts must affirm the Commission wherever there is competent substantial evidence to support its findings.

[9] Tested by these standards and rules there can be no doubt at all that the finding of industrial causation here involved is amply supported. To hold otherwise would require us to hold, as a matter of law, that Dr. duBray must be believed and Dr. Kaufman, as a matter of law, must be disbelieved. Both doctors are eminently qualified specialists in the field of internal medicine. Both personally examined and tested the employee. If their expert opinions, based on substantially the same facts, observations and tests, differ, we certainly cannot and should not attempt to resolve the conflict in favor of one litigant or the other. There being substantial, competent, credible evidence to support the award we have no power to disturb it.

[10] There is nothing in any of the decided cases which even suggests, far less compels, a contrary conclusion. An examination of the heart disease cases previously decided demonstrates that these cases fall within three separate and distinct categories. The first group contains those cases where the Commission denied an award and the appellate courts affirmed. Typical of these cases is *McNamara v. Industrial Acc. Comm.*, 130 Cal.App. 284, 20 P.2d 53, so heavily relied upon by petitioner. In that case the employee had a heart attack shortly after cranking his automobile, which act was a necessary incident of his employment. Shortly thereafter he died. The death occurred on a Monday. The evidence showed that on the preceding Sunday he had had two prior heart attacks at home, and on the preceding Saturday he had one, none preceded by exercise. Prior medical examinations had indicated heart trouble. The autopsy showed hypertrophy and valvular lesion. All agreed that exertion can cause a valvular lesion, but other causes exist as well. An expert called by the employee testified that the exertion of cranking the car could have aggravated the pre-existing condition. Another equally competent medical expert gave it as his positive opinion that the employee died from natural causes, and that the cranking of the car did not precipitate the collapse. The Commission found the death to have been non-industrial and denied an award. The appellate court affirmed. The court in so affirming properly held that compensation will not be awarded

where the employee, while performing his ordinary duties, collapses, and the evidence shows that he suffered from a chronic condition that had reached a stage that death might occur at any time. The court emphasized that the exertion here involved was normal and not abnormal. It is obvious that the case stands for the proposition that heart collapse cases are not compensable unless the employee proves industrial causation, and that if there is substantial, competent and credible evidence that the injury was non-industrial, and the Commission so finds, the award must be affirmed.

A similar case standing for exactly the same principle is *Quail v. Industrial Acc. Comm.*, 138 Cal.App. 412, 32 P.2d 402. Here the employee died from heart trouble after being in an automobile wreck growing out of his employment. The attending physician, who also performed the autopsy, testified that the accident had nothing to do with the death. There was other evidence to the effect that the accident may have strained the heart. The Commission denied an award. Obviously, the case stands at most for the proposition that there was competent evidence to sustain the action of the Commission. Also included within this group are the cases of *Lancaster v. Industrial Acc. Comm.*, 5 Cal.App.2d 304, 42 P.2d 333, and *Singlaub v. Industrial Acc. Comm.*, 87 Cal.App. 324, 262 P. 411. In both cases there was competent substantial evidence that the exertion involved had no connection with the heart collapse, and the Commission so found. The *Singlaub* case particularly emphasizes that the problem is primarily a factual one.

Typical of the second group of cases is *Eastman Co. v. Industrial Acc. Comm.*, 186 Cal. 587, 200 P. 17, where the Supreme Court affirmed an award of a death benefit in a heart case. In this case the employee fell from the truck he was driving and was run over and killed by that truck. There was evidence from which it could be reasonably inferred that a pre-existing heart condition was so aggravated by the driving of the truck and almost having an accident that he had an attack, fell from the truck and was killed. The Supreme Court, emphasizing that the problem was factual, affirmed the award holding that although an employee may be suffering from a chronic heart condition if the collapse is precipitated or hastened by any strain or excitement of the employment the injury is compensa-

ble. The whole problem is one of proximate cause—a question of fact.

The third group of cases all involve situations where in heart cases the Commission denied awards and these determinations were annulled by the appellate courts. *Fogarty v. Department of Indus. Relations*, 206 Cal. 102, 273 P. 791; *Knock v. Industrial Acc. Comm.*, 200 Cal. 456, 253 P. 712; *Blankenfeld v. Industrial Acc. Comm.*, 36 Cal.App.2d 690, 98 P.2d 584; *Mark v. Industrial Acc. Comm.*, 29 Cal.App.2d 495, 496, 84 P.2d 1071; *Nielsen v. Industrial Acc. Comm.*, 125 Cal.App. 210, 13 P.2d 517. Also there should be included within this group cases like *Buckley v. Roche*, 214 Cal. 241, 4 P.2d 929, and *Naughton v. Retirement Board of S. F.*, 43 Cal.App.2d 254, 110 P.2d 714, in which retirement boards denied pensions and the courts reversed them.

[11] In all of these cases, at least the ones involving denial of awards by the Industrial Accident Commission, the appellate courts emphasized that in those cases there was some unusual strain or exertion to which the employee was subjected. In most of them the attending physician or autopsy surgeon testified that the unusual exertion aggravated the pre-existing condition and precipitated the collapse. In most of the cases the conflicting testimony to the effect that the exertion was not a proximate cause of the collapse was that of an expert who did not see, examine, or attend the employee. In all of these cases the courts held that the finding that the injury or death was non-industrial was unsupported and that, as a matter of law, the death or injury was compensable. These cases stand for the proposition that where there is an unusual exertion, plus testimony of an attending physician or autopsy surgeon, that the unusual exertion was a proximate cause of the collapse, the employee or his dependents are entitled to an award, as a matter of law, even though an expert who never saw or attended the employee gives it as his opinion that the death or injury was non-industrial. The cases do not, and in the nature of things cannot, stand for the proposition that the exertion must be unusual before it is compensable.

166 P.2d—58

The astonishing thing about the state of the decided cases is that counsel have not cited a case nor have we found a California, Appellate or Supreme Court case where the Commission has made an award of benefits in a heart case and such award has been annulled.

[12, 13] From an analysis of these cases and of the principles set forth in this opinion it must follow that where examining physicians or specialists differ as to whether the injury or death was industrial, and a competent qualified physician or specialist testifies that in his opinion the collapse was proximately caused by the employment, and the Commission so finds, the award must and should be affirmed although an equally competent doctor expresses a contrary view. In such a case whether the strain is a "usual" or an "unusual" one is only one of the facts involved. If there was strain, even though the strain was a strain usual to that type of employment, the injury or death is compensable if there is competent substantial evidence to show the causal connection between that strain and the collapse. That is this case.

[14] The fact that the referee may have thought he was deciding a law question contrary to the *McNamara* case is a false issue. Whatever his views of the law may have been (and if he believed as petitioners contend he was clearly wrong) it is not his function to declare the law but to find the facts. This he has done. The finding is supported. That is the end of the case. The fact a referee may have misinterpreted the *McNamara* case cannot invalidate an award made on a correct theory and supported by competent evidence.

The award is affirmed.

SCHOTTKY, Justice pro tem., concurs.

WARD, Justice.

I concur in the affirmance of the award but wish to emphasize the thought expressed by the Presiding Justice that "until * * * the Legislature compels, a more consistent policy the courts must affirm the Commission wherever there is competent substantial evidence to support its findings." (Labor Code, sec. 5953.)

73 Cal.App.2d 522

BRADLEY v. DUTY.

Civ. 15182.

District Court of Appeal, Second District,
Division 2, California.

March 13, 1946.

1. Trusts ⇨30½(1)

Defendant who had lived in home of plaintiff for several years did not hold money owing for board and lodging under a trust for plaintiff even though plaintiff had not been fully paid by defendant for room and board, in absence of proof that plaintiff advanced money to defendant or an agreement that defendant was indebted to plaintiff.

2. Trusts ⇨30½(1)

Where mutual current accounts have run between two parties or one holds a book account against the other, alleged debtor does not have in his possession money for the alleged creditor in the absence of an agreement that a definite balance is payable.

3. Appeal and error ⇨882(3)

Where lower court found a resulting trust in favor of plaintiff of property allegedly purchased by defendant partially with money received from plaintiff, and the finding supported plaintiff's theory of resulting trust and there was no proof of fraud, plaintiff could not contend that defendant held property under a constructive trust or because of fraud or other wrongful act. Civ.Code, § 2224.

4. Fraud ⇨12

The mere violation of a contract is not a fraud.

5. Trusts ⇨371(8)

In an action to have property bought by defendant in his own name declared held by a resulting trust with plaintiff, proof of fraud to show constructive trust for defendant's alleged failure to keep a promise to save his money and purchase with it a home jointly with plaintiff was inadmissible.

6. Trusts ⇨72

A "resulting trust" arises where title of property is vested in the trustee while the consideration therefor is paid by the beneficiary and it is implied from the

facts, neither written evidence of an agreement nor a fraud on the part of the alleged trustee being essential to its existence.

See Words and Phrases, Permanent Edition, for all other definitions of "Resulting Trust".

7. Trusts ⇨371(8)

In action to have property bought by defendant in his own name declared held by him under a resulting trust with plaintiff, evidence as to existence of a partnership or fraud could not avail plaintiff in an attempt to establish a constructive trust.

8. Trusts ⇨72

Where resulting trust is sought to be imposed upon property purchased by one in his own name with part of the consideration being paid by another, if such trust does not arise at the very instant deed is taken, it can not be created by agreement after the conveyance nor be affected by an agreement made before the transfer.

9. Trusts ⇨63½

An alleged oral partnership agreement between plaintiff and defendant or a joint enterprise to acquire enough money to buy a home for themselves jointly could not be sustained under statute of frauds, it being immaterial that in two years preceding the purchase plaintiff had expended \$100 a month for joint support of plaintiff and defendant. Civ.Code, § 852.

10. Trusts ⇨86

Where there is no written contract and a party sues to impress a purchase price resulting trust upon real property, the action is founded on the statutory presumption that in such circumstances a trust is presumed to result in favor of the person by or for whom such payment is made. Civ.Code, § 853.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Proceedings by Clara Bradley against Samuel D. Duty to have realty purchased by defendant declared held by him in trust. From an adverse judgment, defendant appeals.

Judgment reversed.

William H. Brawner and Robert H. Davis, both of Los Angeles, for appellant.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for respondent.

his payments were full compensation for her services.

MOORE, Presiding Justice.

Respondent sued appellant on three distinct theories in as many causes of action, claiming (1) her right to joint ownership in and title to a parcel of real estate; (2) \$750 on account of services rendered at his request; (3) \$750 for money had and received by appellant to and for the use of respondent. The court found against her claims alleged in the second and third counts. Respondent evidently acquiesced in such findings, since no mention of them appears in the conclusions of law or in the judgment and no appeal was taken on that account. Remaining for review is the finding in response to the first count that in "April, 1944, plaintiff advanced to defendant Samuel D. Duty the sum of \$750 to be expended by said defendant for the purchase of real estate for the benefit of plaintiff and defendant Samuel D. Duty, the title to said property to be in the name of Clara Bradley and Samuel D. Duty as joint tenants."

Appellant, a single man, resided in the home of respondent from 1928 to April 1944. She testified that for two years prior to the latter date she had paid \$30 a month for rent and food; that the bills ran over \$100 a month; that the cost of her support of him was \$50 a month; that during those two years they had talked about the purchase of a home and she told him she would pay the household expenses and he should save all of his earnings in order that they could have "a quick down payment"; that she paid the household expenses and he saved his own money. Finally, in April, 1944, without her knowledge he purchased an improved city lot and took conveyance to himself alone. She demanded that the title be placed in the two as joint tenants. He refused but continued to collect \$100 monthly rentals. During the two-year period above mentioned she had a bank account in her name and he also had his own bank account. She further testified that they had been partners since 1928 and concluded to buy a home in 1938; that during 1942 and 1943 he paid her only small sums although during much of the time prior to 1942 he was incapacitated by virtue of a foot disease or heart trouble. However, in view of the finding against her claim of his indebtedness to her it must be deemed that

[1,2] But if she was not fully paid by him for food and lodging prior to the filing of this action it cannot be concluded that he held her money, in the absence of proof that she advanced the \$750 to him or of an agreement that he was indebted to her in that sum and that he should invest the same. Where mutual current accounts have run between two parties or one holds a book account against the other it cannot be said that the alleged debtor has in his possession money for the alleged creditor in the absence of an agreement that a definite balance is payable. With the exception of small weekly payments made to her in 1942 and 1943 he deposited his earnings in the bank and purchased war bonds until he had saved a total of \$950. With this sum and \$50 he had borrowed he paid \$1,000 on the purchase price of the property here in dispute. Whereas appellant denied that he owed respondent any sum of money at all, there is no evidence that at any time the parties agreed that he was indebted to her or that he held any amount of money belonging to her. The nearest approach to it was her proof that in the two years prior to April, 1944, he became indebted to her for services performed, to the contrary of which the court found.

Since the uncontradicted testimony of appellant was that he paid \$1,000 on the purchase price, the finding that plaintiff advanced \$750 of such sum requires explanation. This is found in the fact that after the motion for nonsuit had been at one time denied respondent gained leave to amend her amended complaint by interlineation, whereupon she made the pleading read "that on or about April, 1944, and for an approximation of 16 years prior thereto plaintiff advanced" to defendant the sum of \$750 to be expended by him in the purchase of real estate for the benefit of plaintiff and defendant, the title to be in both of their names as joint tenants. However, the amount of money she alleges herself to have advanced becomes immaterial in view of her claim for only a half interest in the lot and improvements.

[3-5] The judgment is based upon the finding of a resulting trust which is alleged to have arisen from appellant's having received \$750 from respondent prior to his receipt of the conveyance of the lot. Notwithstanding such finding she now con-

tends that a constructive trust arose by virtue of his promise and of the provisions of section 2224, Civil Code, which declares that "one who gains a thing by fraud * * * the violation of a trust, or other wrongful act is * * * an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." It is readily seen that the quoted section cannot avail her for the reason that she pleads a resulting trust and the finding adopts her allegation. Moreover, there is no proof of a fraud on the part of appellant. She says that he made a promise to buy a home for them and thereafter breached his agreement. But the mere violation of a contract is not a fraud. *O'Melia v. Adkins*, Cal.App., 166 P.2d 298; *Bragg v. Bragg*, 219 Cal. 715, 28 P.2d 1046. If appellant's conduct was fraudulent in not keeping a promise and respondent had desired to take advantage of such action, an appropriate remedy was available to which she might have readily resorted and whereby she might have alleged fraud by virtue of his lack of intention to perform his promise. But no such proof was admissible under count one of the complaint herein.

[6, 7] A resulting trust is implied from the facts, and neither written evidence of an agreement nor a fraud on the part of the alleged trustee is essential to its existence. It arises where title of a property is vested in the trustee while the consideration therefor is paid by the beneficiary. *Brown v. Spencer*, 163 Cal. 589, 593, 126 P. 493; *O'Rourke v. Skellenger*, 169 Cal. 270, 272, 146 P. 633. Therefore, in view of the allegation of a resulting trust neither respondent's testimony alone nor when supported by other reliable evidence as to the existence of a partnership or of a fraud can avail her in her attempt to establish a constructive trust.

[8] If a resulting trust was created by appellant's investment it arose out of the payment by respondent to him of the \$750 at the time of or prior to the purchase of the property. If it did not arise at the very instant the deed was taken by appellant it could not have been created by an agreement between the parties after the conveyance, nor could it have been effected by an agreement made before the transfer. *Lincoln v. Chamberlain*, 61 Cal.App. 399, 402, 214 P. 1013.

[9] Respondent attempts to sustain the judgment by her contention that a constructive trust arose out of appellant's oral agreement that he would save his money and with it purchase a home for them "jointly." Such attempt is frustrated first by the finding of a resulting trust and second by the statute of frauds, which declares that no trust in relation to real property is valid unless declared by a written instrument subscribed by the trustee or unless it is created by operation of law. (Civil Code, sec. 852.) If all the terms of a trust in real estate must be evidenced by a writing subscribed by the trustee, then no terms can be ascribed to an alleged trust in relation to land by virtue of an oral agreement. Hence the contention that a constructive trust arose by virtue of a "partnership that had existed many years" and that the parties were engaged in a "joint enterprise to acquire enough money to buy a home for them jointly," is defeated by the cited statute. Neither is the fact material that in the two years respondent expended \$100 a month for their joint support, for there was no writing whereby appellant agreed in consideration for such support to buy the lot and hold it in trust for her.

[10] The consideration urged by respondent as the ineradicable support of the trust adjudged is that she served appellant and that for such service he became indebted to her in the amount of \$1,200 whereby she acquired a half interest in all of his savings. Her arguments in that behalf are doomed by the findings against both the second and third causes. It follows that if respondent acquired a beneficial interest in the lot such interest must have had its genesis in the oral contract or in the fact that she paid appellant \$750 cash in hand with which to make the purchase. Inasmuch as the asserted oral agreement has no more force in proving a trust than if it had never been uttered, and since respondent never paid appellant \$750 and he was not indebted to her in any sum prior to his receipt of the conveyance, no part of the \$1,000 down payment belonged to respondent and no trust arose in her favor out of the purchase of the home. Where there is no written contract and a party sues to impress a purchase price resulting trust upon real property, the action is founded on the presumption contained in section 853, Civil Code, which declares

that under such circumstances "a trust is presumed to result in favor of the person by or for whom such payment is made." *Juranek v. Juranek*, 29 Cal.App.2d 276, 280, 84 P.2d 195.

The judgment is reversed.

McCOMB and WILSON, JJ., concur.



73 Cal.App.2d 548

**NORTHWESTERN MUT. LIFE INS. CO. v.
STATE BOARD OF EQUALIZATION
et al.
Civ. 12935.**

District Court of Appeal, First District,
Division 1, California.

March 18, 1946.

Rehearing Denied April 17, 1946.

Hearing Denied May 16, 1946.

**1. Municipal corporations ⇨405
Taxation ⇨1**

The terms "tax" and "assessment" except in the case of specific taxation, both include the idea of some ratio or rule of apportionment.

**2. Municipal corporations ⇨405
Taxation ⇨1**

Whether a "tax", which is an assessment on person or the property, is a tax or an assessment cannot be determined by any positive rule, and in each case the character of the given tax must be ascertained by its incidents, and from the natural and legal effect of the language employed in the statute.

See Words and Phrases Permanent Edition, for all other definitions of "Tax".

**3. Municipal corporations ⇨405
Taxation ⇨1**

There is a broad and well-recognized distinction between a tax levied for general governmental or public purposes, and a special assessment levied for improvements made under special laws of a local character.

**4. Adverse possession ⇨8(1)
Municipal corporations ⇨426**

There is a legal distinction between property impressed with a public purpose

and property of an agency not so impressed, for in the latter instance the property may be sold for delinquent special assessments levied by other agencies or may be affected by adverse possession and other burdens of private property.

**5. Municipal corporations ⇨406(1)
Taxation ⇨2**

The power of assessment comes from the general power of taxation and both are the same in origin and legal or constitutional complexion, but are essentially different in mode of their exercise and effect of such exercise upon the property of the taxpayer.

**6. Municipal corporations ⇨405
Taxation ⇨1**

A special assessment is a "tax" in that it distributes what is originally a public burden, but is not a tax in the sense of a tax for revenue which is an exaction upon the citizen for support of government, paid to the state as a state for protection or public service, whereas a special "assessment" is imposed upon property within a limited area for payment of a local improvement to enhance value of all property within that area, and can be levied only upon land; and is ordinarily based wholly upon benefits, and is exceptional both as to time and locality.

See Words and Phrases, Permanent Edition, for all other definitions of "Assessment".

**7. Municipal corporations ⇨405
Taxation ⇨1**

A tax on all property, real and personal, in a prescribed area, is a "tax" and not an "assessment" even though levied to make a local improvement on a street or highway, but a charge imposed only upon property owners benefited is a special "assessment" notwithstanding the statute calls it a tax.

8. Levees and flood control ⇨22

The Los Angeles flood control act does not provide for a tax but rather a special assessment with benefits conferred on the specific property for which the levy compensates notwithstanding the use of the word "tax" throughout the act. *St.1915*, p. 1502, as amended.

9. Taxation ⇨327

A deduction in the amount of taxation does not include a deduction of special as-

assessments unless expressly stated in a statute.

10. Taxation — 387, 397

The provision of State Constitution requiring insurance companies doing business in the state to pay tax on gross premiums from business done in state, and providing for deductions for any "taxes" paid on real estate owned by them in the state does not entitle such companies to deduct amounts paid under the Los Angeles Flood Control Act, since such act provides for an "assessment" and not a "tax". St. 1915, p. 1502, as amended; Const. art. 13, §§ 14, 14¾.

Appeal from Superior Court, San Francisco County; C. J. Goodell, Judge.

Suit by Northwestern Mutual Life Insurance Company, a corporation, against State Board of Equalization of the State of California and others, to recover taxes paid under protest. From adverse judgment, plaintiff appeals.

Affirmed.

David Livingston and Louis F. Di Resta, both of San Francisco, for appellants.

Robert W. Kenny, Atty. Gen., and T. A. Westphal, Jr., Deputy Atty. Gen., for respondents.

WARD, Justice.

This is an appeal by plaintiff from a judgment in favor of the State Board of Equalization in a suit to recover taxes paid under protest. The case was tried under an agreed statement of facts and involves solely a question of law—the construction of the provisions of secs. 14 and 14¾ of art. XIII of the California Constitution. In respect to the point in controversy both sections read the same. However, the sections apply to different years, sec. 14 to taxes assessed in 1938, and sec. 14¾ to taxes assessed in 1939 and 1940.

The statement of facts sets forth in part: "In the years 1936 and 1937 plaintiff, hereafter sometimes called the Insurance Company, was the owner of certain real property in the County of Los Angeles. On or about July 1, 1936, certain levies—hereinafter more particularly described—were imposed on said properties which were paid by the Insurance Company as follows: one-half (½) in December, 1936 and one-half (½) in April, 1937. On or about July 1, 1937, certain levies were imposed on said

properties one-half (½) of which was paid by the Insurance Company in December, 1937." Only one item is in dispute:

"Said item represents the portion of the rate of said levy imposed pursuant to the provisions of the Act of the Legislature of the State of California, approved June 12, 1915 (Statutes of 1915, Ch. 755, page 1502) known as the 'Los Angeles Flood Control Act,' and amendments thereto.

"The question for decision is whether said portion of said levy is deductible under the provisions of Article XIII, section 14 of the Constitution of California, viz.: 'Every insurance company or association doing business in this State shall annually pay to the State a tax, assessed by the State Board of Equalization, of two and six-tenths per centum upon the amount of the gross premiums other than gross premiums from ocean marine insurance, received upon its business done in this State, less return premiums and reinsurance in companies or associations authorized to do business in this State; provided, that there shall be deducted from said two and six-tenths per centum upon the gross premiums the amount of any taxes paid by such companies on real estate owned by them in this State. * * *'"

In 1938 the insurance company filed a statement of taxes paid on real estate owned in the State of California with the state Insurance Commissioner. This statement included the entire amount paid during 1937, including "flood control levies." The same situation prevailed with respect to the deduction of taxes on real property for the years 1938 and 1939, including "flood control levies," from the gross premiums tax in 1939 and 1940. Some time in 1941 the Insurance Commissioner investigated the component parts of the amounts of real property and found that the items constituting "flood control levies" had been included in the real property taxes for the years 1937, 1938 and 1939 and reported such findings to the State Board of Equalization.

The commissioner reported that these flood control items which were deducted in the three years should be added to the tax levied in 1941. The board added to the tax levied in the year 1941 the aggregate amount of the previously deducted items constituting "flood control levies." This additional amount was paid under protest. If the items were properly deductible,

judgment should go in favor of plaintiff. The trial court rendered judgment for defendants.

Appellant stresses the fact that for twenty-five years the flood control act had been in force and the items in dispute had always been allowed as a deduction. Respondents replied that the commissioner had for the first time discovered the improper deduction in 1941. Moreover, on the 1938 return appears the following: "(b) Positively no irrigation or reclamation district taxes, nor special taxes and assessments, penalties, interest, nor other charges on account of delinquency of tax can be allowed." On the 1939 and 1940 returns appear the following: "(b) Positively no irrigation or reclamation district levies, nor other district assessments based upon the benefits accruing to real property as a result of improvements * * * can be allowed." The language on the forms indicates that the commissioner has consistently held that special assessments are not deductible.

[1] It is appellant's theory that in providing for deduction of "taxes" the Constitution uses the word "taxes" in a broad and all-inclusive sense. Appellant claims that its position is strengthened by the use of the word "any" in conjunction with "taxes." The word "any," as used, might well be defined as "all or every." It is true that in this and other jurisdictions the word "taxes" often includes some form of assessments. To that extent the words have often been used synonymously. "The terms 'tax' and 'assessment,' except in the case of specific taxation, both include the idea of some ratio or rule of apportionment." 24 Cal.Jur., p. 38, sec. 22; see, also, *Holley v. Orange County*, 106 Cal. 420, 39 P. 790; *Neary v. Peterson*, 1 Cal.2d 703, 37 P.2d 82.

[2] A tax is an assessment levied on the person or the property involved and hence the terms have often been confused, but there is a difference that may be determined from the language and legal effect of the particular statute involved. In *Ingels v. Riley*, 5 Cal.2d 154, 159, 53 P.2d 939, 942, 103 A.L.R. 1, the court said: "It is impossible to lay down any positive rule by means of which the character of any given tax may be ascertained. In each case the character of the given tax must be ascertained by its incidents, and from the natural and legal effect of the language em-

ployed in the statute." See, also, *Flynn v. City and County of San Francisco*, 18 Cal. 2d 210, 115 P.2d 3; *Edward Brown & Sons v. McColgan*, 53 Cal.App.2d 504, 128 P.2d 186.

[3-7] "There is a broad and well-recognized distinction between a tax levied for general governmental or public purposes, and a special assessment levied for improvements made under special laws of a local character." *City of Inglewood v. Los Angeles County*, 207 Cal. 697, 702, 280 P. 360, 363; see, also, *San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189, 41 P. 291, 35 L.R.A. 33; *City Street Imp. Co. v. Regents, etc.*, 153 Cal. 776, 96 P. 801, 18 L. R.A., N.S., 451; *Holley v. Orange County*, supra. "Moreover, the law recognizes a distinction between property impressed with a public purpose and property of an agency not so impressed, for in the latter instance the property may be sold for delinquent special assessments levied by other agencies or may be affected by adverse possession and other burdens of private property." *La Mesa, etc., Irr. Dist. v. Hornbeck*, 216 Cal. 730, 738, 17 P.2d 143, 147. "While the power of assessment comes from the general power of taxation it must not be confounded with it, for as we have seen in *Emery v. San Francisco Gas Co.* [28 Cal. 345], the words 'taxation' and 'assessment' are employed in the Constitution to represent different modes of exercising the general power of taxation, and also as indicating different objects and purposes in aid of which a resort to the taxing power may be had. In their origin and legal or constitutional complexion they are the same; but in the mode of their exercise, and in the effect of such exercise upon the property of the taxpayer, they are essentially different." *Taylor v. Palmer*, 31 Cal. 240, 251. "A special assessment is taxation in the sense that it is a distribution of that which is originally a public burden. Clearly, however, a special or local assessment is not a tax in the sense of a tax to raise revenue for general governmental purposes. Taxes for revenue, or 'general taxes' as they are sometimes called by distinction, are the exactions placed upon the citizen for the support of the government, paid to the state as a state, the consideration of which is protection or public service by the state, whereas special or local assessments, sometimes called 'special taxes,' are imposed upon property within a limited area for the payment for a

local improvement supposed to enhance the value of all property within that area. To enumerate significant differences between a special assessment and a tax, it may be observed: (1) A special assessment can be levied only on land; (2) a special assessment cannot (at least in many states) be made a personal liability of the person assessed; (3) a special assessment is ordinarily based wholly on benefits; and (4) a special assessment is exceptional both as to time and locality. The imposition of a charge on all property, real and personal, in a prescribed area, is a tax and not an assessment, although the purpose is to make a local improvement on a street or highway. A charge imposed only on property owners benefited is a special assessment, rather than a tax, notwithstanding the statute calls it a tax. It has been ruled that a special assessment is not, in the constitutional sense, a tax at all." 48 Am.Jur., pp. 565-567, § 3; see, also, McQuillin, *Municipal Corporations*, 2d Ed., Vol. 5, p. 699; *Coolley on Taxation*, 4th Ed., p. 105, sec. 31; *Hamilton, Law of Special Assessments*, Ch. III, p. 148.

[8] The Supreme Court of this state has declared in reference to this particular flood control district: "The interveners point to the fact that the Legislature has used the word 'tax' throughout the act, and does not anywhere refer to the charge as an assessment. Furthermore, such 'tax' is to be levied and collected in the same manner, by the same machinery, and at the same time as general taxes. These facts are not, however, conclusive. The word 'tax' is used, with equal propriety, in two distinct senses. In its broad meaning the word includes both general taxes and special assessments. *Chicago G. W. R. Co. v. Kansas City N. W. Ry.*, 75 Kan. 167, 88 P. 1085, 12 Ann.Cas. 588; 1 Page & Jones on *Taxation by Assessment*, § 40. See, also, *In re Madera Irr. Dist.* [92 Cal. 296, 28 P. 272, 675, 14 L.R.A. 755, 27 Am.St.Rep. 106]. *Los Angeles County F. C. Dist. v. Hamilton*, 177 Cal. 119, 128, 129, 169 P. 1028, 1032. Courts have always assumed, upon stipulation or otherwise, since the decision in the *Hamilton* case that under the provision of the *Los Angeles County Flood Control Act* (Stats.1915, p. 1502) it is an assessment for benefits and not a tax that may be imposed. To the same effect, see *Los Angeles Railway Corp. v. Flood Control District*, 78 Cal.App. 173, 248 P. 532; *Los Angeles County Flood Con-*

trol Dist. v. Superior Court, 207 Cal. 709, 280 P. 366; *City of Inglewood v. Los Angeles County*, supra; *Los Angeles County Flood Control Dist. v. Wright*, 213 Cal. 335, 2 P.2d 168; *City of Los Angeles v. Los Angeles County F. C. Dist.*, 11 Cal.2d 395, 80 P.2d 479; *Chesebro v. Los Angeles County Flood Control Dist.*, 306 U.S. 459, 59 S.Ct. 622, 83 L.Ed. 921. The above citations must be accepted as authority that, notwithstanding the use of the word "tax," the *Los Angeles flood control statute* does not provide for a tax but rather a special assessment with benefits conferred on the specific property for which the levy compensates.

[9,10] A deduction in the amount of taxation does not include a deduction of special assessments unless expressly stated in a statute. Art. XIII, secs. 14 and 14 $\frac{3}{4}$ of the Constitution permit deduction to insurance companies upon payment of a stated percentage upon gross premiums of any taxes paid by them on real estate in this state. To be available and advantageous to appellant, the Constitution would have to provide for a deduction not only of any taxes but in addition any special assessment. The constitutional provision is silent on special assessments. It must be held that taxes, but not assessments, are deductible under sections 14 and 14 $\frac{3}{4}$ of art. XIII of the California Constitution. This conclusion finds support not only in the cases cited but for a practical and equitable reason. Taxes contribute to the general cost of governmental expense whereas the assessments imposed under the *Los Angeles Flood Control Act* are for the benefit of the particular property assessed. The gross premiums tax is in lieu of all other taxes and was intended as an ad valorem tax on particular businesses whose tangible property did not represent its true value for purposes of apportioning the cost of general governmental functions. Inasmuch as the constitutionality of the flood control act must be and has been sustained as a special assessment conferring particular benefits on the land assessed, to allow its deduction from the gross premiums tax would permit the insurance company to benefit therefrom without paying a corresponding tax. This was not the intent of the constitutional provision. The "flood control levies" are not taxes, but have all the essential elements of assessments for benefits only to those owning property in a specified area. Such assessments do not come with-

in the purview of "any taxes." " * * * a special assessment is not, in the constitutional sense, a tax at all." Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 29, 148 P. 217, 219, L.R.A.1918E, 197.

The judgment is affirmed.

PETERS, P. J., and SCHOTTKY, J.,
pro tem., concur.

Hearing denied; SHENK and SCHAU-
ER, JJ., not participating.



UNITED STATES ELECTRICAL MOTORS,
Inc., v. UNITED ELECTRICAL, RADIO
AND MACHINE WORKERS OF AMERI-
CA, LOCAL NO. 1421, et al.

No. 509427.

Superior Court of California,
Los Angeles County.

Feb. 6, 1946.

1. Equity ⇨65(2)

Although employers have the duty to bargain in good faith with employees when solicited on proper occasions and for proper purposes, such duty is not breached, so as to render employer outlawed from relief in a court of equity on grounds of "unclean hands", simply because the negotiations previously engaged in had reached a state of deadlock.

2. Master and servant ⇨15(32)

An employer does not breach the duty to bargain collectively by refusing terms proposed by the employees or their union representative, if, in good faith, employer deems such terms improper or beyond economic business safety for him to accept.

3. Equity ⇨65(1)

The doctrine that a suitor must enter a court of equity with "clean hands" has reference to the transaction complained of by him.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

4. Torts ⇨18

A refusal to bargain further with employees or their union representatives does not justify or render immune unlawful acts

of the employees committed in picketing in a subsequent strike.

5. Constitutional law ⇨90 Torts ⇨10

The right of labor unions to picket is a relative right, just as is the constitutional guaranty of free speech from which it is derived, and, to be lawful in its relation to the rights of others, picketing must be peaceful and honest.

6. Constitutional law ⇨90, 91

Picketing maintained in conjunction with acts which amount to actual physical intimidation of the will of others by force, or a form of physical intimidation arising out of persuasion by a grouping or massing of persons resulting in coercion of the will of others from mere force of numbers, is not protected by the constitutional guaranties of freedom of speech and assemblage.

7. Injunction ⇨101(3)

The court has power to enjoin mass picketing under appropriate factual circumstances which establish the presence and operation of physical intimidation, and to accomplish this end may limit the number of pickets at a given point.

8. Injunction ⇨101(3), 189

Where union members were occupying the entrances to plant of employer in a mass formation, and by force of numbers, threats, and intimidation prevented employer from rightful use and occupation of its plant, such mass picketing would be enjoined by limiting the number of pickets at entrances and other points.

Action by United States Electrical Motors, Inc., against United Electrical, Radio and Machine Workers of America, Local No. 1421, etc., and others for an injunction against mass picketing. On application for temporary injunction.

Preliminary injunction granted in accordance with opinion.

Tuttle & Tuttle, of Los Angeles, for plaintiff.

Katz, Gallagher & Margolis, of Los Angeles, for defendants.

HENRY M. WILLIS, Judge.

On January 11, 1946, pursuant to an affirmative strike vote taken on November

28, 1945, defendant Local No. 1421 commenced a strike against plaintiff's plant and picketing began. On January 15, 1946, plaintiff commenced this action, procuring ex parte a temporary restraining order against the continuance of so-called "mass picketing" for the purpose of intimidation, coercion and prevention of others from entering or leaving the plant; and limiting the number of pickets at each of six entrances to four, with ten foot spaces between pickets except when passing each other.

At the same time an order to show cause why a preliminary injunction should not be issued to the same effect was issued and the return day thereof was set for January 25, 1946. On this latter date the parties appeared represented by counsel, affidavits were presented by both sides, the matter partly argued and continued over to January 28, 1946, for further argument and proof upon the order to show cause. On this latter date further affidavits were filed and argument presented and leave was granted both parties to file further affidavits. The matter was thereupon ordered submitted upon receipt of such affidavits and the temporary restraining order was continued in force except as to the limitation of the number of pickets to four at each entrance, which portion was vacated on undisputed showing that notwithstanding the large number of pickets at the plant, persons desiring to enter the plant were free to do so. The provision restraining mass picketing was continued in force.

Upon the hearing of the application for a preliminary injunction, two defenses or reasons in opposition to its issuance were advanced and submitted by defendants, namely:

(1) That plaintiffs were not entitled to any injunctive or equitable relief because of its violation of the doctrine of "unclean hands"; and

(2) That the court had no power to enjoin mass picketing or to limit the number of pickets at a given place at the struck premises, and that therefore the defendants were justified in refusing to obey the temporary restraining order limiting the number of pickets at entrances.

1. *Doctrine of Unclean Hands*

[1,2] As to the first of the defenses above stated, it is sufficient to state that the proofs entirely fail to show that plaintiff, prior to the strike, had refused or

ceased to negotiate or bargain collectively with the defendant Union Local 1421, as contended by defendants. While it is a recognized duty of employers to bargain in good faith with their employees when solicited on proper occasions, and for proper purposes, it cannot be properly claimed that such duty is breached so as to render the employer outlawed from relief in a court of equity simply because the negotiations previously engaged in had reached an impasse or a state of deadlock as the proofs herein indicate. It is not a breach of the duty to bargain collectively for an employer to refuse terms proposed by the employees or their union representative, if, in good faith, such employer deems such terms improper or beyond economic business safety for him to accept. A deadlock arises from mutual obstinacy of purpose and does not cast upon either party the imputation of unclean hands. And the union's affirmative strike vote on November 28, 1945, would at least have a tendency to interrupt if not terminate negotiations.

[3,4] Furthermore the doctrine that a suitor must enter a court of equity "with clean hands" has reference to the transaction complained of by him. *Germo Mfg. Co. v. McClellan*, 107 Cal.App. 532, 541-545, 290 P. 534. A refusal to bargain further with employees or their union representative does not justify or render immune unlawful acts of the employees committed in picketing in a subsequent strike. Here plaintiff is seeking relief from alleged unlawful acts in mass picketing maintained for the purpose of intimidation and coercion and prevention of plaintiff's employees and agents and customers from entering or leaving the struck plant. Any misconduct of the plaintiff arising out of a refusal to negotiate or bargain with its employees' agents, is not related to later and independent acts of the striking employees acting under union direction in the form of mass picketing for the purpose of preventing free ingress and egress at the struck premises. It follows, therefore, that the defense of "unclean hands" is not applicable herein.

2. *Power of the Court to Limit Picketing*

By the terms of the temporary restraining order herein, the defendants were enjoined from maintaining pickets or other persons at plaintiff's plant entrances with the intention of intimidating, coercing or preventing others, desiring so to do, from

entering the plant. This is tantamount to prohibiting mass picketing for the purpose above stated. It is the equivalent of an injunction against physical intimidation as defined in a long line of Supreme Court decisions hereinafter referred to. In addition to the above restraint and to render the order more specific, there was provision against maintaining more than four pickets at each of the six entrances, who should keep ten feet apart except when passing each other in the conventional oval shaped picket line. This order was served upon certain of the defendants as individuals and on the defendant unions on January 17th early in the morning, and the same was read at length over a loud speaker system so that all there present in the immediate vicinity of the entrances could hear. That it was heard was demonstrated by loud "boos," and immediately thereafter the mass of persons continued to cover the entrances so that no person could pass through without being subjected to violence. No effort was made to obey the four picket limitation, and in order that persons who desired to enter the struck plant might do so, the police of Los Angeles city in numbers proceeded to open up an avenue of entrance. Resistance by members of the picket groups resulted and some arrests were made. Later the mass reduced itself to lesser numbers and persons who so desired were free to enter and leave the entrances through the picket line. Up to the date of hearing there was revealed no evidence of the defendant union's intention of reducing the pickets to four at an entrance. However, it has been shown that the defendants have ceased for the time being to block entrances or to prevent free ingress.

Defendants contend that the order made violated the constitutional guarantees of freedom of speech and assemblage; that the court had no power to limit the number of pickets or to enjoin mass picketing as long as it was peaceful.

[5,6] The answer to both questions lies in the answer to the question, may the courts enjoin picketing in mass? If the answer is affirmative, then it logically follows that the court has power to reduce or dissolve the mass by limiting the number of pickets. The right of labor unions to picket is a relative right, just as is the constitutional guarantee of free speech from which it is derived. Picketing, to be lawful in its relation to the rights

of others, must be peaceful and honest. *Steiner v. Long Beach Local No. 128*, 19 Cal.2d 676, 682, 123 P.2d 20. Picketing maintained in conjunction with acts of physical force and violence is outlawed. This amounts to actual physical intimidation of the will of others by force. Another form of physical intimidation arises out of persuasion by a grouping or massing of persons resulting in coercion of the will of others from the mere force of numbers. It is this latter form of coercion which defendants contend is protected and afforded sanctuary by the constitutional guarantees of freedom of speech and assemblage. That such claim is not well founded is demonstrated by the following quotations from decisions of our highest courts.

In the case of *Lisse v. Local Union No. 31*, 2 Cal.2d 312, 317, 323, 41 P.2d 314, 318, it was held that physical intimidation may be accomplished as effectually by obstructing and annoying others and by insult and menacing attitude as by physical assault; that intimidation includes persuasion by or on behalf of a combination of persons, resulting in coercion of the will from mere force of numbers; that even a mere request to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimidation, with a design to hinder or obstruct workmen, is unlawful intimidation and not less obnoxious than the use of physical force for the same purpose. And in that case the Supreme Court of this state set forth the language of an injunction appropriate to the occasion of mass picketing, which has been used ever since and in substance and effect is included within the provisions of the temporary restraining order herein. One provision therein approved as a proper subject of injunction reads as follows:

"* * * intimidating, threatening, molesting or coercing plaintiffs in the conduct of their business * * * or for any such purposes obstructing or interfering with, or attempting to obstruct or interfere with the free use, occupation and enjoyment thereof by plaintiffs * * *"

In the later case of *Steiner v. Long Beach Local No. 128*, 19 Cal.2d 676, at page 682, 123 P.2d 20, at page 24, the Supreme Court said:

"But the constitutional guarantee of freedom of speech extends no further than to confer upon workmen the right to publicize the facts of an industrial controversy by

peaceful and truthful means. Labor has no sanctuary in any federal right when it departs from the bounds of peaceful persuasion and resorts to acts of violence, physical intimidation, or false statement. Under such circumstances, picketing loses its character as an appeal to reason and becomes a weapon of illegal coercion. These principles both authorize and require courts to enjoin acts of violence or acts which 'amounted to physical intimidation.' *Lisse v. Local Union*, supra * * *."

In the *Lisse* case the Court said:

"In this regard it is held that, in order to prove physical intimidation and fear, it is not necessary to show that there was actual force or express threats of physical violence used; that such result may be accomplished as effectually by obstructing and annoying others and by insult and menacing attitude as by physical assault."

In the *Steiner* case the Court proceeded to declare:

"Furthermore, the inherent power of a court of equity to grant injunctive relief is not limited to the imposition of a restraint against the violent and unlawful conduct, but may, under given conditions, be exercised to enjoin future picketing in any form. * * * This is the rule which was very recently stated and applied in *Milk Wagon Drivers Union v. Meadowmoor Dairies Inc.*, 312 U.S. 287, 61 S.Ct. 552, 555, 85 L.Ed. 836, 132 A.L.R. 1200, where the United States Supreme Court upheld the right of a state court to enjoin acts of picketing in themselves peaceful, when they were enmeshed with accompanying violent conduct which was unlawful. * * * The rule is particularly applicable where violent picketing is continued in defiance of a preliminary injunction restraining the defendants from resorting to violence or physical intimidation."

[7,8] From the foregoing it is quite manifest that a court of equity has power to enjoin mass picketing under appropriate factual circumstances which establish the presence and operation of physical intimidation. Having the power to enjoin the acts constituting physical intimidation, the court indubitably has power to restrain such acts by removing the source, namely by dissolving the mass of pickets. This is easily and effectually accomplished by limiting the number of pickets at a given point at the struck premises. By this process the right of free entry and occupation of the

premises is assured the employer and at the same time the union or striking employees are permitted to exercise the right to strike and picket for the purpose of publicizing their grievances and demands.

The proofs offered on the application for the temporary restraining order and order to show cause why a preliminary injunction should not be issued herein as prayed for, clearly establish the fact in the first instance that the defendants were occupying the entrances to plaintiff's plant in a mass formation, and were effectually blocking the entrances so as to prevent ingress of others who wished and endeavored to enter, and to whom oral threats were addressed warning them not to enter. In short, that defendants were resorting to and employing physical intimidation to prevent plaintiff from its rightful use and occupation of its plant and to prevent others, having the right so to do, from entering the plant. That this prevention was the purpose of defendants is demonstrated by expressions and orders given by apparent leaders on January 17th in such words as "Hold that line," and "Keep that line closed," and "Don't give way." These proofs were amply sufficient to support the temporary restraining order in its essential parts enjoining mass picketing for purpose of physical intimidation which prevented persons from entering or leaving plaintiff's plant or offices, and they also justified the order limiting the number of pickets to four at each entrance, an order which has been used frequently within the past ten years for the purpose of reducing massed picket lines to a reasonable proportion and number, and to remove the danger of violence and breach of the peace.

When this matter was first argued herein on the return on the order to show cause, it was made clear by proofs furnished that the defendants had at least temporarily ceased to resort to and employ physical intimidation by force of numbers so as to prevent others from ingress and egress at the struck premises. Upon that showing the court in continuing the effect of the temporary restraining order until further order, modified the same by eliminating the clause limiting the pickets to four at an entrance. This was done because it was manifest that such limitation was not then necessary pending the final hearing on the application for a preliminary injunction, in view of the admitted fact that ingress and egress was not being prevented at the moment by the manner and conduct of the

numbers of pickets. It was in that connection that the Court announced that the question of the number of pickets was of no importance in considering an injunction suit to regulate picketing where it was made to appear that such numbers were not acting unlawfully; that organized employees still had the right to assemble, parade and sing pep songs as long as they did not violate the rights of others or any local police regulations.

On the second hearing on January 28th, in an effort to explain to counsel for plaintiff the new theory of the defendant C.I.O. unions relative to mass picketing, the undersigned judge stated in substance that up to five years ago the unions frankly admitted they used mass picketing for the purpose of preventing ingress and egress at the struck premises, but that now such unions were advancing the new theory that such picketing was not for that former purpose but to demonstrate power of numbers engaged in the strike, their earnestness and solidarity, so as to impress employers and the public with the serious reality of their move to improve their conditions. A metropolitan newspaper published a news item announcing that the judge had expounded his theory as above stated and the newspaper headlined the news item with the words "Mass Picketing Upheld." The judge of this court had never upheld mass picketing as mistakenly stated by the newspaper in question, and does not now declare mass picketing to be legal. On the contrary, so-called mass picketing maintained for the purpose of intimidating, coercing or preventing others from entering or having a struck plant is declared unlawful and is subject to injunctive process. And where such unlawful activity may be stopped or prevented by the provisions of an injunction reducing a picket line to specific numbers, it becomes and is proper to include such provision limiting the number of pickets.

In this particular case under the further proofs adduced at the final hearing on the application for a preliminary injunction, it is clear that plaintiff is entitled to an injunction, to fit the factual situation as it has existed both before and since the temporary restraining order was issued, in order to insure continued peaceable and honest picketing pending the trial of this action. That preliminary injunction will find its best expression (following the caption and usual prefatory matter) in the following language, selected so as to conform to the Lisse form of injunction, with the added

provision limiting the number of pickets so as to insure prevention of mass picketing for purposes of physical intimidation and to minimize the danger of riotous conflicts, to-wit:

"Be and they are hereby enjoined, restrained and commanded to desist and refrain, pending final determination of the action, from doing or attempting to do or causing to be done, directly or indirectly, by any means, method or device whatsoever, either or any of the following acts:

"1. Intimidating, threatening, molesting or coercing plaintiff in the conduct of its business conducted at 200 East Slauson Avenue in the city of Los Angeles, California, or for any purposes obstructing or interfering with, or attempting to obstruct or interfere with the free use, occupation and enjoyment thereof by plaintiff, its agents, servants and employees;

"2. Stationing, placing or maintaining on the street or sidewalk or elsewhere, at or near the entrances to plaintiff's premises, plant or office, described in the plaintiff's complaint, any picket or pickets, or other person or persons, for the purpose or with the intention of intimidating, threatening, molesting, coercing or attempting to coerce any of the plaintiff's officers, employees, customers, or any other person or persons, so as to prevent them from entering or leaving plaintiff's said premises, plant and office.

"3. Obstructing and preventing plaintiff or any of its officers, employees, customers or any other person or persons from entering plaintiff's premises, plant or office described in plaintiff's complaint, by walking, marching, or standing in groups or masses at, near, or in the immediate vicinity of said premises, plant and office.

"4. Stationing, placing, or maintaining more than ten pickets or other persons at or in front of or in the immediate vicinity of any one of the six entrances to plaintiff's plant or office, described in the plaintiff's complaint, or stationing, placing or maintaining at or in the immediate vicinity of any of said entrances, any pickets in such manner that any picket shall be less than four feet from any other picket, except in passing.

"The Court hereby expressly reserves the right and power to vacate or modify this preliminary injunction."

Let a preliminary injunction issue as above set forth on plaintiff giving bond in the sum of \$1,000.

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